IN THE SUPREME COURT OF NIGERIA

Suit No: SC186/1986

Petitioner: A.A. Macaulay
And
Respondent: NAL Merchant Bank Ltd.

Date Delivered: 1990-06-29

Judge(s): Augustine Nnamani (JSC), Adolphus Godwin Karibi-Whyte (JSC), Salihu Modibbo Alfa Belgore (JSC), Abdul Ganiy

Judgment Delivered

The plaintiff\'s Bank, NAL Merchant Bank Ltd., sued the defendant, Mr. A. A. Macaulay in a Lagos High Court claiming against him as follows:'

The plaintiff\'s claim against the defendant is for the sum of N3,490.95 (Ninety three thousand, four hundred and ninety naira, ninety-five kobo) being the amount due and payable by the defendant to the plaintiff as at 30th September, 1984 for money lent in form of a term loan to the defendant at the defendant\'s request in the normal course of plaintiff\'s business as a banker together with interest and the usual bank charges thereon, which sum defendant has refused and neglected to pay A in spite of repeated demands.

AND THE PLAINTIFF ALSO claims interest on the said sum of N3 ,490.95 at the rate of 91/2% per annum from 1St October, 1984 until judgment and thereafter at the rate of 91/2% per annum until final liquidation of the whole debt together with costs.

The writ of summons containing the claim, dated 21/11/84 and a state'ment of claim dated 21/11/84 were filed together in the Lagos High Court Registry on this same day. Both were served upon the defendant.

Upon the failure of the defendant, within the time prescribed by law, to enter an appearance to the writ of summons or file a statement of defence to the plaintiff\'s statement of claim, the plaintiff by motion on notice under Order 9 Rule 3 and Order 24 Rule 2 of the High Court of Lagos State Rules of Court and the Court\'s Inherent Jurisdiction, applied to court for the fol'lowing relief:-

An order entering final judgment for the plaintiff in the amount claimed in the plaintiff writ of summons and Statement of Claim together with interest as claimed upon default of appearance and or defence.

The application came on for hearing before Adeniji. J.. on 25/4/85. on that day, counsel for defendant sought and was granted an adjournment for him to regularise the defendant\'s position. Nothing significant happened in the case until l/7/85 when the following occurred in court before Adeniji, J:-

PARTIES.

Absent.

Bayo Adeniji - Fashola for Plaintiff/Applicant.

Mr. Joseph for Defendant.

Case Adjourned. 8/7/85 to enable defendant file Statement of Defence before then, with N200 costs to plaintiff/applicant.

Costs to be paid on or before 8/7/85.

Pursuant to the above order of Adeniji. J. 1/7/85. the defendant filed a statement of defence dated 4/7/85 to the plaintiff\'s statement of claim. It ap'pears therefore quite clear that the statement of defence was filed regularly. For reasons hereinafter appearing I have to reproduce the whole of the statement of defence:-

STATEMENT OF DEFENCE

SAVE AND EXCEPT as herein specifically admitted, the de'fendant denies each and every allegation of facts contained in the plaintiff\'s Statement of Claim if each were set out seriatim and specifically traversed the same.

1. The defendant admits paragraphs 1,2.3,4 and 7 of the plaintiff\'s Statement of Claim.

2. The defendant denies paragraph 5, 6, 8. u and lo ~ the H plaintiff\'s Statement of Claim.

3. The defendant shall at the trial of this action rely on the ag'reement between the parties herein as contained in the Let'ter dated 25th April, 1980 and hereby gives the plaintiff notice to produce same.

4. The defendant avers that pursuant to the aforesaid letter/agreement, the defendant appointed Messrs. Mcgregor and Ojutalayo, Chartered Surveyors and Valuers as his agents.

5. Furthermore by a letter dated 6th May, 1980 the defen'dant\'s aforesaid agents with the defendant\'s full knowledge and consent duly noticed the plaintiff of their position and the defendant hereby gives notice to the plaintiff to pro'duce the said letter.

6. The defendant denies the receipt of any debit or revision letter whatsoever from the plaintiff and or its solicitors.

7. The defendant shall at the trial of this action contend that the plaintiff action herein is premature.

WHEREOF of defendant denies the plaintiff\'s claim of N93,490.95k or at all as same is not due to the plaintiff.

It was after this regular statement of defence had been filed by the de'fendant that the plaintiff/bank by summons on notice applied to the court under order 10 Rules 1 & 2 of the Lagos State High Court Rules for the following relief:'

Entering judgment against the defendant for the sum of N93,490.95 (Ninety-three thousand, four hundred and ninety naira, ninety five kobo) together with interest at the rate of 91/2 per annum from 1st October, 1984 until judgment and thereafter at the rate of 91/2 per annum until final liquidation of the whole debt together with costs.

Order 10 rules 1 & 2 provide as follows:-

1. (a) Where the defendant appears to a writ of summons spe'cially indorsed with or accompanied by a statement of claim under Order 3, rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judg'ment as may be just, having regard to the nature of the

re'medy or relief claimed.

(b) If on the hearing of any application under this rule it shall appear that any claim which could not have been specially indorsed under Order 3, rule 4, has been included in the indorsement on the writ, the Judge may, if he shall think fit, forthwith amend the indorsement by striking out such A claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim.

(c) Where the plaintiff\'s claim is for the delivery up of a specific chattel (with or without a claim for the hire thereof or for damages for its detention) the Judge may make an order for the delivery up of the chattel without giving the defendant any option of retaining the same upon paying the assessed value thereof, and such order if not obeyed may be en'dorsed by a writ of attachment or a writ of delivery.

2. The application by the plaintiff for leave to enter final judgment under rule 1, of this Order shall be made by summons returnable in Chambers not less than four clear days after service. accompanied by a copy of the affidavit and exhibits referred to therein.

The affidavit in support of the summons read thus:'

AFFIDAVIT IN SUPPORT OF SUMMONS

I, Kolade Ajayi, Nigerian Bank Officer, now residing at Block7, House 14 Satellite town, Lagos hereby make oath and say as follows:'

1. That I am an officer in the Credit Department of the Plain'tiff Company.

2. That I am familiar with the facts of this case and I have the E prior authority and consent of the plaintiff to swear to this affidavit.

3. That the plaintiff\'s cause of action in this suit is as indorsed in the writ of Summons and Statement of Claim herewith attached and marked Exhibit \'P1\'

4. That sometime in April, 1980 the plaintiff granted to the F defendant at the defendant\'s request a term loan of N70,000.00 (Seventy thousand naira) under certain terms and conditions as communicated to the defendant vide plaintiff\'s letter JAO/BEE/NAL of 25/4/80, which terms were accepted by the defendant.

5. That the document now shown to me and marked Exhibit \'P2\' is a photocopy of the aforesaid letter showing the said G terms and conditions and which copy I confirm as correct having compared it with the original in plaintiff\'s custody.

6. That under the terms and conditions governing the loan and accepted by the defendant the defendant was required by paragraph 5 of the same to repay the loan in full within H four (4) years from either

a. rental income on the bungalows estimated at N12,000.00 (twelve thousand naira) per annum on i.e. N24,000.00

(twenty-four thousand naira) per annum or/and

b. any other sources.

7. That the defendant made full use of the loan granted as aforesaid and as at 30/8/84, his loan account with the re'flected a debit in the sum of N93,490.95 (Ninety- three thousand, four hundred & ninety naira ninety-five kobo).

8. The defendant has not in spite of repeated demands paid back the said sum upon which interest at the rate of 91/2% continues to accrue.

9. That the attached and marked Exhibit \'P3\' are some of the plaintiff\'s several letters of demand to the defendant which were never responded to.

10. That I am informed by Mr. Kola Awodein who is the coun'sel conducting this suit on plaintiff\'s behalf and I verily believe him that the defendant duly entered an appearance to this suit through his solicitors Messrs Akin 0. Sikuade & Co., and also filed a Statement of Defence on 8/7/85.

11. That the document now shown to me and marked Exhibit \'P4\' is a copy of the defendant\'s Statement of Defence.

12. That I am informed by Mr. Kola Awodein of counsel and I verily believe him that the Statement of Defence discloses no defence whatsoever to the plaintiff\'s claim.

13. That the document now shown to me and marked Exhibit \'P5\' is a photocopy of the letter referred to in paragraphs of the Statement of Defence and which copy I confirm as cor'rect having examined it with the original in the custody of the plaintiff.

14. That the document now shown to me and marked Exhibit \'P6\' is a copy of the Statement of Account of the defendant with the plaintiff/applicant which statement has been duly certified by me after examining same with the original en'tries in the book in the custody of the plaintiff/applicant and having found the same to be true and correct.

15. That the books are those kept by the plaintiff/applicant in the ordinary course of its business and that the entries thereon are those made in the ordinary course of plaintiff\'s business.

16. That the defendant has no defence whatsoever to this claim.

17. That I swear to this affidavit in good faith.

The defendant then filed an affidavit showing cause why he should be let in to defend the action. The affidavit read thus:-

1. That I am the above named defendant.

2. That I have been shown a copy of the affidavit of Kolade Ajayi deposed to on the 18th day of October, 1985.

3. That paragraphs 4 and 5 of the said affidavits are true.

4. That I intend to reply on the letter dated 25th April, 1980 refer'red to in paragraph 5 of the said affidavit.

5. That it was mutually agreed between the plaintiff and myself that time is not the essence of the agreement.

6. That in furtherance of the agreement my sole letting agents caused Exhibit 'P5\' referred to in paragraph 13 to be written to the plaintiff.

7. That I am made to understand by the plaintiff before agreeing with same that the sum ofN70,000 is to be repaid to the plaintiff within 4 years of completing the bungalows and tenanting.

8. That it was the averments in paragraph contained in paragraphs 4, 5, 6 and 7 above that lured me on to accepting the loan.

9. That I have repeatedly informed the plaintiff of the state of the bungalows same being uncompleted yet.

10. That the sum of 70,()0O or at all is not due to the plaintiff.

11. That the plaintiff\'s claim and application before this court is an abuse of the process of this court.

12. That I at no time received any advice or notification from the plaintiff.

13. That I intend to defend the plaintiff\'s claim upon the foregoing depositions.

14. That I swear to this affidavit conscientiously.

Adeniji, J. heard the arguments on the application for summary judgment. Giving his ruling on it on 29/11/85 he held as follows:-

....Since the facts and particulars here show that this is a fair dispute as to the meaning of the loan terms and questions of facts may arise I think it is right in the circumstances to grant the defendant leave to defend this suit.

And he accordingly ordered as follows:-

Leave is hereby granted to the defendant to defend the action, and the Statement of Defence already filed deemed to have been properly filed in the circumstances. The parties are accordingly directed to take out summons for directions.

The plaintiff bank appealed against this ruling to the Court of Appeal, Lagos Division, which in its judgment in the appeal as per the lead judgment F of Uthman Mohammed, J.C.A., in which Nnaemeka-Agu, J.C.A., as he then was, and Kutigi, J.C.A. concurred delivered on 21/7/86 held as fol'lows:-

first: In April, 1980, the appellant, on an application by the re'spondent granted the latter a loan of N70,000.00 with interest at 61/2 percent. The respondent accepted and signed the agreement on the terms and conditions specified therein. By the end of four years, after signing the agree'ment, the Loan Account of the respondent had gone up to N93,490.95. One of the conditions of offering the lo~n was that it would be repaid, with interest, within four years of the signature of the agreement.

Second: lt is without any doubt that the respondent has not raised any defence in both the statement of defence and the affidavit filed by him in this appeal"""and I am in agreement with the submission of Mr. Awodein that the appellant is entitled to summary judgment on the claim filed before the High Court""""".....

The appeal therefore succeeds and it is allowed.

The ruling of Adeniji, J., delivered on 29th November, 1985, is set aside. In its place, as applied for in the writ of summons, judgment is hereby entered in favour of the appellant and against the respondent, in the sum of N93,490.95 The respondent shall also pay all the accumu'lated interests at the rate of 91/2 percent per annum, from the 1st October, 1984 to date. In addition the judgment debt shall yield interest at the rate of 41/2% until the final liquidation of the total debt. I assess costs in favour of the appellant at N50.00 in this court and Nl50.00 at the court below.

It is against this judgment that the defendant has now appealed to this Briefs of argument were filed and served on both sides. According to the defendant/appellant the issues arising for determination in this appeal

are as follows:'

1. Whether or not from the State of the pleadings the main issue joined between the parties turns on the construction of the terms and conditions of the agreement between the parties.

2. Whether or not the finding of the learned trial Judge that the ap'pellant made out a prima facie case which ought to be tried being a finding of fact based on the totality of the evidence before the court ought to have been disturbed by the Court of Appeal.

3. Whether or not Order 10 Rules 1 and 2 procedure is appropriate in the circumstance of this case particularly in construing and NOT inspecting document to wit the terms and conditions of the agreement without the assistance of the arguments of both counsel and purely on affidavit evidence.

4. Whether or not the parties from the materials before the court agreed 'That the loan would be repaid, with interest, within four years of the signature of the agreement\", and if so whose signature'

The main thrust of the submissions of counsel for the defendant/appellant Mr. C.O. Joseph on all the issues said to arise in this case is that the resolution of the dispute between the parties to this case turns on the construc'tion of the loan agreement. And, this being so counsel submits this case is not a proper subject-matter for the proceedings for summary judgment under Order 10 rule 1 of the Lagos State High Court Civil Procedure Rules. For this proposition counsel relies on the following authorities:

Bowes v. Caustic Soda and Chlorine Syndicated (1982-93) 9 T. 328; Jacobs v. Booth\'s Distillery Company 85 L.T. 212 H.L. The Law Vol. LXXXV Page 262. Saw v. Khakim Lindsay V. Martin (1888-89) 5 T. L. R. 323 The Electric and General Contract Corporation V. Thomson - Houston Electric Company (1893-94) T.L.R. 103 Ford V. Harvey and other (1892-93) 9 T.L.R. 328.

Counsel for the defendant further makes the point that the Court of Appeal erred when it held:'

One of the conditions of offering the loan was that it would be repaid, with interest, within four years of the signature of the agreement.

According to the brief of arguments of the plaintiff\'s respondent the issues arising for determination in this appeal are as follows:

(a) Whether the Court of Appeal was right in holding that the appel'lant had no arguable defence to the claim and in entering judg'ment for the respondent accordingly.

(b) Whether the Court of Appeal was right in examining and con'struing the relevant documents in evidence in its determination of the case.

(c) Whether a proper application of the relevant provisions of the said Order 10 precludes in all events an examination and construction of relevant documents produced in evidence.

These issues are, in my view, vitiations of the issues said by the defendant to p arise for determination in this appeal which together boil down to the point whether or not the defendant should be let in to defend the action. And the submission in this regard of counsel for the plaintiff, Mr. Kola Awodein, is that on the whole of the material in this case there is no issue or question in which it ought rightly to be allowed to go to actual trial. In effect, counsel has submitted that the defendant has not raised either in his statement of de- F fence or in the affidavit showing cause against the application any triable issue. He places reliance on the following cases:'

1. Verrall v. Great Yarmouth BC (1980)1 All E.R. 839 at 843,.

2. European Assian Bank V Punjab and Sind Bank (1983) 2 All E.R. 508 at 516;

3. Nishizawa Ltd. V. S.N. Jethwani (1984)12 S.C. 234 at 276-7; and

4. VanLynn Developments Ltd. V Pelias Construction Co. Ltd. (1968)3 All E.R. 824 at 825.

The provisions of Order 10 rules (1) and (2) were considered in depth in the case of Nishizawa Ltd. v. S.N. Jethwani (1984)12 S.C. 234 by this court. It will be a work of super-ero-gation if I were to undertake to examine the provisions afresh and construe them. I think it is enough for me if I apply the decisions in the case to the case in hand or state my reasons why a particular decision in the case will not apply here.

It is to be noted as I have said earlier on in this judgment the defendant\'s statement of defence to the plaintiff\'s statement of claim was filed regularly. So an important feature of this case is that there was a regular statement of defence in existence before the plaintiff applied for summary judgment under Order 10 rule 1. In Nishizawa Ltd. V. Jethwani Ltd. (supra) this court H was confronted with a situation where a statement of defence was filed after an application for summary judgment was made but before leave to defend the action was given to the defendant by court. It was in this context that the relevance of the statement of defence filed was pronounced upon in the con'sideration of the point whether or not the defendant in the case should have been let in to defend.

In Nishizawa Ltd. V. Jethwani, (supra) it was remarked as per the lead judgment of Obaseki, J.S.C., that the English case of Mclardy V. Slateum (1890) 24 Q.B.D. 504 is:

'.no authority for the statement that \"the fact that he has de'livered a defence may be sufficient to enable a defendant to get leave to defend\" but only an authority for the proposition that \"the plaintiff\'s application for judgment may be made even after the delivery of a statement of a defence.

I consider the decision in the case of Mclardy V. Slateum (supra) very much relevant to the case in hand. So it behoves me to set down the decision in the case at page 506 of the report by Pollock, B.:-

This is an appeal from an order of Field, J., at chambers, setting aside an order of a master, who, upon an application under Order XIV., had given the defendant leave to defend upon pay'ing the amount of the claim into court.

The order of Field, J., proceeded upon his view of the proper construction of Order XIV. , r.1, namely, that the plaintiff was bound to make his application for summary judgment before the defendant had put in any statement of defence. We took time to consider our judgment, principally because we were desirous of ascertaining what was the practice followed by other Judges, and by the masters, in consequence of being informed by counsel that Field, J., had long ago decided, in an unreported case, that

the application must be refused if made after delivery of a statement of defence.

We have made those inquiries, and learnt that the view of Field, J., still is that the intention of Order XIV was that the plaintiff must make his application before delivery of a statement of defence; but that in peculiar circumstances it may be made after, as where the defendant has delivered his defence before the expiration of the usual time, for the very purpose of defeating such an application. The view taken by other Judges, and by the masters, is that the intention of Order XIV., r.1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under Order XIV right and proper. We think that this is the proper construction of the rule. (Italics mine)

As I have said earlier on in this judgment the statement of defence in the instant case was filed regularly. It appears from the decision in Mclardy v. Slateum (supra) that before that case the view was that upon a proper constructionoforderXl Rule 21 (U.K. Rules of Court) which as I have said is in pari materia with Order 10 rule 1 of the Lagos High Court Civil Procedure Rules the plaintiff was bound to make his application for summary judgment before the defendant had put in any statement of defence. My understand'ing of the decision in Mclardy v. Slateum is that that case has not swept away that view. What it has done, in my view, is that it recognises an exception to that view, namely, when it happens that a defence, which has been deli'vered, itself discloses facts which make an application for summary judg'ment right and proper. It appears to me that when an application for summary judgment is made under these circumstances, one must perforce have recourse in the first instant to the statement of defence delivered in the con'sideration of the point whether or not to grant the application. If the statement of defence in fact shows a triable issue, then the application will be re'fused. If it does not, then recourse will be had to the affidavit of the defen'dant showing cause to the application with a view to finding out if the defen'dant, in the language of Order 10 rule 1(a) of the High Court of Lagos State Rules has satisfied the Judge that he has a good defence to the action on the merits or that he, the defendant, has disclosed such facts as may be declared sufficient to entitle him to defend the action generally.

On all the matters which the trial Judge has to consider before coming to his decision as to whether or not to make an order empowering the plain'tiff to enter summary judgment against the defendant, the trial Judge is not without guidance.

In Nishizawa Ltd. v. Jethwani (supra) at page 260 this court quoted with approval Notes 14/3 - 4/4 to Order 014 r.3 of the En'glish Rules on Summary Judgment in the Supreme Court Practice 1976 as guidance to a court dealing with a matter of this nature:-

The defendant\'s affidavit must \"condescend upon particulars\", and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on as supporting it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.

A mere general denial that the defendant is indebted will not suffice (Wallingford V. Mutual Society (1880) 5 App. Cas., per Lord Blackburn, at p.704; Re General Rail Syndicate, Whiteley\'s Case, (1900)1 Ch., per Lindley, M.R., at p.369 Anon., (1875) WN 249, per Quain, J., at p.250) unless the grounds on which the defendant relies as showing that he is not indebted are stated (ibid.). If the affidavit commences, as it may, with a statement that the defendant is not indebted to the plain'tiff in the amount claimed, or any part thereof, it should proceed to state why the defendant is not so indebted, and to state the real nature of the defence relied on (Re General Rail, Syndicate, G supra).

Again, it is not enough for the defendant to show a case of hardship but creating no enforceable right, e.g., past promise by plaintiff unsupported by valuable consideration (Woolston V. Baines, (1876) W.R. 74), nor a mere inability to pay (Besant V. Townsend, 22 L.R. Ir. 389), nor an allegation that the plaintiff H has given time for payment which, of course, constitutes no de'fence unless there be consideration (Hookham V. Nayer (1905), 22 T.L.R. 241).

If the defence relied on is fraud the affidavit should state the particulars of the fraud (Wallingford V. Mutual Society (1880) 5 App. Cas. 685). A mere vague general allegation of fraud is use'less (ibid).

Similarly, if a legal objection is raised, the facts and the point of law arising thereon must be clearly stated.

Indeed, in all cases, suffident facts and particulars must be given to show that there is a bona fide defence (Wallingford V. Mutual Society (1880), 5 App. Cas. 685, see judgment of Lord Blackburn at p.704; Harrison v. Bottenheim, 26W. R. 362; Ray V. Barker, 4 Ex. D. 283; Shurmur V. Young (1889), 5 T.L.R. 155). Matter of hearsay is admissible in the defendant\'s affidavit (Harrison V. Bottenheim (1878), 26 W.R. 362, C.A.), provided that the sources and grounds of information or belief are disclosed: see Rule 4(2), supra, and Re Young Manufacturing Co., (1900)2 Ch. 753, C.A.; and cf. 0.41, r.5.

The defendant\'s affidavit is not conclusive and does not pre'clude him from relying on defences not raised in it (Ray V. Newton, (1913)1 K.B., per Hamilton, L.J. at p.258).

The case of Jacob\'s v. Booth\'s Distillery Company (1901-2) Volume 85 N.S. The Law Times Report 262 is authority for

the proposition that judg'ment should only be ordered under Order XIV (U.K. Rules) dealing with summary judgment where assuming all the facts in favour of the defendant they do not amount to a defence in law. The same case also decides it that where there is a triable issue, though it may appear that the defence is not likely to succeed the defendant should not be struck out from laying defence before the court either by having judgment against him or by being put under terror to pay money into court as a condition of obtaining leave to defend.

The case of the Electric and General Contract Corporation V. The Thomson - Houston Electric Company 1893 - 94 Vol. X The Time Law Report 103 is authority for the proposition that Order XIV (U.K. Rules) pro'viding for summary judgment does not apply to cases raising what may turn out to be difficult question of law. The case of Ford V. Harvey & anor. 1892-95 9 T.L.R. 328 is authority for the proposition that Order XIV (U.K. Rules) which allows summary judgment to be entered is not intended to apply to cases in which there is a fair dispute as to the meaning of a document.

In the dealing with an application for summary judgment under the re'levant rule of court the following passage in the speech of the Lord Chancellor (Halsburys) in Jacobs V. Booth\'s Distillery Company (supra) is worthy of note:-

The Lord Chancellor said \'People do not seem to understand that the effect of order XIV is, that, upon the allegation of the one side or the other a man is not to be permitted to defend himself in a court; that his right are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the right of parties by delay and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

I can now go on to the consideration of the arguments from both counsel in this court. I have set down earlier on in this judgment the Statement of Defence of the defendant and his affidavit showing cause against the application for summary judgment. I have set down the statement of claim of the plaintiff/bank.

By paragraph 1 of the statement of defence, the defendant admits paragraphs 1, 2, 3, 4 and 7 of the statement of claim. In effect, the defendant admits the following averments in the plaintiff\'s statement of claim:

3. Sometime in April, 1980, the plaintiff at the specific request of the defendant granted to the Defendant term loan of N70,000 (Seventy Thousand Naira) under certain terms and conditions which terms and conditions were accepted by the Defendant. The Plaintiff will rely on its letter dated 25/4/80 by which the loan was granted and the Defendant\'s signature thereon signifying his acceptance of the terms and conditions stated therein.

4. The Plaintiff avers that the Defendant made full use of the loan granted as aforesaid and that as at 30th September, 1984, the Defendant\'s loan Account reflected a huge outstanding sum of (N93,490.95) Ninety-three thousand, four hundred and ninety naira, ninety-five kobo).

On the authority of Seldon v. Davidson (1968) 2 All E.R. 755 it is clear that once the defendant admits the receipt of the loan the burden of proof as to repayment or as to the reasons for non repayment is on the defendant. The only thing in respect of the latter is paragraph 7 of the statement of defence which says:'

7. The defendant shall at the trial of this action contend that the plaintiff action herein is premature.

Paragraph 7 of the statement of defence contains no facts and particu'lars indicating that the plaintiff\'s action is premature. So on such authorities as Willingford V. Mutual Society (supra) Harmson V. Buthenliejin (supra) Ray V. Baker (supra) and Sharmier V. Young (supra) such a defence will not De countenanced in an application for summary judgment. So in my judgment the plaintiff was in order on the authorities in applying for summary judgment after the defence has been filed. For the defence shows facts which made such an application necessary and proper. And in my judgment the defence does not raise a triable issue.

This is not the end of the matter. I have said that the defendant in addi'tion to his statement of defence has filed pursuant to Order 10 rule 3 an af'fidavit showing cause against the application for summary judgment. It therefore behoves me to see if the lower court, guided by the relevant au'thorities ought to have been satisfied as the trial court was, that the defen'dant has a good defence to the action on the merits or that the defendant has disclosed such facts as may be deemed sufficient to entitle him to defend the action generally.

I have set down earlier on in this judgment the affidavit of the defen'dant. By paragraph 3 of the affidavit he admits paragraphs 4 and 5 of the af'fidavit in support of the application for summary judgment which say:-

4. That sometime in April, 1980 the Plaintiff granted to the Defen'dant at the Defendant\'s request a term loan of N70,000.00 (Se' venty thousand naira) under certain terms and conditions as communicated to the Defendant vide Plaintiffs letter JAO/BEE.NAL of 25/4/80, which terms were accepted by the Defendant.

5. That the document now shown to me and marked Exhibit \'P2\' is a photocopy of the aforesaid letter showing the said terms and conditions and which copy I confirm as correct having compared it with the original in plaintiff\'s custody.

The effect of this admission is that both parties to this case are agreed that the terms and conditions of the loan which the plaintiff undoubtedly granted the defendant are contained in the plaintiffs letter to the defendant reference No.JAO/BEE.NAL of 25/4/80 a copy of which is Exh.P2 exhi'bited in this application.

Exhibit P2 reads thus:-

Dear Sir,

TERM LOAN FACILITY

With reference to your applications of 9th April and 7th May, 1979, and further to our subsequent discussions, we are pleased to offer you a term loan of N70,000.00 (Seventy thousand Naira) subject to the following terms and conditions:-

1. AMOUNT: The maximum amount that may be drawn under this facility is N70,000.00 (Seventy thousand Naira only).

2. PURPOSE: To provide you with part of the finance re'quired for the completion of your two bungalows under construction at Ogba Residential estate costing N113,000.00.

3. PERIOD: This facility is available for a maximum period of four years in accordance with the repayment programme as contained in paragraph (5) below.

4. AVAILABILITY: This loan will be made available to you immediately upon your acceptance of and compliance with its terms and conditions. Disbursements will however take the form of direct payment to your contractors against the certificate of an approved Architect/Quantity Surveyor.

5. REPAYMENT: Repayment is to be effected in full within four years from either.

(a) rental income on the two bungalow estimated at N24;000.00 per annum or/and

(b) any other sources.

In the case of (a), we are to be given an ir'revocable letter of undertaking by your Letting Agents domiciling all the rental in'come on the property to us.

6-9 not relevant.

The other paragraphs in the defendant\'s affidavit on which he can pos'sibly rely as containing his defences or facts which should be deemed sufficient to entitle the defendant to defend the action generally are as follows:-

4. That I intend to rely on the letter dated 25th April, 1980 referred to in paragraph 5 of the said affidavit.

5. That it was mutually agreed between the plaintiff and myself that time is not the essence of the agreement.

6. That in furtherance of the agreement my sole letting agents caused Exhibit \'P5\' referred to in paragraph 13 to be written to the plaintiff.

7. That I am made to understand by the plaintiff before agreeing with same that the sum of N70,000.00 is to be repaid to the plaintiff within 4 years of completing the bungalows and tenanting.

8. That it was the averments in paragraph contained in paragraphs 4, 5, 6, and above that lured me on to accepting the loan.

9. That I have repeatedly informed the plaintiff of the state of the bungalows and same being uncompleted yet.

10. That the sum of N70,000 or at all is not due to the plaintiff.

At this stage I will refer to notes 14/3-4/3 to Order 14 (U.K.) in the Sup'reme Court Practice 1976 dealing with Defendant showing cause against an application for summary judgment: -

The defendant may show cause against the plaintiff\'s application.

(1) by a preliminary or technical objection, e.g., that the case is not within this Order or that the statement of claim or af'fidavit in support is defective, such as no due verification of the claim. No affidavit is required in support of such objection. Cf. Bradley V. Chamberlyn (1893)1 Q.B.439. If the objection is fatal, the Master will then dismiss the application under Rule 7 or give unconditional leave to defend; if the defect is capable of amendment, the Master may give leave to amend and proceed on the application as amended, subject to the questions of adjournment and costs;

(2) on the merits, e.g., that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which requires the taking of an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.

Then I must remind myself of the provisions of section 131 of the Evidence Act which says:'

(1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or pro'ceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence: The provisos (a) - (e) not relevant.(Italics mine).

As I have said above the defendant has himself admitted in his affidavit that the terms and conditions of the loan agreement between him and the plaintiff have been reduced into writing. In the circumstances and having re'gard to the provisions of Section 131(1) of the Evidence Act, can the defen'dant be heard to say that besides these written terms and conditions there is other evidence of the terms of the loan agreement' I have no difficulty at all in answering the question in the negative. So in my judgment it is only the written conditions and terms of the loan agreement that are evidence of the loan\'s terms and conditions. So paragraphs 5 and 7 of the defendant\'s af'fidavit to wit:'-

5. That it was mutually agreed between the plaintiff and myself that time is not the essence of the agreement.

7. That I am made to understand by the plaintiff before agreeing with same that the sum of N70,000.00 to be repaid to the plaintiff within 4 years of completing the bungalow and tenanting.

cannot in my judgment be relied upon as raising (1) a good defence on the F merits, or (2) a difficult point of law to be resolved or (3) a dispute as to facts to be tried or (4) any other circumstances showing reasonable grounds of a bona fide defence.

The upshot of what I have just said is that the resolution of the question whether or not the application for summary judgment under Order 10 rule 1 of the Lagos High Court Rules should be granted revolves squarely around the written conditions and terms of the loan agreement as c6ntained in Exh. P2.

The learned trial Judge granted the defendant leave to defendant be'cause according to him, there is a fair dispute as to the meaning of the terms and conditions of the loan. He relied on the case of Ford V. Harvey (1893) Q.B.D. 228.

The lower court overturned, as I have said above, this decision of the trial court. That court treated Exh. P2 containing the terms and conditions of the loan as of paramount consideration in this case. Mohammed, J.C.A., in his lead judgment held that one of the conditions of offering the loan was that it would be repaid with interest within 4 years of the execution of the loan agreement. In effect the learned Justice of appeal has construed exhibit P2.

Counsel for the plaintiff Mr. Joseph has submitted to us that it was wrong of the learned Justice of the Court of Appeal to have embarked at all on the construction of the exhibit in an application for summary judgment. It was submitted that he should have limited himself to finding out if there was a fair dispute as to its meaning as the trial court had done. It was further submitted that in any case the construction which the learned Justice put on it was wrong. It was at this stage that counsel was asked by us, that since parag'raph 7 of the statement of defence which pleads that the plaintiff's action is premature what construction of Exh.P would he be contending for as to the time when the four year period for the repayment of the loan would begin to run. Try as we could we were unable to get a clear cut reply from him. Again when we asked him to disclose to us the reasons why the defendant was saying that the plaintiff's action was premature, there was nothing specific from him. All I can gather from the replies of counsel is that time is not of the es'sence of the contract sued upon, a contention already raised by paragraph 5 of the defendant\'s affidavit showing cause and which I have already consi'dered and rejected.

For the plaintiff it was contended by his counsel Mr. Awodein that since the only issue in this case is the construction of Exhibit P2. and the point does not involve any difficult point of construction the issue can be resolved in an application of this nature and final judgment entered for the plaintiff or the defendant as the case may be. He relied on the case of Van Lynn Development Ltd. v. Pelicas Construction Co. Ltd. (1968) 3 All L.R. 824 at 825 and the other cases he cited to us which I have noted earlier on in this judgment.

I cannot say that the Court of Appeal was wrong in embarking on the construction of Fxh.P2 at all. If it could not how would it know whether or not there is a fair dispute as to the meaning of the terms and conditions of the loan agreement'

It is said in Jacobs v. Booth\'s Distillery Company (supra) that judgment should only be ordered in application for summary judgment where assuming all the facts in favour of the defendant, they do not amount to a defence in law. By the same token where in an application for summary judgement and the only point involved is the construction of a document which docu'ment is capable of more than one meaning, then one tries and fathoms all the meanings capable of being given to the document, and if any of them gives the defendant a defence in law to the action, then there is a fair dispute as to the meaning of the document which will entitle the defendant to defend the action. If, on the other hand, none of the meanings which the document is capable of bearing can give a defendant a defence to the action then there can be no fair dispute as to the meaning of the document. In which case the defendant has not shown that the case raises a triable issue and summary judgment will be entered against him.

I can now go and examine Exh.P2 containing the terms and the condi'tions of the loan. It is common ground that the defendant has taken the loan. What has to be ascertained from Exh.P2 are the terms for the repayment of the loan. The relevant provisions in Exh.P2 in this regard are clauses 3 and 5 thereof which say:'-

3. PERIOD: This facility is available for a maxim urn period of four years in accordance with the payment prog'ramme as contained in paragraph (5) below.

5. REPAYMENT: Repayment is to be effected in full within four years from either

(a) rental income on the two bungalows estimated at N12,000.00 per annum i.e.N24,000.00 per annum or/and

(b) any other sources.

It is clear beyond a peradventure that the period within which the loan granted to the defendant is to be repaid i~ a maximum one of 4 years. And equally clear is the fact that there is nothing in Exh.P2 by reference to which one can possibly jettison the clear provision as to the period for the repayment of the loan. The statement in Exh.P2 as to where the money for the re'payment of the loan would come from, namely,

(a) rental income on the two bungalows estimated at N12,000.00 per annum i.e. N24,000.00 per annum or/and

(b) any other sources; and

In the case of (a) the plaintiff/bank is to be given an irrevoc'able letter of undertaking by the defendant\'s Letting Agents committing a/i the rental income on the property to the plaintiff.

are clear and unambiguous and cannot at all be stretched in its meaning to constitute a gloss on the period for the repayment of the loan.

So, in the final analysis, the only is sue arising from the examination of Exh.P2, on which there can be any worthwhile differences of opinion . is as to the point in time when the maximum period of 4 years fort he repayment of the loan will begin to run.

This takes me to clause 4 of Exh.P2 which says:'

4. AVAILABILITY: This loan will be\' made available to you immediately upon your acceptance of and compliance with its terms and conditions. Disbursements will however take the form of direct payment to your contractors against the certificate of an approval Ar'chitect/Quantity Survevor.

Perhaps it is clause 4 which informed the Court of Appeal in its decision which is criticized before us that one of the conditions governing the loan ag'reement is that the loan would be repaid with interest within four years of the date of the execution of the agreement. However, clause 4 says the defen'dant cannot avail himself of loan facility until after the agreement for the loan has been entered into. It then goes on to say that the disbursements of the loan will be made by the bank. So, Exh.P2 envisages a situation where full utilisation of the loan will not occur until after the loan agreement itself has been executed. So, an alternative view to that of the Court of Appeal is that time for the repayment of the loan

will not begin to run until the loan have been fully disbursed by the bank, that is to say, until the defendant has fully utilised the loan. The defendant is entitled to have this view as to when the time for the repayment of the loan will begin to run considered in the application for summary judgment. And if on that view point the defendant will have a defence in law to the action then the application for summary judgment must fail.

It now remains for me to see if this viewpoint of Exh.P2 can possibly give the defendant a defence in law to the plaintiff.

It is an admitted fact in the case now before us that, as at 31st October, 1980, the defendant has fully utilised the loan facility which the plaintiff! bank granted him. The plaintiff brought this action for the recovery of the loan on 21st November, 1984, that is to say, more than a period of 4 years after the defendant has in fact taken it. Evidently in these circumstances, even on this view point of Exh. P2, the defendant has not shown a defence in law to the plaintiff\'s action. So, in my judgment on all the possible construc'tions which can be put on Exh. P2 it cannot be said that the defendant has a defence in law to the plaintiff\'s action. In effect it cannot be said, in my judgment, that there is a fair dispute as to the meaning of the terms and condi'tions of the loan agreement, whereby, on the authorities the defendant is entitled to be let in to defend the plaintiff\'s action.

Before I conclude this judgment, I should refer to the case of Van Lynn Developments Ltd. V. Pelias Construction Co. Ltd. (supra) at 825 cited to us by counsel for the plaintiff, Mr. Awodein. The defendants in the case had a bank overdraft which was paid off by the plaintiffs in consideration for an as'signment of the debt to themselves. The assignment was dated June 26, and on June 27 the plaintiffs called on the defendants for payment. In the letter of June 27, it was stated (incorrectly) that notice of the assignment had pre'viously been given to the defendants. On the question whether the letter of June 27 constituted a valid notice of assignment, and as to the propriety of D the procedure for summary judgment in that circumstance Lord Denning, M.R. said:-

There was one sentence in that letter which was inaccurate. It is the sentence, \"Notice of this Assignment has already been given to you.\" That was wrong. No notice of assignment had been given. But the question is whether, in spite of that wrong statement, the letter itself is a notice of assignment such as to satisfy the statute. That is a pure question of law. It is a point which we can decide today. It is an arguable point, no doubt, but I do not think we should give leave to defend simply to have it argued again. This court is in as good a position as it ever will be to decide the matter. So I think we should decide it, even under R.S.C. Ord. 14.

Lord Denning having considered all the relevant law then held:-

The assignment is properly sued on here. I do not see that there is any defence of any substance in the case whatsoever. Some-thing was said about the new wording of R.S.C., Ord. 14 r.3. I do not think it makes any alteration from the previous wording. It only states in simple words the principles on which we have acted CI for many years under R.S.C., Ord. 14.

The Judge gave leave to defend conditional on the full amount being paid into court. The defence was so shadowy that

the condition was rightly imposed.

On that authority if I had held that there is a fair dispute as to when the time for the repayment of the loan would begin to run, I would have resolved that issue here and now. Although it would be then an arguable point which might entitle the defendant to leave to defend the action, yet because (1) no difficult question of construction is involved and (2) no other point is involved, I would not have remitted the case to the trial court for a decision in it. I have held that the lower court was wrong in its decision that time for the repayment of the loan began to run from the time the contract agreement was signed. I would have held that time for the repayment of the loan would begin to run from the time the defendant fully utilised the loan. The fate of the plaintiff\'s claim would then depend on whether or not it instituted its action after 4 years of the admitted date when the defendant utilised the loan which will mean judgment for the plaintiff.

In sum, I dismiss the defendant\'s appeal. I affirm the decision of the lower court entering summary judgment in favour of the plaintiff as follows:-

Judgment is hereby entered in favour of the Appellant and against the Respondent, in the sum of N93,490.95. The Respon'dent shall also pay all the accumulated interests at the rate of 9' percent per annum, from the 1st October, 1984 to date. In addi'tion the judgment debt shall yield interest at the rate of 4' % until the final liquidation of the total debt. I assess costs in favour of the appellant at N250.00 in this court and N150.00 at the court below.

I award the plaintiff/respondent the costs of this appeal against the defendant/appellant which I assess at N500.00.

Judgment delivered by

Nnamani, J.S.C.

I had a preview of the judgment just delivered by my learned brother, Agbaje, J.S.C., and I entirely agree with his reasoning and conclusions. My learned brother has so exhaustively dealt with all the issues raised before us that my comments here are only by way of emphasis.

The whole question of the principles governing the application of Order 10 Rules 1,2 and 3 of the High Court of Lagos State (Civil Procedure) Rules has been fully dealt with in Nishizawa Ltd. V. J.N. Jethwani (1984)12 S.C. 234 and I need not go into that. I would, however, note as did my learned brother, that the situation in Nishizawa is slightly different from the position F here. In Nishizawa there was a failure to follow the proper Order 10 procedure in that a statement of defence was filed after an application for summary judgment had been put in and before leave to defend had been panted. As decided in Nishizawa the proper procedure is that an affidavit to show cause should be filed, and statement of defence can only be filed if leave to defend has been granted. In the present case, on the other hand, the statement of defence was filed pursuant to an Order of court. An affidavit to show cause was subsequently filed.

The only matters on which I wish to comment are firstly, whether as submitted to us the Court of Appeal was wrong to have construed the relevant document in this case in its attempt to see if there was a fair dispute bet'ween the parties, and secondly, whether the case ought to have been remitted to a lower court to determine. On the first issue, I would wish to emphasise that by its very nature the Order 10 procedure means that a judgment is given without taking the defence of defendant. It does seem to me that in deciding whether there is a fair dispute to justify letting in the defence, 'one ought to be fully satisfied that there is no defence, or that there is only sham defence that would result in delay before refusing leave. I gratefully adopt the comments of Lord Halsbury, Lord Chancellor in Jacob\'s V. A Booth\'s Distillery Company (1901-2) Vol.85 Law Times Report 212 R.L. There the learned L9rd Chancellor said:-

There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay..... and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things''

It would seem to me that the emphasis is that the defence is merely putting up something just for purposes of argument. See Aniagolu, J.S.C., in Nishizawa\'s case.

In the instant case, I see nothing in the statement of defence or the af'fidavit filed by the defendant to indicate that there is any real defence to the claim. Paragraph 7 of the statement of defence merely stated

The defendant shall at the trial of this action contend that the plaintiff\'s action herein is premature.

No further details followed. In the affidavit to show cause filed by defendant, there is nothing definite on which one can focus a defence. As my learned brother rightly stated, some of the admissions of the paragraphs of the affidavit of the plaintiff knock the bottom out of such a defence. Besides, some of the defendant\'s assertions cannot be entertained such as to vary the written document agreed by both parties.

It is perhaps only to determine why the defendant says the action is premature, and also to see the basis on which Adeniji, J., granted leave to de'fend, that one looks at the agreement of loan between the parties. Exhibit P2 has been set down by my learned brother and I therefore need not put down all the contents. I shall only refer to paragraphs 3 and 4 thereof. These read as follows:

3. Period: This facility is available for a maximum period of 4 years in accordance with the repayment programme as contained in paragraph 5 below.

4. Availability: This loan will be made available to you immediately upon your acceptance of and com'pliance with its terms and conditions. Disbursements will however take the form of direct payment to your contractors against the certificate of an approved Architect/Quantity Surveyor.

From the terms of Exhibit P2, there is no doubt in my mind that the loan was to be repaid within 4 years, nor is there any doubt as to the sources from 6 which repayment was to be made. The only issue that can be said to arise is date of commencement of the 4 years. Dealing with this, Uthman Moham'med, J.C.A., said:

Equally in the case in hand it is very relevant to look into the documents attached to the affidavit of the applicant to see if the

Respondent has any defence to the action.

Also while stating the facts of the case the learned Justice said that '

One of the conditions of offering the loan was that it would be repaid, with interest, within four years of the signature of the agreement.

Learned counsel to the appellant complained that the Court of Appeal ought not to have construed the documents. Infact I have not seen where the Court of Appeal engaged in any construction of the terms of the document, Exhibit P2. The portion I set down above was not as a result of any construction exercise. It came, albeit erroneously, while the learned Justice was setting down the facts of the case. In any case I do not see how the Court of Appeal could find out if there is a fair dispute without looking at the document and even examining any dispute that may surround the terms. I am of the view, however, that if the document involved is vague, and the terms are capable of bearing so many meanings, and this possibility has been raised in the defendant\'s statement of defence or in the facts deposed in his affidavit to show cause, this would be a good ground for holding that there is a fair dispute. It is interesting to note that when a question of stay of execution arose in this court over this matter, Aniagolu, J.S.C., made these remarks,

In the first place there is the issue of when the four years is to be calculated - from the date of the agreement or from the date the grant of N70,000 to the applicant was completely made.

In his own remarks Coker, J.S.C. said,

The question is when was repayment of the loan to commence' The two parties have advanced different construction of the loan agreement. The two versions appear plausible.

I am of the view that if that had been the situation now that the question of leave to defend is being considered, it would have been possible to hold that there is a fair dispute and that leave to defend ought to be granted. That is not the

situation now. As stated earlier, the only dispute can only be as to when the 4 years is to commence. The Court of Appeal mentioned date of signature of the agreement. I think this, with respect, is wrong. From paragraph 4 of Exhibit P2, it can only be from the date when the loan was fully utilised. In effect, therefore, even if one conceded this as the time of com'mencement of the 4 years, there would still be nothing for the defendant to defend. This is because the loan facility was fully utilised on 30/7/80 while the present action was instituted on 21/11/84 - well over 4 years.

As regards the second issue I mentioned above, there would be no need to remit the matter to a lower court even if it was a matter in which leave to defend was to be granted. As mentioned in Nishizawa, by virtue of Section 22 of the Supreme Court Act, 1960, this court can make an order which the lower court would have made.

In all the circumstances, I also dismiss this appeal and endorse all the or'ders made by my learned brother including the order for costs.

Judgment delivered by

Karibi-Whyte, J.S.C.

The issue for determination in this appeal is u ~ frequent in our Courts. It calls for determination of the grounds under which the trial Judge, in an application by a Plaintiff under Order X rr. 1 and 3 of the High Court of Lagos (Civil Procedure) Rules for summary judgment can refuse the application, and allow the Defendant to defend the action.

The facts of this case which are fairly simple and to a very large extent Bot in dispute, are as follows '

Respondent, a Merchant Bank; was the appellant in the court below; and A the plaintiff in the court of trial. The present appellant was the defendant to the action. Sometime in April, 1980, at his own request made to the respondent, appellant was granted a loan of N70,000.00 for the purpose of com'pleting two bungalows then under construction at Ogba Residential Estate costing N113,000.00. The sum of N70,000 .00 was the maximum amount re'spondent could grant appellant under this arrangement. The parties agreed that the conditions of repayment was to be as stipulated in paragraph 5 of their agreement which reads as follows '

5. REPAYMENT: Repayment is to be effected in full within four years from either

(a) rental income on the two bungalows estimated at N12,000.00 per annum i.e. N24,000.00 per annum or/and

(b) any other sources

In the case of (a) we are to be given an irrevocable letter of undertaking by your Letting Agents domiciling all the rental income on the property to us.

The agreement provided for when and how the agreed loan would be made available to the appellant, on his \"immediately.... acceptance of and compliance with its terms and conditions.\" It also provided that disbursement would be made by direct payment to appellant\'s contractors against the cer'tificate of an approved Architect/Quantity Surveyor. There are other terms which are not material to the issue in this appeal. The agreement was signed and the terms accepted by the Appellant in a Memorandum of acceptance dated the 29th April, 1980.

On the 21st November, 1984, respondent as plaintiff issued a writ of summons endorsed and claiming from the appellant/defendant, the sum of N93,490.95k being the amount due and payable by the defendant to plain'tiff as at 30th September, 1984 for money lent in form of a loan to defendant at the defendant\'s request in the normal course of the plaintiff\'s business as F a banker together with interest and the usual bank charges thereon, which defendant in spite of repeated demands had refused to pay. Plaintiff also claimed interest at the rate of 9'% per annum until final liquidation of the whole debt together with costs.

The writ of summons was accompanied with a statement of claim which averred in paragraph 4, thereof that appellant made full use of the loan and that as at 30th September, 1984, appellant\'s loan account stood at 6 N3,490.95k. It was also averred at paragraphs that defendant had refused to pay the outstanding sum with interest despite repeated demands. Parag'raphs 6,7,8 and 9 averred reliance on the statement of account, and letters of demand by the respondent to the appellant.

Appellant as defendant, entered appearance to the action, and in the statement of defence dated 4/7/89 admitted paragraphs 1,2,3,4 and 7 of the H plaintiff\'s/respondent\'s statement of claim. He denied paragraphs 5,6,8,9 and 10 of the statement of claim. Thus defendant/appellant is admitting that respondent granted to him a loan of N70,000.00 under the conditions stated therein. It is also admitted that as at 30/9/84 he had made full use of the loan granted. The statement of account is also admitted. In issue therefore are the questions whether there was repeated demand for the repayment of the loan and the interest thereon. The defendant/appellant contended that the plaintiff/respondent\'s action was premature.

On receipt of the statement of defence, counsel to the plaintiff issued a summons under Order 10 rules 1 & 2, entering summary judgment for the sum in the action at the rate of 9'% as claimed. In the affidavit in support of the summons, the deponent at paragraphs 5 deposed to the letter showing the terms and conditions of the agreement subject matter of the action. Paragraph 6 deposed to paragraph 5 of the terms and conditions of that letter, and at paragraph 12, the belief that the statement of defence of defendant/appellant disclosed no defence whatsoever to the plaintiffs claim. In his own affidavit, defendant deposed at paragraph 10 that the sum of N70,000.00 or at all was not due to the plaintiff. Specifically he averred at paragraph 5 that

5. That it was mutually agreed between the plaintiff and myself that time is not of the essence of the agreement.

x x x x

7. That I am made to understand by the plaintiff before agreeing with same that the sum of N70,000.00 is to be repaid to the plaintiff within 4 years of completing the bungalows and tenanting.

Thus the issue now is as to whether the appellant\'s construction of paragraph 5 of the agreement, or the plaintiffs is right.

The summons came before Adeniji J. for trial. In his ruling, he relied on the letter dated 25th April, 1980, to hold that there is a fair dispute as to the meaning of the terms of agreement between the parties, \'and that questions might arise from which the defendant may wish to submit to the Court.\" After setting out the contents of the letter and observing that as a consequ'ence of the ambiguity a firm of chartered surveyors and valuers were ap'pointed as Sole Managing Agents, the learned judge held,

Since the facts and particulars here show that this is a fair dispute as to the meaning of the loan terms and questions of facts may arise, I think it is right in the circumstances to grant the de'fendant leave to defend this suit.

He relied on Ford V. Harvey & Ors. (1893) QBD.328. Plaintiff ap'pealed against the judgment. The Court of Appeal allowed the appeal and set aside the judgment of the learned trial Judge giving unconditional leave 6 to defendants to defend the action.

The Court of Appeal referred to Order 10 r.3 and to the affidavit of the defendant seeking leave to defend the action. The court also referred to the tern\'s and conditions of the agreement relating to repayment particularly clause 5 thereof.

It was observed that the issue between the parties in this case is whether in view of the terms of clause 5 repayment of the loan is to be effected in full within four years from either (a) rental income on the two bungalows, esti'mated at N12,000.00 per annum i.e. N24,000.00 per annum and/or (b) any other sources.

The court relying on Nishizawa Ltd. V. Jethwani (1984)12 S.C. 234 rejected the submission of counsel to the defendant/respondent that under A Order 10 procedure the court cannot construe documents. The court ob'served and pointed out that in that case the Supreme Court referred to a number of documents attached to the affidavit in support of the application in determining whether the defendant had raised a defence to the action.

In their construction of the provisions of clause 5, the court of Appeal held, at p.92

In clause 5, it is agreed that repayment is to be effected in full within four years from either (a) rental income or (h) any

other sources. In other words, if the repayment could not be effected through rental income the respondent must offset the loan through any other sources, but within four years.

On this construction of clause 5 of the agreement the court of Appeal held that the defendant has not raised any defence to the claim both in the statement of defence and in the affidavit filed in support of a defence. It was accordingly held that there is no defence to the action for failure to repay the loan with interest within four years as he undertook to do when accepted the loan. The statement of defence and affidavit having not raised a triable issue, in answer to the plaintiff\'s claim, judgment was entered in favour of the plaintiff against the defendant in the sum claimed.

Defendant/respondent appealed against the decision of the court of Appeal. It is this appeal that is now before us. There are three grounds of appeal. The grounds of appeal summarily stated are as follows:'

I. The court erred in law in holding that the parties agreed that the repayment of the loan was to be in full within four years of the signature of the agreement.

2. That the court of Appeal erred in law by deciding the issue in dis'pute solely on affidavit evidence, when the issue was whether the defendant had made a prima facie case to entitle him to defend the action.

3. Judgment is against the weight of evidence.

Counsel to the parties filed briefs of argument. They relied on their briefs and elaborated on arguments therein in their oral argument before us. Counsel to the appellant formulated four issues for determination as arising from the grounds of appeal The issues are as follows-

1. Whether or not from the state of the pleadings the main issue joined between the parties turns on the construction of the terms and conditions of the agreement between the parties.

2. Whether or not the finding of the learned trial Judge that the ap'pellant made out a prima facie case which ought to be tried being a finding of fact based on the totality of the evidence before the court ought to have been disturbed by the court of Appeal.

3. Whether or not Order lo rules I and 2 procedure is appropriate in the circumstance of this case particularly in construing and NOT inspecting documents to wit the terms and conditions of the agreement without the assistance of the arguments of both coun'sel and purely on affidavit evidence.

4. Whether or not the parties from the materials before the court agreed \"That the loan would be repaid, with interests, within four years of the signature of the agreement,\" and if so whose signature.

The formulation of issues 1, 3, and 4 are based on the question of construc'tion and whether the subject matter of the action was appropriate under Order X rr. 1 and 2. Only issue 2 seems to me different. I think the three issues formulated by counsel to the respondent more appropriately cover the issues involved in this appeal. The respondent\'s formulation of the issues are as follows -

(a) Whether the Court of Appeal was right in holding that appellant had no arguable defence to the claim and in entering judgment for the respondent accordingly.

(b) Whether the Court of Appeal was right in examining and constru'ing the relevant documents in evidence in its determination of the case.

(c) Whether a proper application of the relevant provisions of the said Order 10 precludes in all events examination and construc'tion of relevant documents produced in evidence.

I think these issues cover all the grounds of appeal filed. Counsel to the appellants after formulating issues for determination, abandoned the issues so formulated and in his argument in his brief relied on his grounds of appeal. This is a wrong approach. This court has advised counsel arguing appe'als to rely on the issues formulated rather than the grounds of appeal. This is because it is on the basis of the issues that the parties found their contention. Although erroneous, the first ground of appeal filed would seem to me to be covered by the first issue for determination. I consider it convenient to start with this issue because it is capable of determining the central issue in this cause; and that is, whether the court of Appeal was right in holding that ap'pellant did not in his statement of defence and affidavit disclose an arguable defence against the claim.

The relevant provision of Order to rule 1. provides as follows -

(a) Where the defendant appears to a writ of summons specially en'dorsed with or accompanied by a statement of claim under Order 3 Rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, (if any Liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on merits or shall disclose such facts as may lie deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed..

This is the provision relied upon by both parties. It has not been disputed at any stage that plaintiff has brought his action within the provisions of the Order. Counsel for the appellant has however contended before us that the provision is not available for matters relating to the construction of docu'ments. I agree entirely with the Court of Appeal that the argument is wrong and that the leading case of Nishizawa Ltd. V. S. N. Jethwani (1984)12 S.C. 234 involved construction of documents. It is important to emphasise the fact that Order 10 r.1 prescribes the causes of action excluded from its purview. It states clearly that the provision is available where the writ of summons has been specially indorsed are accompanied by a statement of claim under Order 3 rule 4. Order 3 rule 4 prescribes that the following causes of action are out of the purview of the procedure:

(a) a claim for libel, slander, malicious prosecution, false imprison'ment, seduction and breach of promise of marriage; and,

(b) a claim based on allegation of fraud.

Thus every other action where liquidated damages have been claimed, or even unliquidated damages may be recovered under this rule if there is no real defence to the action. - See Dummer V. Broom (1953)1 QB.710.

The procedure is such that once the writ of summons is specially in'dorsed or served with the statement of claim, and is supported with the state'ment of claim, and is supported with an affidavit which has sworn positively as to the facts establishing the cause of action and is proof of the amount claimed, and that in his opinion there is no defence to the action, he is enti'tled to judgment as claimed. However, the defendant can be allowed to de'fend where he is able to satisfy the Judge by his statement of defence or af'fidavit that

(1) he has a good defence on the merits of the case or

(2) he can disclose such facts as may be deemed sufficient to entitle him to defend the action generally,

(3) the claim does not come within the purview of Order 3 rule 4.

Causes involving interpretation of documents are not one of those named in Order 3 rule 4 as those excluded from the procedure under Order 10 rule 1. It is therefore a clear misunderstanding of the scope of order 10 rule 1 to contend as was done before us by Counsel to the appellants that the provisions of Order 10 rule 1 cannot be invoked to determine issues involving construc'tion of documents. This disposes of the third issue.

I now turn to the determination of the remaining two issues whether the Court of Appeal was right in holding that defendant had no arguable defend to the claim against him; and whether it is right in examining and construing the

documents subject-matter of the action.

It is appropriate for the determination of the issue whether there is a defence to the claim to determine whether the Court of Appeal was right in construing the document in evidence. It is common ground between the par'ties that the terms for the repayment of the loan are as stipulated in paragraph 5 of the Agreement.

Counsel to the appellant submitted to us that the finding of the Court of Appeal that \"One of the conditions of offering the loan was that it could be repaid with interest, within four years of the signature of the agreement\" is a reading into the agreement a term not made by the parties. He argued that the view of the Court of Appeal resulting in their taking a completely erroneous view of the real issue before it, which was whether on the totality of the evidence before the High Court, the appellant had made out a prima facie case. Counsel then submitted that the High Court was right in its finding based on the totality of the evidence that appellant has a defence to the ac'tion. - See Holman Bros. (Nig.) Ltd. V. Kigo (1980) 8-11 S.C. 43. It was contended relying on Woluchem V. Gudi (1981) 5 S.C. 291 that being a finding fact, the Court of Appeal ought not to interfere by making a fresh appraisal of the same evidence and thereby arriving at a different conclusion from the Court of trial.

Counsel to the respondent in supporting the decision of the Court of Appeal has argued that the Court below was justified in appraising the evi'dence before the trial Judge because he had failed in relation to the claim to do so.I agree entirely with this submission. It is well settled, that primarily it is the duty of the trial Judge to appraise evidence before it. But this duty is only inviolable where the evidence is one of hearing and seeing the witnesses where the impression of credibility and veracity is formed from oral tes'timony. In such cases it is inadvisable and indeed unwise for the appellate court to interfere with the impressions formed of such evidence by the trial Judge who heard and saw the witnesses, - See Ogundulu & Ors. V. Phillips & ors. (1973)1 NMLR. 267.1 do not think this rule applies to evidence on af'fidavit where similar considerations are not in issue. I think it is safe for the Court of Appeal or any appellate Court considering evidence on affidavit to evaluate such evidence where the trial Judge has failed to do so. I will go further to say that even where the trial Judge had evaluated evidence on affidavit which is not based on demeanour of witnesses and a court of appeal is satisfied that his conclusion is perverse and does not follow from the evidence, before him. I am satisfied and emboldened by the many decided cases covering the situation that the Court of Appeal is in such a situation free to come to a conclusion different from the trial Judge but consistent with the evidence before him See Shell BP Petroleum Dev. Co. of Nigeria Ltd. V. His Highness Pere Cole & Ors. (1978) 3 S.C. 183.

The affidavit evidence before the trial Judge related to undisputed facts as to the existence of the Agreement for the loan, its amount, the fact that the loan had been utilised, and that the purpose for which it was granted had been accomplished. There was also no dispute that the loan was to be repaid within a period of four years, as stipulated in the Agreement. The only area of apparent dispute was whether time is of the essence of the agreement, in other words the punctus temporis, when the agreement took effect.

In his consideration of the evidence before him the learned trial Judge had the letter of offer to the appellant dated 25th April, 1980 containing the terms and conditions for repayment. This offer was accepted by the appellant on the 29th April, 1980. In the absence of any other date stipulated by the parties for its taking effect, the contract became operative on the 29th April, 1980 when it was accepted. Counsel to the appellant should not therefore have had any doubt as to the date of its commencement. It is the date when the offer of the respondent was accepted by the appellant. I have no doubt that this was what the Court of Appeal meant when it observed that \"One of the conditions of offering the loan

was that it would be repaid with interest, within four years of the signature of the agreement.\" I find no ambiguity in the statement. The criticism by Counsel to the appellant whether the signature of the appellant or that of the respondent was meant for determining the operative date of the contract is clearly unjustified.

Mr. Joseph, counsel to the appellant has maintained in his argument be-fore us that time was not of the essence of the contract and that a construc'tion of clause 5 of the agreement does not suggest that it is. Mr. Kola Awodein, for the respondent maintains his argument in the court below that time was of the essence. He submitted in support of the judgment of the court below that the loan was repayable within four years of the operative date of the contract. It is immaterial whether payment was made from rental of the bungalows or from any other sources.

I have myself read the agreement and clause 5 in issue and find no am'biguity in its terms. It provides for the repayment in full within four years. either from (a) rental income (b) any other sources.

I think the Court of Appeal was justified in its construction of the clause to mean.

if the repayment could not be affected through rental income the respondent must off-set the loan through any sources, but within four years.

It is clear that the governing and controlling consideration is the repayment of the loan within four years. This could be made through rentals from the bungalows the purpose of the loan, or by any other means available to the appellant.

The operative date of the contract for the loan was on the 29th April. F 1980. The action for the recovery of the loan with interest was instituted on the 21st November, 1984 a period of more than four years. There is no aver'ment in appellant\'s affidavit that he has repaid the loan or any part of it with interest either within the period or outside the period of four years stipulated by the parties.

This now takes me to the main consideration in this appeal whether in view of the foregoing, the trial Judge was wrong to hold that the appellant was entitled to be allowed to defend the action as was held by the Court below.

Under the Order 10 procedure under which this action was brought, a defendant can only be allowed by the trial Judge to defend the action where he is satisfied.

(a) that the defendant has a good defence to the action on the merits, or

(b) that the defendant has disclosed such facts as may be deemed suf'ficient to entitle him to defend the action generally.

The object of the Order 10 procedure is to enable plaintiffs whose claim is unarguable in law and where the facts are undisputed, and it is inexpedient to allow a defendant to defend for mere purposes of delay to enter judgment in respect of the amount claimed - See Jones V. Stone (1894) A.C. 122

The maxim interest rei publicae Ut sit finis litium is the mother of this pro'cedure as in all forms of action which seek to reduce the volume of litigation.

In Nishizawa V. S. M. Jethwani Ltd. supra Aniagolu, J.S.C., in line with older decided cases stated the principles governing the determination of the granqt of leave to defendant to defend actions under Order 10 procedure.

1. That a defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting his obligation and indebtedness; and

2. that, on the other hand a plaintiff should not be permitted to shut out real (not a sharm) defence to an action by his clinging to the assertion that once the defendant has failed to 'show cause against such plaintiff's application by affidavit' as required by Order 10 ritle3, of Lagos High Court Rules, he is out of Court and must have a judgment signed against him no matter how genuine a defence he has disclosed by means other than by affidavit under that rule of the Order

It is clear from the above only a real defence and not a sham intended to delay and frustrate will be allowed. In fact the rule speaks of a good defence on the merits or such facts as may be deemed to entitle the defendant to de'fend the action generally. In my opinion, the two considerations refer to grounds of law or of fact which will enable the defendant to defend the claim on the merits.

Thus to allow a defendant a right to defend where plaintiff has shown his claim is prima facie unassailable, he must show that he has a fair case which is bona fide and that there is a substantial issue which ought to be tried.

I do not think it is the difficulty in the point of law involved or construc'tion of a question that should be considered. In my opinion once it is under'stood that the point of law if construed is unanswerable, the plaintiff is enti'tled to summary judgment - See Cow v. Casey (1949)1 K.B. 474 at p.481. In such a circumstance it is inconceivable that a defendant can establish a de'fence on the merits. The defendant ought to show that either on grounds of law or of some disputed facts which ought to be resolved he is entitled to de'fend the action. It is immaterial that he may ultimately lose the action - but there is a substantial question of law or fact which ought to be tried.

I have read both the statement of defence and the affidavit filed by the appellant, and I agree entirely with the Court of Appeal that \"there is fair dispute as to the meaning of the terms of agreement which ought to be submitted to the Court for determination. I also agree with the Court of Appeal that \"both the statement of defence and the affidavit filed by the respondent (defendant) have not disclosed a triable issue in answer to the appellant\'s statement claim.\"

There is therefore no defence to the respondent\'s claim for failure to repay the loan with interest within four years as he agreed to do when he took the loan.

All the grounds of appeal therefore fail and are dismissed. The appeal is accordingly dismissed. The judgment of the Court of Appeal entering judgment for the appellant in that Court and respondent in this Court is hereby affirmed.

I have read the judgment of my learned brother, Agbaje, J.S.C.; I agree with his reasoning and conclusion that this appeal he dismissed.

Appellant shall pay to the respondent the costs of this appeal assessed as N500 in this Court, and N300 in the Court below.

Judgment delivered by

Belgore, J.S.C.

I have read in advance the judgment of my learned brother, Agbaje, J.S.C., and I am in complete agreement with him that this appeal has no substance. I also for the reasons contained in the said judg'ment, which I adopt as mine, dismiss this appeal and make the same consequential orders as made therein.

Judgment delivered by

Wali, J.S.C.

I have had a preview of the lead judgment of my learned brother, Agbaje, J.S.C., and I entirely agree with it. For the same reasons contained in the judgment, I too hereby dismiss the appeal and adopt the consequential orders made therein, including that of costs.