Case Review

Recovery of Pre-judgment Interest: Stretching the Sanctity of Contracts

(A review of the Supreme Court decision in A.G Ferrero & Co Ltd v. Henkel Chemicals (Nigeria) Ltd [1]

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On June 17, 2011, the Supreme Court of Nigeria delivered judgment in the above suit which originated in the High Court of Kaduna State as far back as 1989. This decision of the apex portends great consequences for the practice of commerce in Nigeria as it enunciates groundbreaking new rules on the recovery of interest on debts. This writer finds some of the dicta and supporting reasoning rather objectionable; hence, this review. For purposes of clarity, the Supreme Court is Nigeria's highest appeals court and has country-wide jurisdiction and binds, by its decisions, all courts, authorities, and persons within the federal republic. Its decisions are supreme because they are final, and not the other way round.

A Synopsis of the Facts

In 1989, the Appellant entered into a written contract with the Respondent for the construction of a factory and offices at the Kudenda Industrial Layout, Kaduna at a total price of NGN3,854,938.10. It was a term of the agreement that the respondent

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[1] *[2011] All FWLR (Part 587), page 647)*

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would pay to the appellant such part of the contract price as is indicated in a certificate of payment to be issued by the respondent's architect, within 21 days of such certificate being issued. The sum of NGN449,474.45 fell due and payable under the architect's certificate number 18 of December 7, 1989. The respondent failed to pay this amount to the appellant despite repeated demands.

Consequently, the appellant took out a writ of summons in which he claimed for the outstanding valuated sum of NGN449,474.45 and interest at the rate of 25% from due date to judgment and thereafter at the rate of 10% from judgment until actual satisfaction of the judgment. After a legal debacle lasting more than nine years at the High Court, the learned trial judge, in his judgment of June 16, 2000, found for the appellant (Plaintiff therein) and awarded as claimed. Dissatisfied, the respondent appealed to the Court of Appeal, vehemently urging against the pre-judgment interest.

On June 20, 2002, the Court of Appeal allowed the appeal, setting aside the award of pre-judgment interest on the debt. As can be expected, the aggrieved contractor appealed to the Supreme Court where the main issue in controversy was the propriety or otherwise of the interest awarded to cover the period between the due date of the debt and the date when judgment was entered for the sum. A five-strong panel of the Supreme Court heard the appeal and unanimously dismissed it, upholding the decision of the Court of Appeal.

The Ratio and Dicta of the Supreme Court

In arriving at their unanimous decision, their Lordships agreed wholly and entirely with the arguments of learned counsel for the respondent. In summary, the respondent's arguments were as follows:

1. The agreement signed between the parties was silent on interest on amount due and unpaid, and interest could therefore not be claimed

2. The claim for 25% pre-judgment interest was not included in the original Statement of Claim, but had only been introduced in an amended Statement of Claim

3. The payment of pre-judgment interest was not traceable to any custom or trade usage in order to be annexed into the contract by virtue of section 132 (1) of the Evidence Act.

4. To be recoverable, interest claimed must be traceable to contract, equity or mercantile custom.

The Supreme Court (per Tabai, JSC), in the leading judgment, adopted the reasoning and conclusion of the Court of Appeal in which the Court of Appeal had observed thus:

"There is equally no material before the court to infer that compensatory award of interest on the claim outstanding beyond 21 days of receipt of valuation certificate was within the contemplation of the parties..., a party cannot unilaterally impose a term of contract on another, the parties to the agreement must be ad idem on a term and condition of the contract before it becomes enforceable…."

The learned justice of the Supreme Court reviewed a line of decided cases and came to the conclusion that pre-judgment interest cannot be claimed without an express agreement between the parties, essentially handing a most undeserved veto to the offending party, who indeed has failed to honour the terms of a contract it freely signed up to. Could this ever be the intendment of the Supreme Court – to launch a regime within the polity and economy wherein one party (whether out of malice, mischief, impecuniosity, or other extra-contractual factors) is at liberty to detain sums of money payable to another or generally to dilate from honouring contractual obligations, with impunity?

The appellant had cited **Nigerian General Superintendence Co Ltd v. The Nigerian Ports Authority** [1990] 1 NWLR (Pt 129) 741, and **Adeyemi v Lan & Baker (Nigeria) Ltd** [2000] 7 NWLR (Pt. 663) 33 in support of its claim for interest before judgment. The learned justice shoved these classic, compelling Supreme Court precedents to the sidewalks of legal analysis. For the purposes of this review

it is very fitting to reproduce, *in extenso,* the dictum of Tabai, JSC in response to the above cases cited by the Appellant:

> *"There is no doubt that Nigerian General Superintendence Co. Ltd v. The Nigeria Ports Authority and Adeyemi v. Lan & Baker (Nig) Ltd cited by the appellant were decided on the principle that in <u>purely commercial transactions</u>, a party who holds on to the money of another for a long time without any justification and thus deprives that other of the use of such funds for the period should be liable to pay compensation by way of interests: Nigerian General Superintendence Co. Ltd v. The Nigeria Ports Authority went a step further to decide that even when interest is not claimed in the writ, the court can, in appropriate cases, award interest in the form of consequential order."* (Emphasis mine)

Indeed, the above is a true and valid statement of the law and has been part of our corpus juris for many decades. It is not only legally correct, it is also very commonsensical and consistent with the workings of the modern industrial society. Respectfully, to my mind, what leaves much to be desired is the way in which the Supreme Court (dis)applied this legal truism to the case in review, throwing out the appeal consequently. Again, it serves clarity to reproduce the relevant dictum of the apex court in resolving this legal principle against the appellant. Per Tabai, JSC, the court reasoned as follows:

"The question now is whether the principle in these cases adequately applies to the facts and circumstances of this case. The principle in the two cases pertains to <u>*normal commercial transactions*</u> *without reference to any particular agreement, oral or documentary, in contradistinction to the instant case wherein the parties agreed to and are bound by a written contractual agreement. Can any of the parties be at liberty to read into such a written contract a term which is not embodied in it? I am inclined to answer that question in the negative"*.

Respectfully, I beg to disagree very vehemently with the reasoning and conclusion of the Supreme Court in this appeal. Legal analogy from the following relevant subjects of law will bear out the grounds of my demurrer and substantiate my respectful disappointment with the decision of the Supreme Court:

1. Commercial character of transactions
2. Trade usage and custom
3. The doctrines of equity

Commercial character of transactions

In dis-applying *Nigerian General Superintendence Co Ltd v The Nigeria Ports Authority* and *Adeyemi v. Lan & Baker (Nig) Ltd* the Supreme Court introduced a very curious dichotomy between contracts (oral or written) on the one hand, and "pure" or "normal" commercial transactions, on the other. With all due respect, I find

this dichotomy untenable, for what can ever be purer, more normal or more commercial than a written construction contract? Building contracts have historically been among the most strictly commercial of all transactions.

Ordinarily, in legal parlance, the word “commercial” is deployed in contrast to “social”, “domestic”, or “family” arrangements. So much so that there is a presumption that legal relations are ruled out in arrangements that are considered merely social, domestic, or family, as in when a father promises a son a brand new car on condition that the son pass his academic tests distinctively. How the Supreme Court failed to see that a contract to build a factory and block of offices is, in their words, a “purely commercial” or “normal commercial” transaction remains to be appreciated. Not as yet. To make matters even worse, the Supreme Court failed to enunciate, for the benefit of the legal profession and the business community, what are those transactions that fit their rather recondite “purely commercial” or “normal commercial” test. This unnecessary lacuna has the unintended capability of disorienting and disenchanting the business community and unleashing a pall of uncertainty over the legal profession. Perhaps, it would have been better if the apex court had simply and expressly overruled *Nigerian General Superintendence Co Ltd v The Nigeria Ports Authority and Adeyemi v. Lan & Baker (Nig) Ltd,* as it certainly had the powers to do.

Trade usage and custom

Equally tenuous, respectfully, in my view, is the finding of the Supreme Court that there is no trade usage or custom warranting the payment of interest in the building industry. No doubt, construction industry practitioners would be surprised by this under-researched finding of the Supreme Court. As a matter of fact, the construction industry, like the maritime industry, is one of the few lines of business that boast centuries of customs and trade usages. Recently, many standard forms, like those of the International Federation of Consulting Engineers (FIDIC) have been developed to guide intending parties to construction contracts. Prior to these forms, though, many customs had been in widespread application. Indeed, throughout the ages, the courts have had cause to import into contracts terms that are unexpressed therein, with a view to giving such contracts "business efficacy". The controlling test was stated by MacKinnon, L.J., in *Shirlaw v Southern Foundaries Ltd* (1939) 2 KB 206 at 227, CA:

> *"Prima facie that which is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh, of course.'"*

These are terms without which commerce and business would be rendered trivial and of no consequence. The job of the courts, in appropriate circumstances, is to

make sure that life (including commerce) within the realm is lived in as efficacious and orderly a manner as possible. To stretch the Supreme Court's reasoning to its logical conclusion, could the court be taken as saying that any contracting party can elect to detain and withhold sums of money that fall due and payable by him at will, and pay instead upon judgment 10 years after due date with no legal consequences whatsoever, even if the sum owed makes no economic sense on the date of judgment? Clearly, the principal sum of NGN449,474.45 that fell due in December 1989 is not worth the same value in June 2011 when the final appeal was decided. For the Supreme Court to turn a blind eye to this stark economic / commercial reality is pure elitist insularism, and scorns the common man in the street nationwide who would have to put up with the harsh consequences of this judgment read in the federal capital.

The Remedies of Equity

Their Lordships reasoned that it was possible for the doctrines of equity to come to the aid of a claimant for interest where no agreement exists as to interest, but proceeded to state that there was indeed no basis upon which to invoke equity. The Supreme Court, as did both the trial court and the Court of Appeal, found that the respondent was in breach of the so-called agreement between the appellant and the respondent by failing without any justification to pay for services rendered, effectively detaining the appellant's funds and depriving it of the use of it, for more than 10 years! I would think that such a high-handed conduct by a contracting party would, if nothing else, be characterized as a wrong (legal or otherwise).

One of the leading maxims of equity is that it will not suffer (permit) a wrong to be without a remedy. Unfortunately, as here, the Supreme Court has lent its sheer weight to the brazen perpetration of a major wrong without a remedy. In the absurd result created thereby, an offended, cheated and shortchanged party goes away in defeat with costs to pay, whilst an acknowledged wrongdoer and breaker-of-contracts goes home unscathed, triumphant and gleeful.

This precedent is certainly a turning point for many commercial transactions and does not bode well for hope. Like Lord Alfred Tennyson said of England: a land “where freedom broadens slowly down from precedent to precedent”, I hope that the Supreme Court would have occasion soon enough and the will to clarify or indeed overrule *A.G Ferrero & Co Ltd v. Henkel Chemicals (Nigeria) Ltd* so as to rid the age-old doctrine of sanctity of contracts the undue tension visited on it. To fail to correct this precedent is to put our nation on the fast track to becoming one in which reason and commonsense tapers quickly down, from precedent to precedent.