IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS MONDAY, THE 21ST DAY OF JUNE, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/2590/13

BETWEEN

ZENITH BANK NIGERIA PLC .....PLAINTIFF

AND

1. **TIBESTI NIGERIA LIMITED**
2. **HAJIYA SAMIRA SHERIFF**

……..…….DEFENDANTS

JUDGMENT

The Plaintiff's claims against the defendants as endorsed on the Amended Statement of Claim dated 13th November, 2015 and filed on 16th November, 2015 are as follows:

1. **The sum of N185,903,732.28 as at the 3rd of May 2012 being the outstanding principal due and payable to the Plaintiff by the two Defendants on account of the facility given to the 1st Defendant.**

2. **The sum of N20, 302,068.70 being the interest and other charges that have accumulated from the 15th day of June 2010 when the 1st Defendant started defaulting in its full payment to the 3rd day of May 2012.**

3. **17% interest per annum from the 3rd day of May 2012 until judgment and thereafter until the entire judgment debt is liquidated.**

4. **The cost of this action.**

5. **IN THE ALTERNATIVE TO RELIEF NO 3 ABOVE;**

a. **The sum of N500, 000, 000.00 (Five Hundred Million Naira) being damages against the Defendants jointly and severally for their failure to liquidate all the principal, accrued interests and charges on the facility given the 1st Defendant by the Plaintiff before the 23rd day of October, 2012 when the said facility expired.**

b. **10% interest Court rate on Reliefs 1, 2 and 5(a) above from the date of judgment until the entire judgment debt is liquidated.**

In response to the plaintiff's claims, the defendants filed the following processes as follows:

1. A statement of defence dated 2nd June, 2014 which was regularized by Order of Court on 21st October, 2014.

2. A consequential Amended statement of defence of 10 paragraphs dated 18th January, 2016.

3. A separate Counter-claim was then later filed dated 9th January, 2018 after plaintiff had led evidence and concluded its case in which the defendants set up a Counter-claim against plaintiff as follows:

   a. **A declaration that all the Offers of Lease Facility, whether dated April 11, 2008 or dated February 3, 2009 or bearing any other date, between the Plaintiff/Defendant-to-Counter claim and the 1st Defendant are unenforceable by the Plaintiff who is the owner of the leased trucks.**

   b. **A declaration that the personal guarantee executed by the 2nd Defendant on behalf of the 1st Defendant and in favour of the Plaintiff/Defendant-to-**

Counter claim is unenforceable by the Plaintiff who is the owner of the leased trucks.

c. A declaration that the 1st Defendant is entitled to recover all monies it paid to the Plaintiff in respect of the lease transaction, subject matter of this counter claim.

d. An Order of this Honourable Court directing the Plaintiff/Defendant-to-Counter claim to pay the 1st Defendant/Counter claimant the sum of N204, 000, 000.00 (Two Hundred and Four Million) being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant-to-Counter claim wrongly debited from the 1st Defendant's bank accounts on the basis of all the Offers of Lease Facility as rental repayments and interest.

e. An Order of this Honourable Court directing the Plaintiff/Defendant-to-Counter claim to pay the 1st Defendant/Counter claimant the sum of N625, 000.00 being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant-to-Counterclaim wrongly debited from the 1st Defendant's bank account as Processing Fee for the transaction.

f. An Order of this Honourable Court directing the Plaintiff/Defendant-to-Counter-claim to pay the 1st Defendant/Counter claimant the sum of N1, 875,000.00 being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant debit from the 1st Defendant's account as Management Fee.

g. An Order of this Honourable Court directing the Plaintiff/Defendant-to-Counter claim to pay the 1st Defendant/Counter claimant the sum of N147,500.00 being the 1st Defendant/Counter-claimant's monies which the Plaintiff/Defendant debit from the 1st Defendant's account as upcountry transfer fee.

h. An Order of this Honourable Court directing the Plaintiff/Defendant-to-Counterclaim to pay the 1st Defendant/Counter claimant the sum of

N8, 820, 000.00 N147,500.00 being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant debit from the 1st Defendant's account as "CQ 3 PD UNIQUE FUSION INSURANCE."

i. **An Order that the Plaintiff/Defendant-to-counter claim shall pay the Defendants/Counter claimants the sum of N150, 000, 000.00 (One Hundred and Fifty Million Naira) as exemplary damages.**

j. **An Order directing the Plaintiff/Defendant-to-Counter claim to pay Defendants/Counter claimants the sum of N25, 000, 000.00 being the cost of this suit.**

k. **An Order that the Plaintiff/Defendant-to-Counter claim shall pay interest on the judgment debt at a rate of 10% per annum from the date of the judgment to the date the entire judgment debt is finally liquidated.**

The plaintiff in response filed a defence to the Counter-claim on 5th March, 2018.

Let me quickly state here that I note that in the **final address** of plaintiff, the Amended statement of defence was described as "abandoned". There is however no such indication that the consequential Amendment filed by the defendants further to the Amendment by plaintiff of its original pleading was abandoned.

Indeed in the Counter-claim filed, to which the plaintiff filed a response to, the defendants in paragraph 1 stated thus:

"The Defendants/Counter-claimants repeats all the averments contained in paragraphs 1-10 of the Amended statement of defence"

As stated above, the plaintiff filed a response to this counter-claim and the entire case was thus contested on the basis of these defined processes including the Amended Statement of Defence. There should therefore really be no confusion with respect to the streamlined pleadings in this case. The contention therefore that the Amended Statement of defence is **"abandoned"** clearly will not fly.

In law, an Amendment of pleadings dates back to the date when the original pleadings was originally filed. This means that once pleadings are amended, what

stood before the amendment is no longer material before the court and no longer defines the issue to be tried in court. See **Union Bank of Nigeria Plc V Osaze (2011) 7 NWLR (pt.1246) 293 at 311 G-H**. Indeed the Amended statement of defence supersedes the original statement of defence, and takes effect from the date of the original document. See **Ezenwa V Katsina State Health Services Management Board (2011) 9 NWLR (pt.1251) 89 at 115 B**.

Now in proof of its case, the plaintiff called only one witness, **Mohammed Abba**, a staff of plaintiff who testified as PW1. He is the same person that equally gave evidence in respect of the **defence to the Counter-claim** which was later filed by defendants after he had earlier given and concluded his evidence and indeed after the plaintiff had closed its case.

He deposed to a witness statement on oath dated 17th November, 2015 which he adopted at the hearing and tendered in evidence the following documents, to wit:

1. Offer of lease facility to Managing Director (M.D) of 1st Defendant dated 11th April, 2008 was admitted as **Exhibit P1.**

2. Extract of Board meeting of 1st defendant held at its Registered Office, 29, Libreville Crescent, Wuse 2 Abuja on 16th April, 2008 was admitted as **Exhibit P2.**

3. Personal Guarantee given by 2nd defendant, Hajiya Samira Sheriff was admitted as **Exhibit P3**.

4. Copies of Statements of Account (5 in number) were admitted in evidence as **Exhibits P4 (1-5).**

5. Letter by the law firm of Mohammed Yamah & Co. dated 11th August, 2011 was admitted in evidence as **Exhibit P5**.

PW1 was then cross-examined by counsel to the defendants and with his evidence the plaintiff closed its case and the matter adjourned for defence.

It was at this point that the matter unfortunately stalled. The defendants were not able to immediately produce their witness and subsequently the defendants

changed counsel; different interlocutory applications were filed and taken; a counter claim was then filed by defendants to which the plaintiff filed a defence before the defendants finally opened their case.

In proof of the defence and counter-claim, the defendants called two witnesses. The 2nd defendant **Hajiya Samira Sheriff** testified as DW1. She adopted at the hearing the witness deposition of 12 paragraphs filed along with the initial **statement of defence dated 16th April, 2014**. With respect to the counter-claim, she adopted her witness deposition dated 9th January, 2018 at the hearing. She tendered in evidence, the following documents:

1. The Offer of Lease facility to the M.D. of 1st defendant dated 3rd February, 2009 was admitted as **Exhibit D1.**

2. Copy of Bill of charges issued by the law firm of Mamman Mike Osuman (SAN) & Co. dated 14th April, 2016 was admitted as **Exhibit D2**.

DW1 was then cross-examined by counsel to the plaintiff.

Mr. Abiodun Agbomabiwon, a Retired Professional Banker, testified as DW2. He described himself as a financial Expert/Consultant and deposed to a witness statement on oath of 16 paragraphs dated 20th June, 2018 which he adopted at the trial. He was then cross-examined by counsel to the plaintiff and with his evidence, the defendants closed their case.

As stated earlier, the defendants **filed their Counter-claim** after the plaintiff had closed its case. The plaintiff accordingly filed a defence and called PW1 to adopt his 18 paragraphs witness deposition dated 5th March, 2018 filed in respect of the defence to the Counter-claim. This deposition was adopted and he was cross-examined by counsel to the defendants and with his evidence, the plaintiff closed its case with respect to the defence to the counter-claim.

At the close of the case, parties filed, exchanged and adopted their final written addresses. The final address of the defendants/counter-claimants is dated 17th February, 2020 and filed same date at the Court's Registry. In the address Eight (8) issues were raised as arising for determination as follows:

1. **Under what label/nature of judicial construction are Exhibits P1 and D1 when considered along with the legal evidence adduced by the parties?**

2. **Whether the Plaintiff is entitled to a claim of outstanding unpaid installments after repossessing the leased trucks and selling same in the manner it did.**

3. **Whether the Plaintiff is entitled to a claim of damages for default of payment of installments or a breach of contract in the circumstances of this case.**

4. **Whether the contract between the Plaintiff and the 1st Defendant was not frustrated.**

5. **Whether the Plaintiff's claim of interest of 17% on the leases trucks calculated on the basis of compound interest, as against the formula laid down in Section 2 (2) of the Hire Purchase Act and paragraph 14 of the Hire Purchase Regulations, can be granted by this Honourable Court.**

6. **Whether the Plaintiff has proven its case against the Defendants as to be entitled to judgment.**

7. **Whether the 1st and 2nd Defendants have proven their Counter-Claim against the plaintiff.**

8. **Whether in the light of the evidence before this Honourable Court, the 2nd Defendant can be said to be a Guarantor to the 1st Defendant.**

On the part of the plaintiff, their final address is dated 24th June, 2020 and filed same date at the Court's Registry. In the address, six (6) issues were streamlined as arising for determination:

i. **Whether from the totality of the evidence led in this suit, the Defendants are not indebted to the Plaintiff as per the Writ of Summons due to their inability to jointly and severally pay up the loan facilities offered to the 1st Defendant.**

ii. **Having regard to the Terms and Conditions of the Lease granted the 1st Defendant by the Plaintiff, whether NNPC Licencing of other haulage agents/transporters renders the 1st Defendant non liable to the indebtedness owed by the Plaintiff frustration (sic).**

iii. **Having regard to Exhibit P3, whether the 2nd Defendant is liable as a guarantor of the 1st Defendant.**

iv. **Whether this agreement of parties is distinguishable from a Higher Purchase Agreement.**

v. **Whether the Defendants have proven their Counter-claim against the Plaintiff to be entitled to the reliefs sort.**

vi. **Whether the Plaintiff will not have failed in its duty of care to its depositors if the Defendants does not pay back the outstanding lease sum.**

In response, the Defendants/Counter-claimants then filed a Reply address on points of law dated 12th October, 2020 and filed same date at the Court's Registry.

Now there is no doubt that there is a claim and a counter-claim in this case. It is trite law that for all intents and purposes, a counter claim is a separate, independent and distinct action and the counter claimant like the plaintiff in an action must prove their case against the person counter claimed before obtaining judgment on the counter-claim. See **Jeric Nig. Ltd V Union Bank (2001) 7 WRN 1 at 18, Prime Merchant Bank V Man-Mountain Co. (2000) 6WRN 130 at 134.**

In view of this settled position of the law, both the plaintiffs and the defendants have the burden of proving their claim and counter-claim respectively. This being so, the issues for determination can be more succinctly accommodated under the following issues formulated by court to wit:

1. **Whether the plaintiff has proved its claims on a balance of probabilities to entitle it to all or any of the Reliefs sought.**

The above will be predicated on a resolution of these sub-issues:

i. **What is the precise nature of the relationship of parties?**
ii. **Did the parties fulfill their obligations under the relationship?**
iii. **If there was a failure to fulfill obligations, which of parties then was in breach and whether there is an availing legal defence to justify the breach?**
iv. **Whether the plaintiff's reliefs are availing?**

2. **Whether the defendants have on a balance of probabilities proved their counter-claim and entitled to all or any of the reliefs sought.**

The above issues and the questions are not raised as alternatives to the issues raised by parties, but the issues canvassed by parties can and shall be cumulatively considered under the above issues. See **Sanusi V Amoyegan (1992) 4 N.W.L.R (pt.237) 527.** The issues thus raised will be taken together as it has in the courts considered opinion brought out with sufficient clarity and focus, the pith of the contest which has been brought to court for adjudication.

Let me quickly make the point that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings should show precisely what are the issues upon which parties must prepare and present their cases. At the conclusion of trial proper, the real issue(s) which the court would ultimately resolve manifest. Only an issue which is decisive in any case should be what is of concern to parties. Any other issue outside the confines of these critical or fundamental questions affecting the rights of parties will only have peripheral significance, if any. In **Overseas Construction Ltd V. Creek Enterprises Ltd &Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

"By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff's case collapses and the defendant wins."

It is therefore guided by the above wise exhortation that I would proceed to determine this case based on the issues I have raised and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

Now to the substance. I will take the two substantive issues and the questions raised under issue 1 together because they are interconnected and have significant bearing on each other. This will then provide both factual and legal basis to determine the related questions of whether the plaintiffs' reliefs and the counter-claim of defendants are availing.

I had at the beginning of this judgment stated the claims and counter-claims of parties. The facts, at least, the primary ones forming the basis of the relationship are largely not disputed. The dispute appear to lie in a proper discernment of the import and application of the terms of the relationship.

It is therefore to the pleadings which has streamlined the facts and issues in dispute and the evidence led that the court must now beam a critical judicial search light in resolving the contested assertions. The pleadings are even more critical here because, I note sadly, that in the addresses, submissions were made at large that cannot be situated within the confines of the issues joined on the pleadings. The liberty and right to file addresses has been used here as a conduit to expand the remit of the grievance beyond that submitted on the pleadings.

In this case, the plaintiff filed a (49)forty nine paragraphs Amended statement of claim and an (18)eighteen paragraphs defence to the Counter claim. I shall refer to specific paragraphs where necessary to underscore any relevant point.

On the part of the defendants, they filed a (10) ten paragraphs Amended statement of Defence and then later they filed an Eight paragraphs counter-claim. I shall equally refer to relevant paragraphs where necessary.

On the pleadings, the case of the plaintiff is simply that a loan or finance lease facility was advanced to the 1st defendant and guaranteed by 2nd defendant on clear terms as streamlined in the letter of offer which the defendants accepted. That the defendants have failed to redeem the facility or meet up with their commitments or

obligations and this case is one to redeem the unpaid facility representing outstanding principal and accrued interest.

On the other side of the aisle, and precisely because of the tenor of the submissions made by counsel to the defendants which I will shortly address, I prefer to allow the pleadings of defendants speak for itself on the case made out. In the Amended statement of defence, the defendants averred in paragraphs 1 - 6 as follows:

"1. The Defendants state that paragraph 4 of the Statement of Claim is only true in so far as it was the Plaintiff's marketers that approached and advertised the Lease Facility to the Defendants.

2. In reply to paragraph 6 of the statement of claim, the defendants state that the operations of the 1st defendant was adversely affected by a sudden change of policy by the Nigerian National Petroleum Corporation (NNPC). Whereas, at the commencement of the haulage business, the 1st defendant was the sole transporter of the NNPC in the whole of Yobe State, but with the change in policy that monopoly was broken and several other marketers were licensed by the NNPC for the same purpose thereby decimating the economic and commercial advantage enjoyed by the 1st defendant.

3. In reply to paragraphs 6, 7, 8, 9, 10, 11 and 12, the defendants admit making payments to the Plaintiff, but will rely on the evidence of a professional accountant during trial for the full amount of what was actually paid by the 1st defendant to plaintiff. The professional accountant will analyze statements of all accounts through which the 1st Defendant was transacting with the plaintiff in connection with the Lease Facility and produce a written report thereon. The said accounts were:

i. Tibesti Nigeria Limited (NNPC OPS A/C 2): 1011708318;
ii. Tibesti Nigeria Limited (Impresit A/C): 1011601048;
iii. Tibesti Nigeria Limited (Admin A/C): 1011840784;
iv. Tibesti Nigeria Limited: 1011354928.

The plaintiff is hereby given Notice to Produce the Statements of all the aforementioned accounts dating back from the 1st of February 2008 till the present day of printing same.

4. **In reply to paragraph 13 of the statement of claim, the defendants state that the trucks were under-valued and under-sold by the plaintiff. In addition, the defendants state that having realised the negative impact of the change of policy by NNPC on its cash flow and its inability to sustain its haulage operations, the 1st defendant called upon the plaintiff to retrieve the trucks and tankers thereby marking an end to the Lease Facility by the mutual conduct of both the plaintiff and the 1st defendant occasioned by Frustration caused by the sudden change of policy by the NNPC.**

5. **In reply to paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40 and 41, the defendants deny the rates at which interest and charges accumulated against the 1st defendant, and aver that such rates were excessive and miscalculated and shall to that effect rely on the opinion of an accounting expert during trial, more so when the 1st defendant transacted with the plaintiff vide more than one account as shown above.**

6. **The defendants deny paragraph 43 of the statement of claim and in reply state that its business was frustrated by the change of policy of the NNPC and that the 1st defendant was never in default to the NNPC up till the time it voluntarily pulled out of the haulage business."**

The case made above by defendants to situate their defence to the main action is clear and unambiguous. These averments equally form part of the distinct counter-claim filed by defendants which as stated earlier will be considered together.

I shall in this case deliberately and in-extenso, rely on the salient averments in parties respective pleadings and of course the evidence as the pleadings have clearly delineated or streamlined precisely the issues subject of the present inquiry. Any issue raised outside the confines of the pleadings, as stated earlier would lack both factual and legal resonance and will be discountenanced. The importance of parties pleadings need not be over-emphasized because the attention of court as

well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings.

Before going into the merits, let me also quickly state some relevant principles that will guide our evaluation of evidence. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. **Section 131(1) Evidence Act.** By the provision of **Section 132 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, 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 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party

who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Now a convenient starting point is to understand the precise situational or foundational basis of the relationship of parties. On the state of the pleadings and evidence, it is common ground that the defendants are customers of the plaintiff bank. It is equally common ground that by **Exhibit P1** dated 11th April, 2008 the 1st defendant was offered a finance lease facility in the sum of **N250, 000, 000 (Two Hundred and Fifty Million Naira)** which was accepted with "all the conditions therein" as contained in **Exhibit P2**, the extract of the Resolution of the Board of 1st defendant. The resolution shows clearly the 2nd defendant as the M.D/C.E.O of the 1st defendant and she equally signed the resolution as one of the signatories.

It is however obvious from the pleadings and evidence that this facility was however later subsequently restructured vide **Exhibit D1** tendered by defendants dated 3rd February, 2009 with significant amendments on terms particularly in relation to the lease amount, tenor period and terms of repayment. In the initial pleadings of plaintiff, no mention of this restructure was made or alluded to in the entire Amended statement of claim of plaintiff.

I note however that in paragraph 3 of the plaintiffs defence to the counter-claim, the plaintiff would appear to have acknowledged that there was a restructuring of the lease facility vide **Exhibit D1**. Indeed in paragraph 5 of the defence to the counter-claim, the plaintiff stated that they acted at all times in line with the contract between the parties as enshrined in the offer letters. This is a recognition that the plaintiff accepted the request for restructuring of the initial offer made by defendants as stated expressly and embodied in **Exhibit D1**. It appears to me

logical to hold that if there was a restructuring which manifested in new terms as contained in Exhibit D1, then it is Exhibit D1 that now contains the terms that governs the relationship and the basis for the mutual reciprocity of legal obligations.

Indeed even in **Exhibit D1**, the plaintiff stated as follows:

"Please note that this offer supersedes and cancels our offer letter for lease facility of N250 Million dated April 11, 2008."

The above is abundantly clear.

We are thus bound to examine Exhibit D2 to situate its true or correct legal import. The only point to add is that the submissions made by the defendants in their Reply address on points of law that the case of the plaintiff is founded only on the first letter offer **Exhibit P1** dated 11th April, 2008 clearly will not fly, precisely because it has no root or bearing on the pleadings filed on both sides in the substantive action and the counter claim.

The case of the plaintiff may have initially been situated within the first letter offer but there is no doubt as already highlighted on the pleadings, that issues were joined on the basis of **both** offer letters. The defence and counter-claim of defendants was predicated on the basis of **both letters of offer** to wit: the original offer and the restructured facility; the plaintiff then filed a defence and specifically similarly pleaded or averred to both the original facility and the restructured facility as the foundation of their case. The case of both parties was thus contested on the basis of both offer letters. Indeed even in the Reliefs sought by the defendants in the Counter-claim vide Relief (a), they specifically sought for a declaration that both offer letters, Exhibits P1 and D1 are unenforceable. Issue 1 of the final address of Defendants equally wants a pronouncement on the status of both offer letter Exhibits P1 and D1 and of course how it impacts on the case of parties. It is therefore difficult to situate the basis of the arguments of defendants that seeks to as it were, pigeon-hole, and limit the case of plaintiff to only Exhibit P1. The point to underscore is that the reply address of defendants on points of law cannot delimit facts streamlined in the pleadings.

Most importantly, it is critical to state that while the facility may have indeed been restructured, this does not mean that the **initial offer,** Exhibit P1, ceases to exist for all purposes or never existed. This must be so because the initial disbursement of the lease facility of N250, 000, 000 was done and received by defendants before the restructure. Secondly, repayments have started to be made by defendants before the restructure. Indeed the defendants factored the Repayments made even before the restructure of the facility in contending that they have paid back substantially the facility given to them. If the first offer ceased to completely exist as seem to be belatedly contended by defendants now in their Reply address, then, even the earlier payments made by them before the restructuring should not have any relevance or application in the context of the restructured facility and the quantum of any outstanding due from them to the plaintiff Bank.

The restructuring of the facility properly understood is aimed principally at altering of the terms of the initial offer to make them usually more favourable to the borrower. In this case looking at both **Exhibits P1** and **D1**, it is clear for example that the monthly repayment due from defendants was **reduced** from thirty (30) equal consecutive monthly rental repayment of N11, 193, 217, 39 vide **Exhibit P1** dated 11th April, 2008 to fifty (50) equal and consecutive monthly lease rental of N6, 248, 901,10 vide Exhibit D1 dated 3rd February, 2009. It is equally important to add that the restructuring by **Exhibit D1** was at the request of defendants.

There should therefore be no dispute that while the restructured facility vide Exhibit D1 clearly provides the terms or defines the issues in dispute, it cannot be correct that the original **offer letter** ceases to exist completely especially in the context of the narrative of the facts of this case. Indeed even Exhibit D1, recognises this reality when in the "purpose" column of the restructured facility, it was stated clearly as follows:

"To restructure repayment of existing lease facility granted for the acquisition of ten (10) brand new trucks for the haulage of petroleum products at Damaturu NNPC Mega Station"

As a logical corollary, in law, where a transaction is drawn out as in this case, the best way of determining the intention of parties is to carefully scrutinize the documents and entire circumstances of the transaction. In **Royal Exchange**

Assurance Nig. Ltd & ors V Aswani Textile Industries Ltd (1991) 2 NWLR (pt.176) 639 at 669 D, the Court of Appeal stated as follows:

"Where documents form part of a long drawn transaction, such as in the instant case, they should be interpreted not in isolation but in the context of the totality of the transaction in order to fully appreciate their legal purport and import. That is the only way to find out and determine the real intention of the parties. A restrictive and restricted interpretation which does not take cognisance of the total package of the transaction in which the documents are integral part cannot meet the justice of the case"

In this case, as already alluded to, a fair resolution of this case must involve carefully examining the documents tendered in the context of the entire trajectory of the narrative of the transaction to fully appreciate their legal purport and to enable a proper discernment of the intention of parties. In addition, both **offer letters** have featured prominently in the pleadings and evidence of parties as already demonstrated.

Accordingly, it follows that where parties enter into a precisely defined contractual agreement or document vide **Exhibit D1**, this document necessarily provides the fulcrum or basis for the mutual reciprocity of legal obligations as between parties and our attention must be focused on it.

It is the law that in construction of agreements or contracts such as **Exhibit D1**, the duty of court is to carefully construe the terms of the agreement so as to discover the intention of parties in the event of an action arising therefrom. See **Ajay Ltd V AMS Ltd (2003) 7 N.W.L.R (pt.820) 577 at 634 A-D.**

By virtue of **Section 128 (1) of the Evidence Act**, oral evidence would not be admitted to prove, vary, alter or add to the terms of any contract which has been reduced into writing when the document is in existence except the document itself. See **Scoa .V. Bondex Ltd (1991) N.W.L.R (pt.138) 389 F-G.**

The defendants have canvassed the point that the agreement or the restructured offer letter Exhibit D1 is a **hire purchase agreement** while the plaintiff contends otherwise. The point to underscore at the onset is that whatever parties choose to call or label the agreement or the offer letter does not in any way derogate from the

terms of the contract which remains sacrosanct and which the court must construe to determine the intention of parties.

Now because of the divergent contentions with respect to the import of the agreement, let me now interrogate key clauses of the offer of lease facility, **Exhibit D1**dated 3rd February, 2009 particularly its salient provisions thus:

"…<u>OFFER OF LEASE FACILITY</u>

We are please to inform you that the management of Zenith Bank has approved a lease facility for your company as requested under the following terms and conditions…:

Type of Facility: Finance Lease

Lease amount: N222,791,044.00 (Two Hundred and Twenty Two Million, Seven Hundred and Ninety One Thousand, Forty Four Naira)

Purpose: To restructure repayment of existing Lease Facility granted for the acquisition of ten (10) brand new trucks for the haulage of petroleum products at Damaturu NNPC Mega Station.

Disbursement: This facility shall be made available for drawdown upon satisfactory compliance with the conditions precedent.

Lease period: Fifty (50) months.

Pricing: Interest Rate: 17% per annum. This rate is subject to upward or downward review in line with money market realities. However, any future advice of upward review of interest rate shall be for information only and will be deemed accepted accordingly unless the facility is paid down on the effective date of such upward review.

Repayment: Fifty (50) equal and consecutive monthly lease rentals of N6,248,901.10 (Six Million, Two Hundred and Forty Eight Thousand, Nine Hundred and One Naira, Ten Kobo) to be debited from Tibesti's account with Zenith.

Repayment Source: Proceeds from haulage contract with NNPC/operational cash flow.

Documentation: 1. Execution of Lease Agreement

2. Execution of Contract of Sale Agreement.

3. Comprehensive Insurance Cover on the trucks with the interest of Zenith noted as first loss payee.

Covenant: 1. Tibesti will ensure that the trucks are comprehensively insured at all times with Zenith General Insurance noting the interest of Zenith as a first loss payee.

2. Tibesti will at all times ensure that the trucks are in good state of maintenance and repair. The cost of the maintenance will be borne by Tibesti.

3. Tibesti will obtain all necessary statutory approvals. licenses, permits and permission for the use of the trucks and lodge copies with Zenith.

Security: 1. Legal Ownership of the ten (10) brand new diesel trucks financed by Zenith.

2. Confirmed Irrevocable Letter of Payment Domiciliation from authorised officials of NNPC committing to domicile all haulage fees with respect to this facility exclusively to Tibesti's account with Zenith.

3. Personal guarantee of the Managing Director of Tibesti, Hajiya Samira Sheriff.

Ownership: Ownership of the trucks shall reside with Zenith (the lessor) during the lease period and reverts to Tibesti or its appointed agent at the payment of the final lease rental.

CONDITIONS PRECEDENT

… 3. Tibesti shall be required to take out a comprehensive Insurance Policy with Zenith General insurance against fire and any other forms of peril on the ten (10) brand new diesel trucks financed by Zenith, noting the interest of Zenith as a first loss payee.

6. Receipt of duly executed Personal Guarantee form from Hajiya Samira Sheriff, Managing Director/CEO of Tibesti.

OTHER CONDITIONS

… 4.Submission of full technical details of the trucks including suppliers, make, model, number, invoices etc.

5. Submission of Delivery and Acceptance Certificate by Tibesti accepting the trucks and certifying that they are in good working condition at the time of delivery.

6. Submission of invoices and other relevant documents supporting the cost of the trucks.

7. Where any portion of the principal and/or interest/fees thereon remain unpaid upon the expiration of this facility, this offer letter with all its attendant terms and conditions shall continue to be in force until full payout of the entire facility. However, this shall neither be deemed as regularisation of any default that has occurred nor a waiver of Zenith's right to recall the facility.

9. Zenith Bank reserves the right to securities, syndicate or sell its interest in this credit facility based on its global risk/liquidity management objectives during the period of the facility.

10. All legal fees, out-of-pocket expenses, taxes or commissions including cost of recovery of the facility in the event of default shall be for the account of Tibesti."

I have at length above situated the contents of the restructured offer of lease facility. As stated earlier, the contents of this offer letter is binding and cannot be altered or interpolations made to it to suit a particular purpose. See **Section 128 of the Evidence Act.**

On the face of **Exhibit D1**, it is clearly described as a **finance lease**. The defendants have however stated that it is a **hire purchase agreement**. The question here is whether the offer letter which defendants accepted is a hire purchase agreement?

In explaining what a hire purchase agreement means, it is fundamental to, again bear in mind the consecrated principle that once parties have agreed between themselves the conditions for the formation of a contract and in this case the conditions are embodied in a document, then they are bound by the terms duly executed by them and neither party or even the court can read into the agreement terms on which parties have not agreed and did not agree to. There cannot be any additions of any kind. What then is a hire purchase agreement?

In **Alhaji Jimoh Ajagbe V Layiwola Idowu (2011) 17 NWLR (pt.1276) 442 at 444 A-B** the Supreme Court stated as follows:

"The contract of Hire-Purchase or even more accurately the contract of hire with an option to purchase is one under which the owner of the chattel lets it out on hire and undertakes to sell it to or that it shall become the property of the hirer conditionally on the making of a certain number of payments. Until the making however of the last payment, no property in the chattel passes where the contract between the parties amounts to an absolute agreement to sell and buy, whether the instrument be called hire purchase or not, the property in the chattel passes upon delivery, provided that was the intention of the parties. The difference between a contract of sale at a price payable by instalments and a contract of hire purchase is that in the former, the purchaser has no option of terminating the contract and returning the chattel, but whereas in the latter, there is one.

In each case, the substance of the transaction or the agreement must be looked at and not the mere words." See also **Halburys laws of England, 1st Edition**

vol. 1 at page 554. See also **Kolawole V Lanre Adebokun Olorioko Nig. Ltd (2015) LPELR – 25005 (CA)**.

Having provided above the import of a **Hire Purchase Agreement**, and also taking an objective view of the facts of this case, particularly what parties have written and done in this case, the question, once again, is whether or not a hire purchase agreement has been made out as strenuously canvassed by defendants.

In this case on the evidence and contents of **Exhibit D1**, there is no where to situate ownership of the **trucks** by the Bank which it let out to the defendants on hire and undertook to sell it or that it shall become the property of the customer on making certain number of payments which is a critical element of a hire purchase agreement.

Indeed on the basis of **Exhibit D1**, while the plaintiff provides the finance, the sourcing of the trucks and ensuring they are in good working condition is the responsibility of defendants. The covenants and conditions of the agreement which I had earlier highlighted makes this abundantly clear. Let me perhaps at the risk of sounding prolix reproduce some of the conditions of **Exhibit D1**. The Defendants are expected to comply with the following covenants under the heading **"OTHER CONDITIONS":**

(4) Submission of full technical details of the trucks including, suppliers, make, model number, invoices, etc.

(5) Submission of delivery and acceptance certificate by Tibesti accepting the trucks and certifying that they are in good working condition at the time of delivery.

(6) Submission of invoices and other relevant documents supporting the cost of the trucks.

(7) Where any portion of the principal and/or interest fees remain unpaid upon the expiration of this facility, this offer letter with all its attendant terms and conditions shall continue to be in force until full pay out of the entire facility …."

Clauses 4 – 6 above donates unequivocally that the defendants are to buy the trucks themselves and then furnish evidence of same to plaintiff.

Clause 7 makes it abundantly clear that the terms and conditions **shall** continue to be in force until **full payout** of the **entire** facility.

To further underscore the above positions, the defendants further covenanted in Exhibit D1 under the heading "Covenant" as follows:

"1. Tibesti will ensure that the trucks are comprehensively insured at all times with Zenith General Insurance noting the interest of Zenith as a first loss payee.

2. Tibesti will at all times ensure that the trucks are in good state of maintenance and repair. The cost of the maintenance will be borne by Tibesti.

3. Tibesti will obtain all necessary statutory approvals. licenses, permits and permission for the use of the trucks and lodge copies with Zenith."

What the above comprehensively show is that the **trucks** in question though financed by plaintiff were bought independent of plaintiff and clearly in the name of the defendants from an **independent vendor or seller**. There is nothing in the pleadings or evidence where the name of this vendor or who defendant bought the trucks from appear in the offer letter. Indeed there is equally nothing on the evidence situating that ownership of the trucks from the vendor to defendants was not transferred until all payments for the trucks were made. Indeed the purchase of the trucks by **defendant** from the **vendor** was complete and clearly not on hire purchase. It is really difficult here, to legally situate a hire purchase agreement in the context of the clear facts of this case and in particular **Exhibit D1**.

The law is settled and I had already alluded to it that where parties have reduced their transaction into writing, oral or extrinsic evidence is not admissible to add to, vary, subtract from or contradict the written terms of the transaction. See **Larmie V D.P.M. & Services Ltd (2005) 18 NWLR (pt.958) 438 at 470 C-D; Bunge V Gov. of Rivers State (2006) 12 NWLR (pt.995) 573 at 616 – 617 G-A**. See also **Section 128 of the Evidence Act 2011**.

There is absolutely no reference to a Hire Purchase Agreement in **Exhibit D1**. It was not stated or mentioned either directly or obliquely. The contents of the offer facility donates clearly that a loan was granted to defendants to finance the acquisition of assets, in this case "ten brand new trucks for the haulage of petroleum products at Damaturu NNPC Mega Station". The offer or transaction clearly is a mode of financing which allows for the use of the trucks in return for agreed rental payments. The plaintiff here transferred to the customer substantially all the risk and rewards incident to ownership of the trucks but legal ownership of the trucks as security, shall reside with the bank during the lease period and "reverts back to Tibesti or its appointed agent at the payment of the final lease rental."

Once therefore the loan facility or last lease rental is paid as clearly streamlined in the offer letter, the trucks reverts back to defendants or its appointed agents. No more. **Exhibit D1** is really, in my opinion, a simple loan transaction and there should really be no confusion with respect to its true import. As much as I have sought to be persuaded, I am not persuaded by defendants that more can be read to the offer letter beyond what it has expressly provided. However the terms are stretched or construed, they do not denote a hire purchase agreement.

Most importantly, the evidence of parties is equally clear. None of them was confused with respect to the true intent and import of the agreement which was a loan transaction to the defendants to facilitate the purchase of ten (10) trucks to aid the business of defendants. The unchallenged evidence of PW1 which he maintained under cross-examination is clear on the true import of the Agreement which is a simple credit facility to defendants to buy trucks. Indeed under cross-examination PW1 made it clear that the **"bank is not involved in the business of selling vehicles."** The evidence was not impugned or challenged by defendants. There was no counter evidence by them showing that the Bank engages in the selling of cars or trucks. If the bank does not engage in the business of selling vehicles, and it is not established that they own trucks or vehicles which they sell, this then gravely undermines in my opinion, any pretention to a Hire purchase agreement. The law is settled that where evidence given by a witness is not contradicted by any other admissible evidence, the trial judge is bound to accept and act on that evidence, even if it had been minimal evidence. See **Adeleke V Lyanda (2001) 13 NWLR (pt.729) 1 at 22-23 A-C**.

The evidence of 2nd defendant (DW1) also underscored this clear position. In her first statement on oath filed with the defence to the action dated 16th May, 2014, this is what she said in paragraphs 1 – 3:

"1. That I am the managing director of the 1st defendant and I am the 2nd defendant in this suit, by virtue of which I know the facts of this case very well.

2. That sometime in February 2008 the 1st defendant applied for a loan facility of the sum of N250, 000, 000 (Two Hundred and Fifty Million Naira) herein referred to as "the facility" from the Plaintiff.

3. That the Facility was sought to principally enable the 1st defendant purchase 12 trucks and 12 tankers for the haulage/carriage of petroleum products to all NNPC filling stations in Yobe State, on behalf of the Nigerian National Petroleum Corporation (NNPC). (The purchase proforma invoice for the trucks and tankers is hereby attached as Exhibit D1.)"

Her depositions above are clear and she knew that what 1st defendant applied for was a "loan facility" to "principally enable 1st defendant to purchase 12 trucks and 12 tanks for the haulage/carriage of petroleum products to all NNPC Filling Stations in Yobe State on behalf of the NNPC". No more.

It is true that in paragraph 10 of her deposition, she stated that what was granted "was a lease facility as opposed to a mere loan facility and by its nature the lease facility exposed the plaintiff to commercial risks and financial losses, where necessary" but I am in no doubt having watched the demeanour of 2nd defendant that she was under no illusions as to the agreement defendants had with plaintiff. The bank was to facilitate the purchase of the trucks and from the business profit made from haulage of petroleum products, the defendants will then pay back the credit facility used to purchase the trucks and the ownership of the trucks then ultimately revert back to the defendants as stated clearly in Exhibit D1. Indeed in her evidence, defendants commenced payments before they had challenges which DW1 claimed frustrated the repayment plans and this I will deal with shortly.

Let me quickly state here that in the counter-claim filed on 9th January, 2018 nearly 4 years after she filed the deposition of 16th May, 2014, the 2nd defendant sought to change the narrative in fundamental respects, which contradicts this earlier deposition and the defence initially presented. I will again treat this point in some detail later on in this judgment but it suffices to say that the counter-claim though a distinct and different cause of action cannot again alter the contents of the foundation of the relationship vide Exhibit D1. Similarly it is difficult to situate the probative value of the conflicting evidence given by the same person (DW1) with respect to the evidence given for both the defence and counter-claim. As stated earlier, I shall return to this point later on in some detail.

It is noted that in the offer letter, "ownership" of the trucks is to reside with the Bank during the lease and reverts back to 1st defendant or its appointed agent at the payment of the final lease rental, but this without more does not **alter** or **change** the structure of the offer letter, its terms and the expressed intention of parties to a hire purchase agreement. The duty of the court in the interpolation of contracts is to interprete the agreement in enforceable terms. Due regard must be given to the entire document so as to find out the correct meaning in relation to the agreement. See **Antra Ind. (Nig.) Ltd V N.B.C.I (1998) 4 NWLR (pt.546) 357 at 379**. The ownership here must be understood in the context of **security** clearly given by defendants to protect the interest of plaintiff which financed the purchase of the trucks. The agreement to buy the trucks have been fully consummated by defendants with the owners. That is a separate and distinct agreement with a life of its own. This distinction is critical and important. If there was to be a hire purchase agreement at all, it has to be with the **vendors** or **owners** of the trucks, logically from whom the defendants bought. I leave it at that.

I incline to the view and agree with the plaintiff that the agreement here is simply a credit facility to defendants to enable them acquire trucks to further their business activities and once they make the last rental payment, ownership of the trucks then becomes that of defendants. No more.

The point to reiterate is that it is not the function of the court to rewrite the contents of the offer letter for parties. Where the intention of parties as expressed in the transaction is clear, a legal interpretation of the nature of the agreement between the parties under the law will be pronounced by court as done here.

Having determined the correct import of the offer letter and before dealing with the question of whether parties lived up to the commitments under the agreement, let me quickly deal with the related question of the **guarantee** said to have been given by 2nd defendant to the lease finance facility granted 1st defendant. The defendants joined issues on this point. Again I take my bearing from the pleadings. The plaintiff in paragraph 3 averred that the 2nd defendant is a business woman and the M.D/CEO of the 1st defendant, its alter ego and directing mind as well as the guarantor of the facility advanced to the 1st defendant. The personal guarantee was tendered in evidence as **Exhibit P3**.

In response, the defendants in paragraph 8 of the Amended Statement of Defence pleaded as follows:

"In reply to paragraphs 45 and 46 of the Statement of Claim, the 2nd Defendant never held out herself as a Guarantor to the Plaintiff in respect of the Lease Facility or any other transaction and the Deed of Guarantee being peddled by the Plaintiff is not only unknown to the Defendants but it is also invalid. The Defendants will rely on an earlier Guarantee which emanated from the Plaintiff to this effect."

In paragraph 11 of her deposition dated 16th May, 2014, the 2nd defendant stated as follows:

"That the Guarantor's form pleaded by the plaintiff is invalid and as a result I am not the guarantor of the lease facility."

I had earlier dealt with the key salient contents of the lease facility agreement. The defendants on the pleadings and evidence clearly accepted and indeed relied on the initial offer of lease facility, **Exhibit P1** and the restructured offer of lease facility. **Exhibit D1** as constituting the basis for the relationship of parties. Indeed, DW1 made this point abundantly clear in paragraph 4 of her deposition in support of the counter-claim.

Indeed, one of the principal condition precedent to the offer of lease facility in both offer letters is the **"Receipt of duly executed personal Guarantee form from Hajiya Samira Sheriff, Managing Director/CEO of Tibesti."**

On the pleadings and evidence, the defendants wholly accepted the offer inclusive of the condition relating to the execution of a personal guarantee before the facility will be disbursed.

In the Resolution of board meeting of the 1st defendant which was signed by the 2nd defendant as one of the signatories, vide **Exhibit P3**, it was resolved that the offer by Zenith Bank be **"accepted with all the conditions therein."**

The above resolution is clear and unambiguous and is binding. In the Black's law dictionary, Eight Edition at page 1337, Board or corporate resolution was defined as a **"formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction or appointment."**

The guarantee, **Exhibit P3** thus tendered by the plaintiff clearly appears to be in furtherance of the contents of the offer letter which demanded of 2nd defendant the execution of a guarantee. The defendants may have stated that the guarantee is invalid but there is nothing in evidence demonstrating what makes the guarantee, Exhibit P3 invalid and the court cannot speculate.

Furthermore in paragraph 8 of the Amended defence reproduced above, the defendants stated that the guarantee relied on by plaintiff is unknown to them and that they will rely on an **"earlier guarantee"** but this "**earlier guarantee"** was not tendered by defendants in evidence. The failure to tender this guarantee meant that the said portion of the paragraph pleading the earlier guarantee is deemed as abandoned. Again, the failure to produce this guarantee allows for the invocation of the principle under Section 167 (d) that the guarantee, if produced, would have been unfavourable to the case of defendants.

Now even though the defendants have not demonstrated in evidence what makes Exhibit P3 **"invalid"** and that then brings the challenge to an end, I will out of caution have recourse to an option open to court where a party or witness denies signing a document. I have here pursuant to the provisions of **Section 101 of the Evidence Act** compared the signature on the guarantee, Exhibit P3 with the

following streamlined documents and in substance it is similar with the signature of the **2nd defendant.** These documents are:

1. The two offer letters she executed vide **Exhibits P1 and D1**.

2. The signature on the Board Resolution of 1st defendant vide **Exhibit P3** and

3. The two witness depositions she signed dated 16th May, 2014 and 9th January, 2018.

See **Adenle V Olude (2002) 18 NWLR (pt.799) 413 at 430 D, F-H**.

The contention by DW1 during cross-examination that she signed **Exhibit P3** under duress appear to be merely speculative posturing and was not established at all. Firstly, the defendants never made any case at all on the pleadings which has streamlined the issues in dispute with respect to duress or that 2nd defendant was forced to sign any Guarantee. It is trite principle of general application that evidence led in respect of facts not pleaded goes to no issue. Secondly, on the pleadings, via paragraph 8, above, the defendants pleaded that the guarantee relied on by plaintiff is **"unknown"** to them. It is a grave contradiction in terms to now them claim knowledge and even identify a document which they contend was **"unknown."** The belated and strange contention by 2nd defendant that she was **"forced"** to sign the guarantee served to completely undermine the claim that the guarantee tendered by plaintiff is **"unknown"** and by extension the credibility of DW1 with respect to the assertion of duress. Thirdly, there is absolutely nothing in the pleadings or evidence as to who forced 2nd defendant to sign the guarantee or the circumstance of the duress. The related questions of who forced her to sign the guarantee, when and where were all left to the unwieldy world of speculation and conjecture. The trial and adjudicatory processes, whatever its imperfections, cannot be based on sterile speculations or guess work. Most importantly, the Board resolution, Exhibit P3 undermines any such claim of duress because it accepted wholly the terms of the offer, including the condition that the 2nd defendant executes a Personal Guarantee.

The bottom line here is that the guarantee, **Exhibit P3** has not been impugned in any manner and is consistent with the requirement of the offer letter which made

the production of a personal guarantee executed by 2nd defendant a condition precedent to the drawdown of the sums contained in the offer to defendants. I accordingly hold that the 2nd defendant indeed and in fact guaranteed the facility subject of both Exhibit P1 and the restructured facility, Exhibit D2. She is thus bound by the contents of Exhibit P3, the guarantee, particularly the clear covenants covered by paragraphs 1, 2, (5) (i) e and 5 (ii) and (iii).

Let me then quickly state the general principle that a **guarantee** in law is an undertaking to answer for the payment or performance of another persons debt or obligation in the event of a default by the person primarily responsible for it.

In law, the liability of a guarantor becomes due and mature immediately the debtor/borrower becomes unable to pay its/his outstanding debt. See **Nwankwo V Ecumenical Dev. Cooperative Society (2001) 5 NWLR (pt.1027) 377**. On when the liability of guarantor will arise, the Court of Appeal in **Crown Flour Mills Ltd V Olokun (2008) 4 NWLR (pt.1077) 254 at 300** stated that **"the fact that the obligation of a guarantor arises only when the principal has defaulted in his obligation to the creditor does not mean that the creditor has to demand payment from the principal or from the surety or give notice to the surety before the creditor can proceed against the surety. Nor does he have to commence proceedings against the principal, whether civil or criminal unless, there is an express term in the contract requiring him to do."** See also A**.I.D. Corp. V. NLNG Ltd (2000) 4 NWLR (pt.653) 494**.

The implication is that the creditor has a legal right to proceed against the guarantor or the principal debtor or both as done here.

Having determined the correct import of the offer letter and the precise legal relationship and status of the parties, we now come to the critical question of whether the terms of the offer was fulfilled or breached by either party and the quantum of the outstanding if any. Put another way, has the plaintiff creditably made out a case for the outstanding balance of the lease facility given to defendants?

Let us now critically evaluate the evidence led on both sides. Some of the facts as stated earlier are not in dispute. I start with the case of plaintiff and the very foundation of the case.

By **Exhibit P1** dated 11th April, 2008, the defendants were offered a facility in the sum of **N250, 000, 000** which was later restructured vide **Exhibit D1** in the sum of **N222, 791, 044.00** (Two Hundred and Twenty Two Million, Seven Hundred and Ninety One Thousand, Forty Four Naira).

By **Exhibit P1**, the tenor or lease period initially was thirty six months. The repayment was for **thirty (30) equal and consecutive rental repayment of N11, 193, 217.39** (Eleven Million, One Hundred and Ninety Three Thousand, Two Hundred and Seventeen Naira, Thirty Nine Kobo) commencing after six (6) months moratorium. By Exhibit P1, the repayment was to commence sometime in November 2008 after the expiry or end of the 6 months moratorium.

In the pleadings and evidence particularly vide paragraphs 10 and 11 of the witness deposition of PW1, the 1st defendant made two payments on 19th November, 2008 in the sum of **N40, 000, 000** into its NNPC OPC A/C account number 1011708318 as well as the sum of **N611,096.00** into its loan account number 1011496253.

The 1st defendant then in December 2008, January 2009 and February 2009 made payments of N10, 017, 667.75 into its loan Account. Again, on the evidence, following the restructure of the facility vide **Exhibit D1** dated 3rd February, 2009, the lease period or tenor was altered to 50 Months and the repayment terms was **"fifty (50) equal and consecutive monthly lease rentals of N6, 248, 901.10 (Six Million, Two Hundred and Forty Eight Thousand, Nine Hundred and One Naira, Ten Kobo) to be debited from Tibesti Account with Zenith."**

On the evidence of Pw1 again vide paragraphs 13-14 of his depositions, the 1st defendant made the monthly repayments of N6, 248,901.13 into its loan account from 15th March 2009 to 15th May 2010 which was the last time the 1st defendant made the full rental payments as contemplated by Exhibit D1. Indeed on the evidence, May 2010 was the last time the 1st defendant made a full lease rental payment and that subsequently the 1st defendant started making little and staggered payments into its loan account as comprehensively itemized in paragraph 15 a – h of the evidence of PW1 covering the period between 24th June, 2010 to 29th October, 2010 contrary to the obligations of 1st defendant in the lease facility agreement, Exhibit D1.

It is equally in evidence that sometimes in December 2011, the plaintiff credited the sums of **N6, 250, 000** and **N13, 750, 000.00** into 1st defendant's loan account being the proceeds of sale of five (5) of the trucks bought with the loan advanced which were voluntarily returned by defendants when they realised that they were not keeping up with their obligations to plaintiff. I will later on equally deal with the voluntariness or otherwise of the return of the trucks.

It is the evidence of the PW1 for plaintiff vide paragraph 18 of his deposition that the outstanding principal and interest due from the 1st defendant to the plaintiff from 15th June, 2010 when the 1st defendant stated defaulting in its full monthly repayments to the 3rd March, 2012 when the 1st defendant stopped any further payments stands in the sum of **N213, 804, 573.83** out of which the 1st defendant has paid only **N27, 980, 841.57** leaving a balance of **N185,903,732.28** due and payable excluding other charges and interest.

PW1 similarly in paragraph 19 of his deposition stated that by the nature of the compound interest charged on the facility, that both the principal and interest accruing are always compounded and interest charged if it remains unpaid as in this case. Further that due to the default by 1st defendant, the facility accumulated interest and charges and in paragraphs 18-39 of the claim and 21-44 of the deposition of PW1 the interest and charges accumulated monthly on the account of 1st defendant were itemized covering the period June 2012 – March 2020 in the sum of **N20, 302, 068.70** and when added to the existing **N185, 903, 732.28**, the total outstanding sum due on the abandoned account of 1st defendant is the total sum of **N206,201,561,96** comprising both the outstanding principal and accrued interest. The statement of loan account of 1st defendant covering the period enumerated by PW1 in his evidence showing the payments made by 1st defendant, the principal and interest was tendered in evidence as Exhibit P4 (1).

The plaintiff here has given a clear narrative on the nature and structure of the facility, the precise payments made and when the 1st defendant stopped servicing the facility and finally they gave particulars as to how they arrived at the above outstanding figures.

Now on the other side of the aisle, the initial case of defendant vide the evidence of 2nd defendant and DW1 vide paragraphs 1-6 of her deposition is that they sought

for the facility to purchase 12 trucks and tankers for the haulage/carriage of petroleum products and that at the time they applied for the facility vide Exhibit P1 they were the only authorised agent for NNPC for the whole of Yobe State but that NNPC later changed its policy and licenced several other agents/transporters to carry out the same business and this made the business of 1st defendant unprofitable and unsustainable and as a result they called upon the plaintiff to retrieve the trucks and tankers that were purchased pursuant to the lease facility and that the plaintiff sent some of its personnel to take custody of the trucks.

DW1 in paragraphs 7-9 of her deposition also stated that 1st defendant made several monthly repayments of N6, 000, 000 before the lease facility became inoperable and that they have discharged all financial obligations it owed the plaintiff on account of the value of the trucks and tankers and the monthly payments received by plaintiff and coupled with the fact that the lease facility became inoperable by frustration.

Let's now further give close scrutiny to the evidence. As stated earlier, the offer of lease facility agreement covered by Exhibit P1 dated 11th April, 2008 and the subsequent restructure covered by Exhibit D1 dated 3rd February, 2009 particularly the restructured offer letter contains the terms of the relationship of parties and the basis for the mutual reciprocity of legal obligations and binding. It cannot now be altered or additions made to it to suit a particular purpose.

I have carefully read the restructured offer letter Exhibit D1 and even the original offer letter Exhibit P1 and there is nothing in them situating or denoting that the offer was made on the condition that the defendants are or will remain the only authorised agent for haulage of petroleum products for NNPC for the whole of Yobe State. It is true that the facility may have been given for the haulage of petroleum products at Damaturu NNPC Mega Station but **NNPC** was no party to the agreement between parties in the extant case.

Nothing was presented by defendants from **NNPC** to plaintiff disclosing that it was the "only authorised haulage agent of NNPC for the whole of Yobe State" at the time of the offer was made and it was clearly not incorporated in the offer letter. The court was equally not furnished with any document by defendants showing that it was at any time designated as the only authorised haulage agent for NNPC

for the whole of Yobe State. Similarly nothing was presented at any time either to the plaintiff or court donating the change of "policy" by NNPC allowing "several other haulage agents/transporters" to carry out the same business of defendants. Indeed nothing was furnished by defendants showing these other haulage operators appointed for the Yobe State axis where plaintiff operated and when they were appointed or made haulage agents and how it impacted on the business of defendants. In the absence of evidence in support of these averments, these representations clearly would lack probative value in the circumstances. Indeed even if there was such evidence and none was presented, it will be difficult to situate how these will alter the content(s) or structure of the clear terms of the lease offer facility.

It is therefore difficult to legally situate the factual or legal basis for the contention that the unproven and purported change of policy by the NNPC allowing others to engage in the haulage business of 1st defendant made the business unprofitable, unsustainable and inoperable by "frustration."

Now **frustration** of contract in law has been defined to mean a premature determination of an agreement between parties lawfully entered into, owing to occurrence of an intervening event, or change of circumstances so fundamental as to be regarded by law both as striking to the root of the agreement and entirely beyond what was contemplated by parties when they entered into the agreement. See **Mazin Eng. Ltd V Tower Aluminium (Nig.) Ltd (1993) 5 NWLR (pt.295) 526; A.G Cross Rivers State V A.G. of Fed. & Anor (2012) LPELR – 9335 (SG)**. A contract is thus frustrated where, after its conclusion, events occur which make performance of the contract impossible, illegal or something radically different from that which was in contemplation of the parties at the time they entered it. In other words, where the performance of the contract is dependent on the continued existence of a state of affairs, the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract.

The courts have over time restricted the doctrine of frustration to basically two scenarios, to wit:

(a) Situations where the supervening event destroys a fundamental assumption on which parties had contracted on; and

(b) Where *force majeur* clauses are drafted into the contract.

See **Diamond Bank V Prince Alfred Amobi Ugochukwu (2007) LPELR – 8093 (CA.)**

In this case and on the facts as already demonstrated, it is difficult to see how the concept of **frustration** has any application here. There is absolutely no evidence of any kind beyond unproven and challenged bare oral assertions situating the occurrence of any supervening event so fundamental as to be regarded by law as striking to the root of the extant agreement of parties. There is absolutely nothing in the agreement situating that the performance or payment for the facility is dependent on the 1st defendant been the **"only authorised haulage agent of the NNPC for the whole of Yobe State."** In addition, as I had already alluded to, there is even nothing to show (1) an identified policy document of NNPC appointing **1st defendant** as its sole authorised haulage agent for the whole of Yobe State, (2) an identified document showing any change of policy appointing other operators in addition to 1st defendant. In **paragraph 41(a) of the counter claim**, the defendants/counter-claimants pleaded that they will rely on its **letter notifying plaintiff of NNPC's change of pattern/arrangement** but this letter was never tendered and so this aspect of the pleading is equally deemed as abandoned. The failure to tender this letter, again, allows for the invocation of the principle under **Section 167 of the Evidence Act** that if it was available, its production would have been unfavourable to the case of defendants. And (3) the entity or entities appointed by NNPC to engage in the haulage business in addition to 1st defendant were not mentioned or streamlined. Most importantly there is absolutely no **pleadings** or **evidence** showing that 1st defendant's appointment as an authorised haulage agent was stopped or ended by NNPC at any time.

In the absence of any of these streamlined situations above, it is again difficult to discern the state of affairs that suffered destruction or disappeared as will discharge the defendants from the contract. The law is settled that a contract is not frustrated where the execution by one party becomes merely difficult or expensive than originally anticipated and has to be carried out in a manner not envisaged at the

time of its negotiation. See **B.O. Lewis V UBA Plc (2016) LPELR – 40661 (SC)**. Indeed in this decision, the Apex Court made it abundantly clear that mere hardship, inconvenience, or other unexpected turn of events that have created difficulties in the repayment of a loan cannot constitute frustration.

Most importantly and at the risk of prolixity, the point must be underscored that there is nothing in evidence showing that the NNPC terminated the appointment of 1st defendant as its agent at any time. If the defendants therefore chose or elected to end the relationship with NNPC on their own, that is an independent transaction which has nothing to do with the relationship with plaintiff. If the defendants ended the agency with NNPC, they clearly brought the purported supervening event by choice and frustration will not fly in such circumstances. Self induced frustration is absolutely no frustration in law but a breach of contract. See **Gold Link Insurance Ltd V Petroleum (special) Trustfund (2008) LPELR – 4211 (CA) Jacob V Afaha (2012) LPELR – 7854 (CA).**

On the whole, the **doctrine of frustration** has no application in this case as nothing has been established by defendants showing that the performance of the contract has been rendered impracticable or impossible as a result of a fundamental intervening change or event striking at the root of the contract and entirely beyond the contemplation of parties.

One more point. To even further compound the contention of frustration, the 2nd defendant in paragraph 9 of her deposition dated 16th May, 2014 stated that defendants had even discharged "all financial obligations it owes plaintiff." In paragraph 7 of the same deposition, she indicated that 1st defendant made several monthly repayments of N6, 000, 000 (Six Million Naira) before the lease became inoperable by frustration.

The defendants here have presented or taken inconsistent or diametrically conflicting positions. If they have "discharged all financial obligations it owes plaintiff" then the question of frustration should not be made, the implication being that they have fulfilled their commitments under the contract. Again in self opposing the contention that they have made or discharged all their obligations, in paragraph 8 of the counter-claim and paragraph 5 of the deposition of DW1 in support of the counter-claim, the defendants now aver or admitted clearly that they

only made part payment (three-fifth) of the rentals due which completely negates the position earlier advanced that all their commitments under the offer letter were discharged. These clear contradictions only served to detract from the credibility of the case of defendants.

Most importantly and this is critical, absolutely no clear evidence was produced by the defendants situating when and how these "several monthly payments" were made and how this translated to the "discharge of all its financial obligations" as embodied in Exhibit P1 (the initial offer letter) and later Exhibit D1 (the restructured offer letter).

In this case, as earlier demonstrated, the plaintiff has in the pleadings and evidence precisely identified or streamlined clear particulars proving or showing how they arrived at the amount claimed. It is trite principle that a bank statement of account is not sufficient explanation of debt and lodgments in a customers account to charge the customer with liability for the overall debit balance shown in the statement of account. Any Bank claiming a sum of money on the basis of overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit balance was arrived at. See **Yusuf V ACB (1986) 1 – 2 SC 49; Wema Bank Plc V Alhaji Idowu Fasasi Osilaru (2001) LPELR – 8960.**

Investigation is obviously not the function of the court and no duty inheres in court to embark on a voyage of discovery. It is the primary duty of plaintiff to plead and lead supportive evidence showing how the overall debit balance was arrived at before the burden then shifts to the defendants to lead further evidence. The plaintiff as demonstrated in this case has sufficiently led credible supporting evidence on the outstanding balance due from defendants and this evidence was not impugned in any manner.

I have evaluated the defence and the evidence led by the defendants and it is difficult to situate the credibility and the value of the rebuttal with respect to the narrative of plaintiff and the outstanding balance due. Now as stated earlier in this judgment, the defendants then filed a counter claim nearly four (4) years later after the plaintiff had closed its case.

As stated repeatedly, the Counter-Claim is inextricably tied to the substantive action which undoubtedly has a bearing on it. Indeed as stated earlier, in paragraph 1 of the counter-claim, the 1st and 2nd defendants adopted the entire contents of paragraphs 1 – 10 of the Amended statement of defence.

Now in paragraphs 2 – 4 of the counter-claim, supported by paragraph 4 of the witness deposition of 2nd defendant, the defendants/counter-claimants sought to now completely alter the narrative and fundamentals with respect to the case made out in the defence using the conduit of a counter-claim which admittedly is a separate and distinct cause of action. Have they made a success of this endeavour? Let me again scrutinize the pleadings and evidence which as I have repeatedly emphasised is critical in the resolution of any dispute.

Now both in the counter-claim (paragraph 2) and deposition of DW1 dated 9th January, 2018 (paragraph 4), the defendants/counter-claimants stated that they leased "5 trucks" belonging to the plaintiff on condition that ownership of the trucks will pass to the counter-claimants on payment of lease rentals. They indicated that they will rely on the two (2) offer letters, **Exhibits P1** and **D1** and the counter-claimants statement of loan account number 10-11496253 admitted as **Exhibit P4 (1).**

I had earlier evaluated the contents of the offer letters, P1 and especially D1 and there is nothing in those Exhibits showing that the 1st defendant/counter-claimant **leased 5 trucks** belonging to the plaintiff. That certainly is not correct and the defendants, unfortunately cannot add or make any additions to the offer letters to suit their purpose. Again at the risk of prolixity, the purpose of the facility vide Exhibit D1 is clear and unambiguous thus:

"To restructure repayment of existing lease facility granted for the acquisition of ten (10) brand new trucks for the haulage of petroleum products at Damaturu NNPC Mega Station."

Indeed the defendants particularly the 2nd defendant appear not be prepared to say the truth and the whole truth as she has sworn to do with respect to the details of the transaction with plaintiff. Now in her 1st witness deposition in support of their defence to the substantive action dated 16th May, 2014 and which she adopted at trial, this is what she said:

"2.That sometime in February 2008 the 1st defendant applied for a loan facility of the sum of N250, 000, 000 (Two Hundred and Fifty Million Naira) herein referred to as "the facility" from the Plaintiff.

3. That the Facility was sought to principally enable the 1st defendant purchase 12 trucks and 12 tankers for the haulage/carriage of petroleum products to all NNPC filling stations in Yobe State, on behalf of the Nigerian National Petroleum Corporation (NNPC). (The purchase proforma invoice for the trucks and tankers is hereby attached as Exhibit D1.)"

The above paragraphs are clear and self explanatory.

The inexplicable somersault by DW1 in paragraph 4 of the deposition dated 9th January, 2018 in support of the Counter-claim that they now leased 5 trucks belonging to plaintiff must be discountenanced as ridiculous and completely lacking credibility. This is a clear after thought ostensibly made to support the flawed contention of a hire purchase agreement with plaintiff. The 2nd defendant cannot blow hot and cold at the same time or present patently conflicting and inconsistent narrative on the same point. A witness who sets out deliberately to misled the court by lying on oath, either by denying facts known to him or her by misrepresenting facts upon which he is questioned or gives patently contradictory evidence cannot be relied on because he or she has from the performance destroyed any rational basis for accepting his evidence in part or in total based on credibility. See **Oguntayo V Adebutu (1997) 12 NWLR (pt.531) 81 at 94 A-B**.

In the same vain, the complaints made in the counter-claim and particularised by DW1 in paragraphs 5a-k, 5(1) a - f of her deposition that the **"offer letters"** did not among others state the money price at which the truck can be purchased; that the offer letter imposed obligations which are over and above what is lawful; that the offer letter did not state the cash price of the goods and the date each installment is payable; that the offer letters did not contain a provision that the 1st defendant could terminate the transaction at any time; that the offer letter did not include the formula for calculation of interest; that the offer letters did not contain notice as required by law and that there was imposition of an insurer, etc appear to me all attempts at clutching at straws by defendants.

It is easy and simple to say in response, that all these, were not issues to defendants when they applied and got vide **Exhibit P1 the huge sum of N250, 000,000** of depositors funds from plaintiff bank and which was later restructured vide **Exhibit D1** to the sum of **N222,791,044.00.** They never at any time raised those issues or raised any complaint when they accepted and executed the offer facility letters and drew down on the facility and it appears to me too late to cry or complain especially having fully enjoyed the benefit of the lease facility. That however is on aside.

Fundamentally however, the belated complaints, stems from an erroneous conception of what a contract entails which is a product of Agreement. Nobody compelled the defendants to apply for the offer, to accept and execute the offer letter and to draw down on the facility. The board of 1st defendant vide **Exhibit P3** deliberated on the offer and accepted all terms as earlier highlighted. The 2nd defendant equally executed a personal guaranty.

In law, contract voluntarily entered into by the parties are binding on them and a court of law will not sanction an unwarranted departure from them unless they have been lawfully abrogated or discharged. See **FGN V. Zebra Energy Ltd (2002) 3 NWLR (pt.754) 471 at 491 E-F**.

Indeed in the interpretation of contracts, it is not the business of the court to make a contract for the parties before it or to rewrite one already made by them. Once the conditions precedent to the formation of the contract are fulfilled by the parties there to, they are bound by it. Where parties have embodied the terms of their contract in a written agreement, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written agreement. See **Larmie V DPM & services Ltd (2005) 18 NWLR (pt.958) 88**.

Indeed the executed offer of lease facility letters including all the terms and conditions been a product or agreement freely entered into are binding on the parties including defendants and there is absolutely no room for departure from what is stated therein. See **Antra Industries (Nig.) Ltd V NBCI (1998) 4 NWLR (pt.546) 357 at 376; Jeric (Nig.) Ltd V U.B.N Plc (2000) 15 NWLR (pt.691) 447.**

Finally, where there is a disagreement between parties to a written agreement on any particular point, the authoritative and legal source of information for resolving that disagreement or dispute is the written contract executed by the parties. The reason for the stringent position of **Section 128 of the Evidence Act** is to ensure that a party to a contract in writing does not change his position midstream in his underserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V D.P.M & service Ltd (supra) 88 469.**

The attempts to now use the counter-claim to "complain," as it were, about the contents of the lease offer letters long accepted by defendants clearly and with respect, completely lacks value and will not fly. There is nothing in the pleadings or evidence of defendants showing that they were compelled to accept the offer. The defendants chose or elected to accept the offer and the whole terms and are bound by it.

The defendants having fully enjoyed the benefits of the facility cannot now seek to shirk from the obligations contained in the offer letters. All the complaints made including that of "subterfuge" completely have no traction in this case and must be discountenanced.

Now in paragraphs 7 and 8 of the counter-claim, the defendants pleaded as follows:

"7. The total lease rentals due on the lease facility is the sum of N335,796,521.70 and of this sum the 1st defendant/counter-claimant made lease rental payments totaling N204,000,000.00 before the Plaintiff forcefully re-possessed the trucks without recourse to any court of law.

8. The Defendants state that the 1st defendant/counter-claimant had paid three-fifths of the total lease rentals before the Plaintiff came and forcefully reposed the leased trucks without having any recourse to any court of law."

In evidence DW1 simply repeated the contents of the above averments in paragraphs 3 and 4 of her deposition but unfortunately nothing was provided or demonstrated in evidence showing the total lease **rental payments** due and **how much was paid** as pleaded above. The **"formular"** defendants pleaded in paragraph 3g and 4a of the Counter claim as what was used to calculate

"outrageous interest rates" cannot be situated within the **offer letters** and must be discountenanced. Indeed even relying or taking at face value the above depositions, it is clear that the defendants have not completely offset their outstanding obligations under the lease facility. What is strange in the above paragraphs is that they claimed that these unproven payments were made before the plaintiff **"forcefully re-possessed the trucks without recourse to any court of law."** I have already shown that the defendants have not demonstrated by credible evidence how much they have so far paid back.

Here again on the issue of the alleged forceful repossession of the trucks, the defendants particularly 2nd defendant is only been economical with the truth. In the defence to the substantive claim in paragraph 4 and her witness deposition in **paragraph 6** dated 16th May, 2014, this is what she said:

"That the change of policy by the NNPC made the haulage business of the 1st Defendant unprofitable and unsustainable and as a result <u>we called upon the plaintiff to retrieve the trucks and tankers</u> that were purchased pursuant to the Lease Facility. The plaintiff acted accordingly, and sometime in the last quarter of 2010, sent some of its personnel to our yard in Zuba and took custody of the trucks and tankers including all title documents relating to the said trucks and tankers."

The above is clear; the 2nd defendant concedes clearly that "**we called upon plaintiff to retrieve the trucks and tankers."** If that is the position, the contention that the trucks were **"forcefully re-possessed"** without recourse to the law clearly lacks factual basis and must be discountenanced or dismissed without much ado. Again, the blatantly inconsistent testimonies been given by the 2nd defendant as demonstrated all through this judgment has only further served to detract from any credibility she may have and shown her as a witness not of truth but one with a self serving interest to see that the defendants do not live up to their commitments having fully enjoyed the facility. The point must be underscored again at the risk of sounding prolix that in law, no witness who has given an oath to materially inconsistent evidence is entitled to the honour of credibility. Such a witness does not deserve to be treated as a faithful witness. See **Ajose V F.R.N (2011) 6 NWLR (pt.1244) 405; Ezemba V Kelani (1985) 3 NWLR (pt.12) 248**.

I agree with the plaintiff that it was because the defendants were not able to live up to their commitments that they called on plaintiff to sell the trucks which was done and which was ploughed backed into defendants loan account to reduce its outstanding indebtedness on the facility. If the trucks were undervalued and sold as alleged in paragraph 4 of the Amended Statement of Defence, there is nothing in the evidence of DW1 showing the parameters of the sale exercise and how it was conducted by plaintiff. There is equally nothing from the defendants showing what the real value of the trucks of similar quality were at the time they were sold to allow for a fair comparison in situating whether the trucks were really undervalued and sold. In the absence of clear evidence, the allegation of sale at undervalue must be discountenanced.

I have in the same vain evaluated the evidence of the financial expert produced by defendants who testified as DW2.

Unfortunately this **"expert"** in his evidence proceeded on a wrong footing when he stated in paragraph 4a of his witness deposition, that after studying the **"financial report"** attached to the "statement of claim," he discovered that:

"4(a) The contract that exist between the Plaintiff/Defendant to the Counter Claim and the 1st Defendant/Counter-Claimant is a LEASE AGREEMENT and the agreement was subject to the continuance of the NNPC's pattern/arrangement of retaining one transporter per state to service its filing station"

Now this witness did not streamline which **"financial report"** attached to the statement of claim he studied which supplied the above information. Firstly, no financial report was attached to the statement of claim. If as he alluded under re-examination, that it was the statement of accounts attached that he was referring to, then there are about four (4) statements of accounts attached. There is the loan account number 1011496253 (Exhibit P4(1)), the loan account which 2nd defendant said she would rely on in paragraph 4 of her deposition dated 9th January, 2018, and **three other accounts** which were tendered as Exhibits P4 (2) – (4). Indeed even in paragraph 3 of the Amended Defence of Defendants, four (4) Accounts were identified or mentioned by defendants through which they said they transacted with plaintiff. There is nothing in his evidence situating from which

account(s) he made the discoveries in 4(a) above and 4(b) – (n) and indeed the basis for the alleged discoveries. Furthermore this witness did not state from which offer letter he saw or read that the lease agreement was subject to "the continuance of the NNPC's pattern/arrangement of retaining one transporter per state to service its filling station."

Indeed as already demonstrated, there is nothing in any **"financial report"** or statement of account(s) or indeed any document stating that the contract between parties was a **"lease agreement and that the agreement was subject to the continuance of the NNPC's pattern/arrangement of retaining one transporter per state to serve its filling station"**.

The question then is what document(s) did DW2 use to reach such far reaching conclusions in paragraph 4a? Nothing was produced in support and it is clear that paragraph 4(a) was simply inserted in the deposition of DW2 to suit a particular purpose.

In paragraph 4 (b) of his deposition, he further stated that the trucks were purchased in the name of plaintiff which contradicts the evidence of DW1 who stated in her evidence in paragraph 4 of her deposition that the trucks were leased from plaintiff on condition that ownership of the trucks will pass to defendants on payment of lease rental payments. In the same paragraph 4b, DW2 referred to the initial lease offer, **Exhibit P1** in the sum of **N250, 000,000** and then immediately in paragraph 4c, DW2 then referred to the restructured offer letter, **Exhibit D1** and its terms and one then even wonders if this witness appreciates that there are even two (2) offer letters, the original and the restructured facility and which of the two he used to situate his findings.

In paragraphs 4 (e) – (n) of his deposition, DW2 simply referred to deductions made without demonstrating or situating from where the deductions were made and how this violated or breached the terms of the offer or any Banking laws or regulations.

If there were illegal over charges or inflated interest rates, the burden was on the defendants to establish the averments by credible evidence showing that rates were charged beyond that allowed by the Agreements and the law. DW2 did not demonstrate in court showing the statement of account he used and then

demonstrating the flaw(s) in the computations made in the particular account and how they violated the offer letter or extant Banking laws.

Again, what is strange is that this witness under cross-examination said he produced a report of his findings but for inexplicable reasons, this was not tendered. Its production would have at least provided some details or insight as to the modalities of how he arrived at his conclusions. This witness then finally made conclusions clearly on a very faulty premise of **forced re-possession of trucks** which the court has found to lack veracity completely. If no truck were forcefully re-possessed as admitted by **2nd defendant**, then the extensive conclusions made by DW2 in paragraphs 6 -15 of his depositions when factoring such a discredited tale as a basis to situate his findings must as of necessity distort and affect his findings as lacking credibility.

In the same paragraph of his deposition, DW2 made valuations and projections on trucks he admitted he has not seen himself. All his projections were made on what he was told and therefore hearsay evidence and inadmissible.

It is accordingly difficult to accept the **valuation of trucks** he has not seen or even examined to know their state of repair or road worthiness. It is strange that DW2 is placing a value and life span on trucks in such unclear and fluid circumstances and one then even seriously wonders if he is really an expert as he makes himself out to be.

The evidence of Dw2 unfortunately is filled with lots of inconsistencies and or contradictions and has not creditably established or made out a case of illegal overcharges or inflated interest rates. Let me quickly add that in banking generally, interest is the money payable by a banker to a customer for money deposited or money payable by a customer to the bank for money received from the bank by way of loan as in this case, overdraft and advance or in any related business. Banks are empowered to charge interests on loans or other advances granted to a customer even where there is no express agreement on the rate of interest to be charged because it is implied that the customer must have consented to an interest to be charged on his account. However the determination of interest is not done arbitrarily by banks. The Central Bank of Nigeria is empowered under **Section 15 of the Banking Act** to regulate from time to time, by way of

guidelines, the interest rates to be charged by banks. See U**.B.N Ltd V Salami (1998) 3 N.W.L.R (pt.543) 538; U.B.N Ltd V Ayoola (1998) 11 N.W.L.R (pt.573) 338.** If there were any illegal over charges or inflated interest rates charged in this case, it is not a matter for simply pleading the complaints. This has to be backed up with credible evidence showing for example violation of the terms of the offer or C.B.N guidelines. Without evidence, the allegations will be deemed as abandoned. That clearly is the situation, defendants find themselves in this case.

Having resolved, the above clearly contested assertions, this provides broad factual and legal template to determine whether the plaintiff's reliefs and indeed the counter-claim are availing.

On **Relief (1)**, the plaintiff claims against the defendants jointly and severally the sum of **N185, 903, 732, 28** as at the 3rd day of May, 2012 being the outstanding principal due and payable to the plaintiff by the two defendants on account of the facility given to the 1st defendant.

In our consideration of the key question of whether the 1st defendant has lived up to its commitments under the lease facility, I found that on the largely unchallenged evidence of the plaintiff, the 1st defendant at some point stopped servicing the lease facility on terms as agreed in the offer letter, Exhibit D1 and clearly has not fully paid up the lease facility given to it by the plaintiff which I found on the evidence to be guaranteed by the 2nd defendant. Indeed, there is no dispute, again on the evidence, that the tenor or time specific criteria for the repayment of the lease facility has not been met by Defendants. By **clause 7** of the offer letter, the terms and conditions remain in force until full payout of the entire facility.

Again in my consideration of the issue of the volume or quantum of the outstanding indebtedness on the facility, I had stated the principle that in a claim for debt outstanding in a customer's account with its banker to succeed, the banker has to prove how the debit balance claimed from the customer was arrived at. In this case apart from the statements of accounts of 1st defendant tendered including the loan account, the plaintiff through PW1, the bank official who is familiar with the account gave specific details or clear breakdown in evidence of how the debit

balance in the sum of **N189,903,732.28** was arrived at as already highlighted or demonstrated.

The adduction of oral evidence by PW1 put the loan account in proper perspective providing credible basis for the amount claimed as the outstanding indebtedness as at, 3rd May, 2012. See **Bilante International Ltd V NDIC (2012) 15 NWLR (pt.1270) 407 at 428 – 429 E-B.**

On the evidence, again as demonstrated, the evidence of the level of indebtedness of 1st defendant was not creditably challenged by defendants or contradicted by any other admissible evidence. The defendants indeed appear to concede that they have not fully paid up the lease facility granted. In paragraphs 7 and 8 of the counter-claim and the evidence of 2nd defendant in paragraphs 4 and 5 they stated or averred thus:

"7.The total lease rentals due on the lease facility is the sum of N335,796,521.70 and of this sum the 1st defendant/counter-claimant made lease rental payments totaling N204,000,000.00 before the Plaintiff forcefully re-possessed the trucks without recourse to any court of law.

8. The Defendants state that the 1st defendant/counter-claimant had paid three-fifths of the total lease rentals before the Plaintiff came and forcefully reposed the leased trucks without having any recourse to any court of law."

The defendants did not in evidence show the basis for the computations made above and the court cannot speculate. If they have made payments beyond that clearly demonstrated by plaintiff in their statement of account, it is for them to establish same by credible evidence. The defendants may enjoy the luxury of carrying out certain calculations as done in paragraph 4.9 – 4.12 of the final address in their chambers to show the total rentals allegedly paid by them but to the clear extent that it is not a product of any exercise demonstrated in court, the calculations will lack validity. The court cannot however engage in any idle exercise of determining in chambers the **"three-fifth of the total lease rentals"** 1st defendant claimed to have paid. In the absence of evidence to substantiate the paragraphs, they are in law deemed as abandoned. As stated earlier, the above paragraphs is a clear admission that they are still **indebted** to the plaintiff **on the lease facility**. The contention in the paragraphs that they were making rental

payments before plaintiff **"forcefully re-possessed the trucks,"** I found to completely lack basis and is false. The bottom line is that the plaintiff has made a clear verifiable case on the level of indebtedness of 1st defendant as at 3rd May, 2012 when 1st defendant started defaulting in its full monthly repayments.

The position of the law is that evidence that is neither impugned or debunked remains good and credible evidence which should be relied upon by the trial judge, who would in turn ascribe probative value to it. Indeed where evidence before a trial court is unchallenged, it is the duty of that court to accept and act on it as it constitutes sufficient proof of a party's claim. See **Kope K. Construction Ltd V Ekisola (2010) 3 NWLR (pt.1182) 618 at 663 C-D.**

I am in no doubt, that the claimant has adduced credible unchallenged evidence establishing **Relief (1)** against the defendants jointly and severally and therefore is **availing**.

Relief (2) is for the sum of **N20, 302,068.70 being the interest and other charges that have accumulated from the 15th day of June 2010 when the 1st Defendant started defaulting in its full payment to the 3rd day of May 2012.**

Again in our consideration of issue 1, I had referred to the contents of the offer letters in both Exhibit P1 and in particular Exhibit D1 with respect to the interest element of the facility.

Now in Exhibit D1, the restructured letter facility stated clearly that the said offer **"supersedes and cancels the offer letter for lease facility of N250 Million dated 11th April, 2008,"** which is Exhibit P1. Now in Exhibit P1, the interest rate was 17% per annum and there are then charges for **management fee** and **processing fee** which are both payable upfront. The plaintiff has taken benefit of these charges already. In **Exhibit D1**, it was only the interest element that was retained; there are no other charges or fees contemplated in Exhibit D1. Now again, parties are bound by the contents of the letter offer – **Exhibit D1**.

Now on the pleadings as it affects Relief (2), the plaintiff pleaded in paragraphs 16 and 17 as follows:

"16. The Plaintiff avers that by the nature of the compound interest charged on the facility, the principal and interest accruing are always

compounded and interest is then charged thereon if it remains unpaid as in this case.

17. The Plaintiff avers that by its default in payments as at and when due, 1st Defendant accumulated interest/charges. The latter are included Management Fees and Transaction Notification Charges since the default of payments has continued."

In paragraphs 18-40 of the claim and paragraphs 21 – 43 of the evidence of PW1, the plaintiff now gave figures of the compound interest and other charges which culminated in the total sum of N20, 302, 068.70 claimed under Relief (2).

On the basis of **Exhibit D1**, it is difficult to situate the basis of the compound interest charge on the loan account and the other charges computed by plaintiff. There is no where in Exhibit D1 providing for compound interest or charges such as **"management fees"** and **"transaction notification charges"**. I am not sure that compound interest can be charged on the facility in contravention of the terms of the facility.

The bank certainly has a right to charge interest and in this case it was defined precisely at 17% per annum in the offer letter. It was therefore within the purview of the offer letter the duty of the plaintiff to proffer credible evidence in proof of this interest element. See **Ilokson & Co (Nig) Ltd V Union Bank of Nigeria (2009) 1 NWLR (pt.1122) 276 at 314**.

In this case, the plaintiff in an unclear manner in paragraph 16 stated that they charged compound interest on both the "principal and the interest" without streamlining even the rate at which the compound interest was computed and the basis for the claim. Interest, even compound interest, cannot be charged at large as appear to have been done here. By section 15 of Banking Act, the rate of interest charged on advances by banks is regulated by Central Bank of Nigeria. See **Kwajaffa V B.O.N Ltd (1999) 1 NWLR (pt.587) 423 at 438.**

The unclear compound interest charge here is certainly not a product of **Exhibit D1**. In law even with respect to overdraft, compound interest is only chargeable when the customer agrees to it or where he is shown or must be taken to have

acquiesced in the account being kept on that basis. See **Ilokson & Co. Nig. Ltd V UBN Plc (supra).**

In real terms, by paragraph 16, the plaintiff here are charging compound interest on both:

i. the principal and
ii. the interest.

The interest element of the principal may be countenanced but to again add another interest element this time called compound interest on both the principal and the interest on grounds of default of payment appear to be arbitrary and highhanded and a form of double interest charges, if I may put it that way. Our superior courts have consistently called on our Banks to refrain from unnecessary and exorbitant interest charges. See **Adebest Telecommunications (Nig) Ltd V Union Bank of Nigeria Plc (2010) 1 NWLR (pt.1175) 366 at 385 – 386**.

The nature of the interest and other charges claimed under Relief (2) cannot be situated on clear foundations.

Apart from the fact that it is not contained in the agreement, the plaintiff have not shown in **paragraphs 18 – 40** of the claim what part of the amounts specified therein is the compound interest element and how it was arrived at; there is nothing equally to show how much of the amount claimed monthly is the management fee or transaction notification charges. For this claim to have any traction, there ought to have been a breakdown of this Relief (2) with clear and sufficient details to enable the court appreciate what is before it without having to do any private calculation. In the absence of a clear demonstration of the basis of this relief and in such unclear and fluid circumstances, **Relief (2)** cannot be availing.

Relief (3) is for 17% interest from the 3rd day of May 2012 until Judgment and thereafter until the entire judgment debt is liquidated.

There are two elements to this relief: The prejudgment claim of interest and the post judgment claim of interest.

In law, there are two ways a claim for interest on a sum claimed as a debt can arise:

a. where interest is claimed as or right

b. where there is power conferred by statute on the court to do so.

Where interest is claimed as or right, the proper practice is to claim entitlement to it on the writ of summons or in the statement of claim and plead facts which show such entitlement. See **Himma Merchants Ltd V Aliyu (1994) 5 NWLR (pt.347) 667 at 676 – 677.**

In this case on the pleadings and evidence, the claim for interest is predicated on the agreement of parties vide both the original offer and the restructured offer (Exhibits P1 and D1) which precisely streamlined rate of interest on the facility given to 1st defendant at **17% per annum**. We had also referred to a clear condition contained in both offer letters which stipulated that where any portion of the principal and or interest/fee remained unpaid at the expiration of the facility, the offer letter with all its attendant terms and conditions shall continue to be in force until full payout of the entire facility.

The defendants accepted the offer and they are therefore bound by it. In this case, there is no dispute that the 1st defendant is yet to fully pay its outstanding indebtedness due to the plaintiff Bank and the time for doing so has since lapsed.

There is in this case a demonstrable basis for the award of the interest element of the claim founded on agreement of parties. The law is settled that a claimant is entitled to interest on a claim for return of money arising from a commercial transaction where the Defendant has held his money for sometime without justification. The defendants ought to pay compensation for so doing. See **Adeyemi V Ian Baker (Nig) Ltd (2000) 7 NWLR (pt.663) 3 at 84 D-H; N.B.N V Savol W/A (1994) 3 NWLR (pt.333) 435 at 463; Kano Textiles Printers Plc V Tukur (1999) 2 NWLR (pt.589) 78 at 84**.

The claim for prejudgment interest at 17% per annum from 3rd May, 2012 until judgment has valid basis and is granted. With respect to the same interest claim post judgment, it must be stated that the award of post judgment interest is purely statutory and can only be awarded if there is provision for it. See **Ekwunife V Wayne (1989) 5 NWLR (pt.122) 422 at 445.**

Under the provision of **Order 56 Rule 1 (3) of the Rules of Court**, post judgment interest can be awarded at a rate up to 20% per annum. It is largely here a question

of discretion. In the overall interest of justice, I award 10% interest on the judgment sum per annum until final liquidation.

On **Relief (3)**, I award 17% interest per annum from the 3rd May, 2012 until judgment and thereafter at 10% interest per annum on the judgment sum until the judgment debt is liquidated.

Relief (4) for cost is availing, the case of plaintiff having substantially succeeded. The order for cost shall be streamlined at the end of this judgment.

The final **Reliefs (5) (a)** and **(b)** is an alternative relief to Relief (3) above. Having granted **Relief (3),** the alternative Relief clearly no longer has any basis. I think the principle is now well settled that once a court has granted the main claim of an action, it cannot proceed to grant an alternative claim. See **Olorun Femi V. Saka (1994)2 N.W.L.R (pt. 324)23 at 39C-D.** Put another way, the law is that where a claim is in the alternative, the trial court will first of all consider whether the principal or main claim ought to have succeeded. It is only after the Court has found that it could not for any reason grant the principal claim that it would consider the alternative claim. See **Newbreed Organisation Ltd V. Erhomosele (2006)5 N.W.L.R (pt.974)499 at 544 D-C.** Having granted the substantive and main claim in this case, the alternative relief has now been overtaken by events and will be struck out. I shall streamline the final orders on the substantive claim at the end of this judgment.

Having dealt with the **plaintiff's claims**, we now come to the **counter-claim of defendants**.

Now with respect to the counter-claim of Defendants, I had earlier stated that the counter-claimant must like the plaintiff in the main action establish his case on the same principles to entitle it to the reliefs sought. I had also stated that because the cases are inextricably tied together, a consideration of substantive issues would provide broad factual and legal template to determine whether the reliefs or claims sought by Defendants are availing.

The only point to add quickly here is that I note that **Reliefs (1) – (3)** sought by the defendants/counter-claimants are declaratory reliefs. In law, faced with a declaratory relief, the court draws inspiration from consecrated principles, one of

which is that the party seeking the reliefs must adduce evidence upon which the relief is granted or denied. The burden is on the party to succeed on the strength of his own case and not on the weakness of the defence, if any. Such relief will not be granted even on admission made by the other party. See **Nyesom V Peter side (2016) 7 NWLR (pt.1512) 452; Onovo V Mba (2014) 14 NWLR (pt.1427) 1319; Akande V Adisa (2012) 15 NWLR (pt.1324) 538**.

Again, a resolution of the counter claim of defendants must be predicated on the pleadings and the quality of evidence led.

Now **Relief (a)** of the counter-claim seeks for **a declaration that all the Offers of Lease Facility, whether dated April 11, 2008 or dated February 3, 2009 or bearing any other date, between the Plaintiff/Defendant-to-Counter claim and the 1st Defendant are unenforceable by the Plaintiff who is the owner of the leased trucks.**

Now in our consideration of the substantive claim, we had dealt with the contents of the original letters of offers vide Exhibit P1 and the restructured facility which the 1st defendant accepted and which I found that the 2nd defendant guaranteed. These offer letters as stated severally in this judgment is binding on defendants and cannot be altered at this point to suit a particular purpose.

By **Exhibit P2**, the board resolution of 1st defendant which 2nd defendant signed or executed as one of the signatories, the offer was accepted and the money disbursed. There was no complaint of any kind at the time money was received and utilised. It is difficult to now understand the situational or factual basis for the complaints that the Agreements are unenforceable.

There is nothing either on the pleadings or evidence precisely streamlining what makes the agreement unenforceable or how the plaintiff is the owner of the leased trucks. I had dealt extensively with the import of the key elements of the offer letters. I need not repeat myself but it is important to state that in the substantive claim, the 2nd defendant stated clearly in evidence that the lease facility was granted to the 1st defendant for the purchase of trucks to enable the company engage in the business of haulage of petroleum products. In the counter-claim, the defendants in what clearly was an afterthought now changed the narrative to now say that they

"leased 5 trucks belonging to the plaintiff/defendant to the counter-claim." This they did even in the face of Exhibit D1, the restructured offer letter which stated clearly that the offer was granted to restructure repayment of existing lease facility granted for the acquisition of "ten (10) brand new trucks for haulage of petroleum products…" These apparent contradictions and inconsistencies in the case of counter-claimants completely detracted from the credibility and value of the case presented by them in both the substantive action and the counter-claim. The contention of unenforceability of the contract on such spurious contentions must be discountenanced as lacking validity. Where is the justice of such a proposition if I may ask? The condition precedent to the validity of such a curious proposition must be fairness and justice. Justice to not only plaintiff and defendants but innocent Nigerians who invested in plaintiff and provided the funds which allowed defendants the opportunity to access the facility in the first place. It is now getting to 11 years since this facility was given and the defendants have not established that they have paid back what they have been given. Instead of efforts to be made to see how the facility can be liquidated, resort is now been made to lame legal excuses and sophistry, that cannot be situated on the pleadings and evidence of defendants.

Learned counsel to the defendants has tried so much and so hard to construct a case not based on the structure of the pleadings and most importantly the evidence led. Cases are decided on the basis of pleadings and evidence led in support and not by address of counsel. Address of counsel is no more than a handmaid in adjudication and cannot take the place of hard facts required to constitute credible evidence. No amount of brilliance in a final address can make up for lack of evidence to prove and establish or disprove and demolish points in issue. See **Iroegba V M.V Calabor Carrier (2008) 5 NWLR (pt.1079) 147 at 167; Michika Local Govt. V National Population Commission (1998) 11 NWLR (pt.573) 201**.

In the absence of pleadings or clear evidence, to support **Relief (a),** it fails.

Relief (b) seeks for **a declaration that the personal guarantee executed by the 2nd Defendant on behalf of the 1st Defendant and in favour of the Plaintiff/Defendant-to-Counter claim is unenforceable by the Plaintiff who is the owner of the leased trucks.**

I had dealt with the question of the guarantee in the substantive action. I need not repeat myself. I **wholly adopt the decision** that the 2nd defendant guaranteed the facility and as a consequence of that is equally liable for the indebtedness. The contention that the guarantee is unenforceable because plaintiff is the owner of the leased trucks clearly will not fly and is discountenanced. The defendants, again cannot speak with both sides of their mouth. Having pleaded that they got the facility to buy trucks, they have undermined this contention by now in the counter-claim stating in complete contradiction to the earlier position advanced that the plaintiff is the owner of the leased trucks. Here too the contents of the offer letters cannot be altered at this stage. **Relief (b)** fails.

Relief (c) is for **a declaration that the 1st Defendant is entitled to recover all monies it paid to the Plaintiff in respect of the lease transaction, subject matter this counter claim.**

Here too, a case can only be presented and reliefs claimed meaningfully on the basis of what was pleaded and the evidence led. The entirety of the case of plaintiff in the substantive action and the counter-claim is predicated on the offer of lease facility to the defendant in the sum of at first the huge amount of **N250 Million** which was later restructured to **N232 Million**. The defendants drew down on the facility.

Both in the defence to the substantive action and the counter-claim, there is no dispute or issue that there is a time sensitive criteria to the facility given to defendants. In both offer letters, **Exhibits P1** and **D1**, what was expected to be repaid back on a monthly basis under the repayment clause were clearly streamlined or identified. I need not repeat myself. These agreements at the risk of prolixity were accepted by **defendants**. On the pleadings and evidence, the counter-claimants have not kept strict fidelity to this repayment schedule. Even in **paragraphs 7 and 8 of the counter-claim**, the defendants acknowledged payment of only part of the total lease rentals. What then if I may ask is the basis for the declaration sought that the counter-claimants are entitled to all monies paid back on the lease facility? A lease facility they have acknowledged they have not fully redeemed? I just wonder. **Relief (c)** fails without much ado.

Relief (d) is for **an order of this Honourable Court directing the Plaintiff/Defendant-to-counter claim to pay the 1st Defendant/Counter claimant the sum of N204, 000, 000.00 (Two Hundred and Four Million) being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant-to-Counter claim wrongly debited from the 1st Defendant's bank accounts on the basis of all the Offers of Lease Facility as rental repayments and interest**

Like **Relief (c),** it is difficult to situate the legal and factual basis for this relief. As stated in **Relief (c)**, upon the grant of the facility, the defendants were expected to make clearly specified lease repayments monthly. The plaintiff in the substantive claim presented in evidence the payments so far made by defendants and when it stopped. This evidence as stated earlier was not impugned or challenged. The defendants did not tender any credible documentary evidence to support their case. Indeed there was no counter-evidence by defendants/counter-claimants showing that they made any payments besides that demonstrated by plaintiff in evidence which shows unequivocally the amount so far repaid by the defendants and the outstanding due on the facility. There is equally no clear evidence by them situating any wrong "debit" on the materials before the court. It is not a matter of guess work or address of counsel.

Now at the risk of sounding prolix, in **paragraphs 7 and 8** of the counter-claim, the defendants pleaded as follows:

"7.The total lease rentals due on the lease facility is the sum of N335,796,521.70 and of this sum the 1st defendant/counter-claimant made lease rental payments totaling N204,000,000.00 before the Plaintiff forcefully re-possessed the trucks without recourse to any court of law.

8. The Defendants state that the 1st defendant/counter-claimant had paid three-fifths of the total lease rentals before the Plaintiff came and forcefully reposed the leased trucks without having any recourse to any court of law."

The above is a clear concession that the defendants are yet to make full payments on the facility granted them. Indeed they have identified with any supporting evidence the rentals due on the facility which is N335, 796,521.70. In paragraphs 4.09 – 4.12 of the final address, the defendants engaged in some calculations which

they contend show they have paid "over three fifths of the total purchase price." As stated in the substantive action, it is really difficult to situate the value of such exercise done in the recess of the chambers of the Respected Learned silk in the absence of a demonstration of how the sums were arrived at in open court. Any such calculations done in chambers and incorporated in a final address will be discountenanced as it cannot be a substitute for forensic evidence that must be elicited and demonstrated in open court. Even if we accept for the sake of argument the above sum as the **total value of the rentals**, they said they made lease rental payments totaling only N204, 000, 000 before the trucks were **"forcefully re-possessed."** We had already treated this issue of forceful repossession as completely lacking value. We need not bother ourselves to be detained by such fabrication. Now by simple arithmetic, if defendants paid only N204, 000, 000 out of N333, 796, 521.70 which is the total lease rentals according to them, it meant clearly that there is still some outstanding sums due from them to the plaintiff.

The question here is what then was wrongly debited? Is it the incomplete payments of N204, 000, 000 admitted as the rentals paid by defendants or what? There is here no real clarity with respect to what defendants are projecting here. How can a party in one breadth claim that it made payments towards settling its indebtedness which is yet to be fully paid and in another breadth claim that these same sums made as part payment was wrongly debited. I just wonder.

In the absence of clear evidence streamlining what was wrongly debited; this **Relief (d)** fails.

I will take **Reliefs (e)** and **(f)** together since they both seek for the sum of N625, 000 and N1, 815, 000 being monies wrongly debited from 1st defendant's account for **processing fee** and **management fee**. These amounts were claimed as special damages in paragraph 5 of the counter-claim. In law special damages must not only be pleaded but strictly proved with cogent evidence putting the court in a commanding height to grant the Relief in special damages. Now in the witness deposition of 2nd defendant in support of the counter-claim, she simply in **paragraph 2 (a) and (b)** repeated these sums as wrongly debited without showing or demonstrating how these processing and management fees charged violated the agreement or any Banking laws. As stated earlier, apart from the letter of restructure offer (Exhibit D1) and the bill of their solicitors (Exhibit D2), the

defendants did not tender any other document(s) in evidence. In paragraph 2 of the counter-claim, they indicated they will rely on defendants statement of account number 1011496253. This account was not tendered by them. One then expected since the plaintiff had tendered copies of defendants statement of account, that the defendants will now use same to show or demonstrate what was wrong with the charge of processing and management fees. They did not do any of this and this is fatal.

The only point to once again add is that by **Exhibit P1**, the initial offer which the defendants accepted, it is provided therein, that management fee of 0.75% flat and processing fee of 0.25% flat are payable upfront upon acceptance of the offer. The defendants accepted the offer and these fees were charged upfront. It is too late in the day to complain about these charges. It would have been a different thing if the defendants have demonstrated that what was charged went beyond the agreed charges as contained in the offer letter. There was no such demonstration here. **Reliefs (e)** and **(f)** fail.

Relief (g) is for **an order of this Honourable Court directing the Plaintiff/Defendant-to-Counter claim to pay the 1st Defendant/Counter claimant the sum of N147,500.00 being the 1st Defendant/Counter-claimant's monies which the Plaintiff/Defendant debit from the 1st Defendant's account as upcountry transfer fee.**

As in **Reliefs (e)** and **(f)**, this relief equally suffers from a complete want of evidence. The 2nd defendant again in her deposition in paragraph 2(c) only repeated what was stated in paragraph 5 of the counter-claim that a certain sum of N147, 500 was deducted as up county transfer fee. No more. There was no demonstration by her or anybody on the basis of the materials before court showing what the charge was for, when it was debited and how it violated the terms of the agreement or Extant Banking Laws. A relief claimed as special damages must be established with credible evidence showing the entitlement of the party to such claim. The court cannot be expected to in chambers determine what is an **"up country transfer fee"** and its modalities and application without clear evidence. This relief fails.

Relief (h) is for **an order of this Honourable Court directing the Plaintiff/Defendant-to-Counterclaim to pay the 1st Defendant/Counter claimant the sum of N8, 820, 000.00 N147,500.00 (sic) being the 1st Defendant/Counter claimant's monies which the Plaintiff/Defendant debit from the 1st Defendant's account as "CQ 3 PD UNIQUE FUSION INSURANCE."**

This relief as couched is not clear. Two figures or sums appear in this Relief. I take it as a typographical error because the issue of the sum of **N147, 500.00**, I had dealt with under **Relief (g)**. Now with respect to the claim of N8, 820, 000 as debit for **"CQ3PD Unique Fusion Insurance"**, there is again nothing in evidence streamlining the particulars of how the defendants arrived at this figure and what **"CQ3PD Unique Fusion Insurance"** means and the court cannot speculate. If there was a wrong debit of this sum as claimed, it has to be proved by credible evidence showing violation of the agreement of parties or extant Banking Laws or even CBN regulations for example. No attempt was made to establish this relief beyond the mere repetition of what is contained in the pleadings. As stated severally in this judgment, where evidence is not led to support averments in pleadings, such pleadings is deemed as abandoned and will not be accorded any value. **Relief (h)** fails.

Relief (i) is for an **order that the Plaintiff/Defendant-to-counter claim shall pay the Defendants/Counter claimants the sum of N150, 000, 000.00 (One Hundred and Fifty Million Naira) as exemplary damages.**

On Exemplary damages, the Supreme Court in **Allied Bank of Nigeria V. Akubueze (1997) 6 NWLR (pt.509) 1** stated thus:

"Exemplary damages properly so called may be awarded in actions in tort but only in three categories; these are:

i. In the case of oppressive, arbitrary or unconstitutional action by the servants of the government.

ii. Where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff.

iii. Where there is an express authorization by statute."

See also **Guardian Newspaper V Ajeh (2005) 12 NWLR (pt.938) pg. 205 at 215**. Where it was held that:

"Punitive or exemplary damages are damages on an increased scale, awarded to the Plaintiff over and above what will barely compensate him for his loss where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant and are intended to solace the plaintiff for mental anguish and punish the defendant."

On the above clear principles and applied to the facts of this case, one really is at a loss as to how exemplary damages can really have any application. A case in which defendants were offered funds of innocent Nigerians in the millions which they are yet to pay back years after enjoying the facility. I just wonder. Exemplary damages follow cause and where there is no cause, there will be no damages. See **Obinwa V I.G.P. (1991) 5 NWLR (pt.193) 593**. **Relief (i)** fails without much ado.

Relief (j) is for **an order directing the Plaintiff/Defendant-to-Counter claim to pay Defendants/Counter claimants the sum of N25, 000, 000.00 being the cost of this suit.**

There is no real clarity as to whether this relief is for professional fees paid to counsel to the defendants or for cost of this action which have different elements. I won't belabour myself into making any inquiry into what they entail. The Relief however speaks for itself: **"N25, 000, 000 for cost of this suit."** Since the cross action of the counter-claimants has in the main failed, this relief has no foundation and accordingly fails too. The final **Relief (k)** for interest on the judgment debt at the rate of 10% with the failure of the substantive Reliefs of defendants must equally fail.

The case of defendants on the Counter claim, just as in the defence they presented in the substantive action must collapse on the basis of a dearth of credible evidence

to sustain the Counter-claim. In closing, may I be permitted to paraphrase and adapt the words of Udo Udoma JSC (of blessed memory) to the extant Counter-claim, in **Elias V Omobare (1992) NSCC 92**, by saying that, if there was ever a counter claim completely starred of evidence, this is certainly one. The Counter claim cries to high heavens in vain to be fed with relevant and admissible evidence. The Counter-claimants failed to realise that Judges do not act like oracles. Judges cannot perform miracles in the handling of matters before them; neither can they manufacture evidence for the purpose of assisting a party to win his case. Cases are determined on the strength of evidence adduced before the court. The Counter-claim is completely bereft and devoid of any substance and merit.

On the whole, **issue (2)** raised with respect to the counter-claim is resolved against the defendants/counter-claimants.

In the final analysis and for the avoidance of doubt, I accordingly make the following orders:

ON PLAINTIFFS CLAIMS

1. **The Defendants/Counter-claimants are ordered to pay the sum of N185,903,732.28 as at the 3rd day of May 2012 being the outstanding principal due and payable to the plaintiff by the two defendants on account of the facility given to 1st defendant and guaranteed by 2nd defendant.**

2. **Relief (2) fails and is dismissed.**

3. **I grant 17% interest per annum on the judgment sum from the 3rd day of May until date of judgment and thereafter at the rate of 10% per annum from the date of judgment until the entire judgment sum is liquidated.**

4. **I award cost assessed in the sum of N50, 000 payable by Defendants/Counter-claimants to the plaintiff.**

ON DEFENDANTS COUNTER CLAIM

The Defendants/Counter-claim fails in its entirety and is hereby dismissed.

…….....

Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Mallam Mohammed S. Shuaib, Esq., and Emmanuel I. Utomi, Esq., for the Plaintiff and Defendant to the Counter-claim.**

2. **Chief Mamman Mike Osuman SAN with Richard Ebie, Esq., Promise N. Elenwo, Esq., for the Defendants/Counter-Claimants.**