

**IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT JABI  
BEFORE HIS LORDSHIP, HON. JUSTICE A.A.I BANJOKO-JUDGE  
DELIVERED ON THE 16<sup>th</sup> DAY OF APRIL 2019**

**SUIT NO. FCT/HC/CV/4315/2012**

**BETWEEN:**

- 1. FORT ROYAL HOMES LTD**
- 2. OTUNBA COLLINS ADEWUNMI.....CLAIMANTS**

**AND**

- 1. SUNTRUST SAVINGS AND LOANS.....DEFENDANTS**

**DR. SONI AJALA ESQ WITH NADIA OKA-OSHIOKHAMELE FOR THE  
CLAIMANTS**

**MOSES IDEH ESQ FOR THE DEFENDANT**

**JUDGMENT**

This is a Transferred Case from Hon. Justice A. O. Otaluka; wherein the Claimants first commenced this Action via an Originating Summons dated the 8<sup>th</sup> of August 2012, accompanied with an Affidavit filed in support, annexed Documentary Exhibits and a Written Address of Counsel. The Honourable Chief Judge subsequently transferred the Case to this Court.

However, this Court in a Ruling on a Preliminary Objection raised by the Defence, held that the Issues raised herein, were rather Contentious on Facts, and Arguments on the validity or place of the Documents sought to be interpreted, which were heavily challenged, could not be accommodated under an Originating Summons Mode of Application, holding further that the

Appropriate Mode of bringing the Action was under a Writ of Summons. The Suit was then transferred to the General Cause List, and Parties were ordered to file their Pleadings.

By a **Statement of Claim** dated the 10<sup>th</sup> of January 2013, filed by the Claimants, the Claimants are seeking the following Reliefs against the Defendant: -

1. A Declaration that **Clause 7 of 'other Conditions'** contained in the **Defendant's Letter of Offer of Commercial Mortgage Loan dated June 28, 2011** is an auxiliary condition, which is inferior to the overriding **'condition precedent to the drawdown'** and therefore cannot operate in isolation without substantial infraction of the operating conditions precedent to the drawdown.
2. A Declaration that **Clause 7 of 'other conditions'** as contained in the **Defendant's Letter of Offer of Commercial Mortgage Loan dated June 28, 2011** is unlawful, unenforceable; as it is inconsistent with the usual Norms and Practice of Mortgage Financing generally.
3. A Declaration that **Clause 7 of 'other conditions'** as contained in the **Defendant's Letter of Offer of Commercial Mortgage Loan dated June 28, 2011** is unconstitutional, unenforceable; unconscionable, repugnant to natural justice, equity and good conscience, contrary to public policy and above all, malicious.
4. A Declaratory that the **Act of Recalling the Loan Facility** regardless of the Plaintiff's compliance with the Monthly Repayment is unlawful, unconscionable, arbitrary, unethical, unenforceable and flagrantly contrary to the Spirit and intendment of the **Terms and Conditions** as contained in the **Letter of Offer of the Credit Facility**.
5. An Order of this Honorable Court perpetually restraining the Defendant from recalling in any manner howsoever the **N70, 000, 000.00 Commercial Mortgage Facility granted to the 1st Claimant for a 5year Tenor** until the 1st Claimant liquidates same in accordance with the **Repayment Schedule** as contained in the **Letter of Offer of the Commercial Mortgage Loan dated the June 28, 2011**.
6. An Order of this Honorable Court as unlawful, illegal, unconstitutional, null and void the 40% punitive interest rate charged on the 1st Claimant's account domiciled with the Defendant.
7. The Sum of N4, 500, 000.00 being the Cost of prosecuting this Suit.

In support of their Claims, the Claimants have filed a **Witness Statement on Oath deposed to by the 2nd Claimant**, dated the 10<sup>th</sup> of January 2013, as well as documents in support.

In response, the Defendant filed their **Statement of Defence/Counterclaim, Witness Statement on Oath** and accompanying Documents via a Motion on Notice dated the 17<sup>th</sup> of May 2013.

In their Counter Claim, the **Defendant/Counterclaimant** claims against the Claimants jointly and severally as follows: -

1. The Sum of **N67, 418, 028.48 (Sixty-Seven Million, Four Hundred and Eighteen Thousand Twenty-Eight Naira, Forty-Eight Kobo)** only due and payable by the Claimants to the Defendant/Counter Claimant, being the Repayment of Loan Facility granted to the Claimants by the Defendant/Counter Claimant.
2. Interest on the said Sum of **N67, 418, 028.48 (Sixty-Seven Million, Four Hundred and Eighteen Thousand Twenty-Eight Naira, Forty-Eight Kobo)** only at the Rate of 21% per annum as the agreed interest in the Loan Agreement from April 2012.
3. Interest on the Judgment Sum at the Rate of 10% per annum until the whole Judgment Sum is liquidated.
4. Cost of this litigation.

The Claimants then filed a **Reply to the Defendant's Statement of Defence** via a Motion on Notice dated the 1<sup>st</sup> of November 2013.

At the Trial, each Party called a Sole Witness in support of their Claims.

Now, the **Summary of the Case** is as follows:-

The 1st Claimant is a Company in the Business of Construction of Mass Housing Estates within the FCT, and the 2nd Claimant is its Managing Director and Chief Executive Officer.

The Defendant on the other hand is a Bank, a Primary Mortgage Institution duly registered by the Central Bank of Nigeria.

**According to the Claimants**, on the 28<sup>th</sup> of June 2011, the Defendants made an Offer of Commercial Mortgage Loan Facility in the Sum of Seventy Million Naira (N70, 000, 000.00) to them, with a Repayment Tenure of Five (5) years at an Interest Rate of 24%, with a Monthly Repayment of One Million, Eight Hundred

and Ninety-Three Thousand, Seven Hundred and Thirty-Five Naira, Nineteen Kobo (N1, 893, 735. 19).

The Offer was duly accepted by the 2nd Claimant as MD/CEO, and witnessed by his Wife, Mrs. Folakemi Collins Adewunmi on the 29<sup>th</sup> of June 2011.

In compliance with the Stipulated Terms and Conditions of the Offer, the Claimants procured and submitted the following Documents on the **15<sup>th</sup> of August 2011**: -

- a. A Board Resolution,
- b. A Letter of Indemnity,
- c. A Letter of Undertaking,
- d. A Letter to Authority to disclose Information,
- e. A Letter of Authority to appoint Professional Valuers,
- f. A Letter of Authority to the Defendant to dispose the Mortgaged Property in the Event of a Default, and
- g. A Letter to the Honorable Minister of the FCT for Consent.
- h. Statement of Net Worth of the MD/CEO (the 2nd Claimant)
- i. Personal Guarantee and Indemnity

Having complied with the Terms and Conditions of the Draw Down Disbursement, the Defendant availed the 1st Claimant with the Sum of Seventy Million Naira (N70, 000, 000.00) on the 9<sup>th</sup> of September 2011.

It is the Claimants' Claim that they effectively made Repayments, and the Defendant at no time complained of any default on their part, either in the Terms, Conditions or Covenants of the Loan Agreement.

The Claimants were then very surprised when the Defendant recalled the Loan on the 17<sup>th</sup> of April 2012, barely Six (6) Months after Disbursement, demanding that the Outstanding Balance of the Loan and the Accrued Interest be paid within a Period of Seven (7) Days.

There had been no Demand Notice, and the Offer Letter did not contain any Clause on Revocation or Repudiation during the Tenure of the Loan, except for the Fourteen(14) Day Time Limit of Acceptance of the Offer, failing which, the Offer would lapse, and the Claimants claimed they accepted and submitted the Offer on the 29<sup>th</sup> of June 2011.

Further, in response to the Defendant's Letter of Recall, the Claimants wrote back to the Defendant on the 19<sup>th</sup> of April 2011, and pleaded for an Extension Period of Sixty(60) Days to liquidate the Loan Facility, but the Defendant in their

Response Letter refused to oblige them with an Extension, and stipulated that the Debt be paid on or before the 30<sup>th</sup> of April 2012.

Thereafter, on the 4<sup>th</sup> of July 2012, the Defendant through her Staff Kehinde Adegboye sent an Electronic Mail to the 2<sup>nd</sup> Claimant, and demanded that the Loan Sum of Sixty-Nine Million, Two Hundred and Thirty-Seven Thousand, Nine Hundred and Forty-Four Naira Eight Kobo (N69, 237, 944.08) being the Outstanding Balance be repaid, and that the Loan would incur a 40% Default Penalty Charge for the Unpaid Principal.

According to Claimants, based on their Statement of Account issued to them by the Defendant, as at the 9<sup>th</sup> of July 2012, it showed a Consistent Commitment to the Loan Obligation from inception until the 17<sup>th</sup> of April 2012, the Date of Recall. This caused the Plaintiff to engage their Legal Counsel to write to the Defendant on the 5<sup>th</sup> of July 2012, demanding for the withdrawal of the Letter to Recall the Debt.

In reaction, the Defendant's Counsel in his Letter dated the 9<sup>th</sup> of July 2012, vehemently restated the Defendant's Position, and further asserted that their Client's Decision to exercise the Right conferred on them by the Offer Letter dated the 28<sup>th</sup> of June 2011, stemmed from **Clause 3.3** of the Commercial Loan Agreement.

As a follow-up to the Letters exchanged between the Legal Counsel, the Defendant's Counsel called the Plaintiff's Counsel on the Telephone and requested for a Meeting to explore an Amicable Settlement, which eventually took place on the 19<sup>th</sup> of July 2012 at the Defendant's Counsel's Office.

According to the Claimants, at the Meeting Frank Ikpe Esq. (Counsel to the Defendant) solicited for an Understanding and Cooperation of the Claimants' Counsel Dr. Soni Ajala to urge the Claimants to make a Lump Sum Re-payment because the Defendant was experiencing some Financial Challenges.

Consequent upon the Meeting, Counsel to the Plaintiff wrote a Letter to the Defendant's Counsel on the 20<sup>th</sup> of July 2012, informing Defence Counsel of the Claimants' Intention to seek both Regulatory and Judicial Protection against the Defendant's High Handedness, except the Defendant reverts to the Consensual Mortgage Loan Agreement Status Quo, as at the 30<sup>th</sup> of April 2012.

In a bid to restore the Mutual Trust of the Parties, the Claimants' Counsel, Dr. Soni Ajala held another Meeting on the 24<sup>th</sup> of July 2012 with the Defendant's Counsel, Frank Ikpe Esq. wherein the Claimants' Counsel proposed to make a

Bulk Payment of Twenty Million Naira (N20, 000, 000.00) to the Defendant, in view of the Defendant's alleged Liquidity Squeeze.

The Defendant's Counsel did not directly speak to the 2nd Claimant at the Meeting, but thereafter he sent the 2nd Claimant an SMS commending him of his Humanitarian Activities rendered to Widows, which he witnessed at the Plaintiff's Office Gate.

Whilst the Claimants were making arrangements to make the Payment, the 2nd Claimant received a Telephone Call on the 6<sup>th</sup> of August 2012 from the Commissioner of Police, X-Squad Unit, Nigeria Police Force Head Quarters, inviting him for an Interview in connection with the Loan.

The Claimants and their Counsel arrived the Office of the Commissioner of Police at 3:00pm and were confronted with a Petition against the 2nd Claimant dated the 27<sup>th</sup> of July 2012, (Three Days after their last meeting of the 24<sup>th</sup> of July 2012).

The Defendant, through their Counsel, Frank Ikpe Esq., wrote a Petition to the Inspector General of Police, which was received on the 31<sup>st</sup> of July 2012, alleging amongst others that the 2nd Claimant took a Loan of Seventy Million Naira (N70, 000,000.00) from the Defendant and absconded.

The Claimants were also confronted with a Similar Petition written to the Economic and Financial Crimes Commission (EFCC) dated the 27<sup>th</sup> of July 2012 and received on the 6<sup>th</sup> of September 2012, claiming that the 2nd Claimant absconded. Ever since these Petitions, the 2<sup>nd</sup> Claimant has been a Guest of the Nigeria Police Force and the EFCC for a purely Commercial and Civil Transaction that had no direct trace of Crime. The Nigeria Police Force and the EFCC's Harassment, Inquiries and Investigation orchestrated by the Defendant are Malicious and have occasioned a Severe Hardship, Anguish, Depression and Ridicule to the Claimants.

According to the Claimants, the Defendant is till date threatening to dispose of the Collateral, that is, the 1st Claimant's Property, noting that the Original Title Documents are in the Custody of the Defendant. This is notwithstanding the fact that the Defendant only Partly Financed the purchase of the Property, and the 1st Claimant never defaulted in complying with the Repayment Commitment.

Based on this, the Claimants caused their Solicitors to bring this Action against the Defendant for the Court to determine the ambit of their Contractual

Obligations in regard to the Offer Letter of the Commercial Mortgage Loan dated the 28<sup>th</sup> of June 2011, and further to forestall the Defendant's High Handedness and Arbitrariness in dealing with the Claimants in relation to the Loan Facility.

Finally, as a result of this Action the Claimants have incurred the Bill of Four Million, Five Hundred Thousand Naira (N4, 500, 000.00) for the Prosecution of this Case, and have made a Part-Payment in the Sum of Two Million, Five Hundred Thousand Naira (N2, 500, 000.00), tendering the Invoice as evidence.

**On the Defendant's part**, the Bank claims that one of the Conditions Precedent to the grant of the Loan Facility was that the 1st Claimant shall within Thirty (30) days of the grant give an Undertaking to domicile its Account with the Defendant Bank, which the Plaintiff was unable to comply with at first when the Offer Letter of the 28<sup>th</sup> June 2011 was issued, and it lapsed by Effluxion of time and was therefore no longer valid and legal.

When the Offer Letter of the 28<sup>th</sup> of June 2011 expired, the 1st Claimant re-applied on the 15<sup>th</sup> of August 2011, and another Offer Letter for a Commercial Mortgage Loan was issued to them on the 15<sup>th</sup> of August 2011. The Claimants accepted the Offer, and a Copy of the Undertaking to domicile the 1st Claimant's Account with the Defendant was done. Also, the Claimants forwarded amongst others the Required Documents on the 15<sup>th</sup> of August 2011, all of which was done in compliance with the Stipulated Conditions of the Offer.

However, the Defendant disagreed with the Claimants that there was no Time Limit, and that the Documents they forwarded were in compliance with the Condition Precedent to the Offer Letter and not to the Draw Down. They also maintained that the Loan Sum of Seventy Million Naira (N70, 000, 000.00), which was availed to the 1st Claimant on the 9<sup>th</sup> of September 2011, was based on the Offer of the 15<sup>th</sup> of August 2011.

According to the Defendant, the Offer of the 28<sup>th</sup> of June 2011 having been replaced by the Offer of the 15<sup>th</sup> of August 2011, is no longer binding upon the Parties, and based on the Offer now binding, which is that of the 15<sup>th</sup> of August 2011, the Claimants are in breach and have defaulted in the Repayment of this Loan Sum. The Particulars of their alleged breaches are as follows: -

- a. The Plaintiff failed to domicile their Account with the Defendant Bank as stated in its Letter dated the 15<sup>th</sup> of August 2011, titled 'Letter of Domiciliation of Business Proceeds'.

- b. The Plaintiff was not repaying the Loan as at when due
- c. The Agreed Monthly Principal and Interest of Three Million, Five Hundred and Ninety-Six Thousand, Nine Hundred and Ninety-Five Naira, Fifty-Seven Kobo (N3, 596, 995.57) was not complied with by the Plaintiff.

As a result of these Breaches, the Defendant exercised their Right to Recall the Loan conferred on them by the Loan Agreement in their Letter dated the 17<sup>th</sup> April 2012, based on the fact that the Claimants were in default with a Penalty Charge of 40% on the Account.

The Defendant denied the Claimants' Claim that their Account showed a consistent commitment to the Loan Obligation.

The Defendant admitted that they received the Plaintiff's Solicitor's Letter of the 20<sup>th</sup> of July 2012, and at the Meeting held at Plaintiff's Solicitor's Office, Dr. Soni Ajala, it was **agreed** and not proposed that the Claimants should make a Down Payment of Twenty Million Naira (N20, 000, 000.00) to the Defendant within Seven (7) Days from the 24<sup>th</sup> of July 2012, and thereafter a Payment Installment Plan would be structured to take care of the Balance.

Unfortunately, the Claimants were not able to meet with their Undertaking, and the Claimants citing the Defendant's Counsel SMS to the 2nd Claimant is a resort to Cheap Blackmail. Because of the Claimants' Intransigency and Evasiveness to pay the Twenty Million Naira (N20, 000, 000.00) the Defendant decided to report the matter to the Nigeria Police Force.

The Defendants urged the Court to disregard the Claimants claims in regard to the Petitions filed against them, as they have been ventilated via a Fundamental Right Enforcement Proceeding brought before this Court, which they lost. Also the Claimants have also sued the Defendant in **SUIT NO FCT/HC/CV/825/12** before the High Court of the FCT for the Defamation of Character.

The Defendant further contended that the Plaintiff is using the Judicial Process to scuttle the Repayment of the Loan, and have failed to establish a Case against the Defendant, and since the Claimants never complained about the Clause in the Loan Agreement, they cannot now complain about it when it time for Repayment.

**IN THE DEFENDANT'S COUNTERCLAIM**, the Defendant restated that the Claimants are in Breach, and added that one of the Requirements for the grant was an Undertaking to domicile its Accounts with the Defendant within 30days.

Further, the Plaintiff was unable to meet with this Condition, and by the 29<sup>th</sup> of July 2011, the Letter of Offer of the 28<sup>th</sup> of June 2011 elapsed by effluxion of time, and was no longer valid, and both Parties agreed to this fact.

Also, the Agreed Monthly Repayment of the Principal and Interest in the Sum of Three Million, Five Hundred and Ninety-Six Thousand, Nine Hundred and Ninety-Six Naira, Fifty-Seven Kobo (N3, 596, 995.57) was not complied with.

Aside of the 2nd Claimant's Personal Guarantee, he also undertook to indemnify the Defendant/Counterclaimant on the 15<sup>th</sup> of August 2011, against all losses that may arise from the Facility granted to the 1st Claimant. As a result, the Defendant demanded the 2nd Claimant to give effect to his Undertakings, which demand has not been met.

As at the 17<sup>th</sup> of April 2012, when the Loan was recalled, the outstanding Debt stood at Sixty-Seven Million, Four Hundred and Eighteen Thousand Twenty-Eight Naira, Forty-Eight Kobo (N67, 418, 028.48). Further, the Loan granted to the 1st Claimant was a Public Fund invested in the Defendant/Counterclaimant. The Claimants upon receipt of the Defendant's Letter to Recall the Loan, accepted their Indebtedness but pleaded for time.

**In RESPONSE TO THE DEFENDANT'S DEFENCE**, the Claimants disagreed with the Defendant that the Offer of the 28<sup>th</sup> of June 2011 lapsed as a result of the Claimants' failure to comply with the 30days Condition to domicile the 1st Claimant's Account with the Defendant, and as regards the Offer of the 15<sup>th</sup> of August 2011, it strangely imported a Term that was not contained in the Offer of the 28<sup>th</sup> June 2011.

The Narration of the Defendant that the 1st Claimant re-applied on the 15<sup>th</sup> of August 2011 is the Defendant's inclination to pervert the Cause of Justice, as the facts contained in the Defendant's purported Offer of the 15<sup>th</sup> of August 2011, which is unknown to the Claimants, is a contradiction with the facts elicited by them. The Defendant's Counsel in Page 2 of their Annexed Document in support, had attested to the Offer of the 28<sup>th</sup> of June 2011 to be the Loan Agreement that governed the Parties, and not the one of the 15<sup>th</sup> of August 2011, which they concocted.

According to them, the only Agreement executed between the Parties was the Commercial Loan Agreement dated the 28<sup>th</sup> of June 2011, which has never been revoked or cancelled.

The Claimants restated the Loan was being repaid as at when due, and they never defaulted in the Monthly Payments, and that the Defendant's averments are misleading.

As regards the payment of Twenty Million Naira (N20, 000, 000.00), the Claimants' restated that the Defendant and Claimants' Counsel never reached an agreement, but rather it was a Proposal made in good faith by the Plaintiff's Counsel taking into consideration the Defendant's Liquidity Constraint revealed by the Defendant Counsel.

More so, the Proposal was predicated on the Defendant reducing the Interest Rate contained in the Offer Letter. Whilst the Claimants were expecting the Defendants to comply with the terms, they received a Petition from the EFCC. As regards the Case of Fundamental Rights Enforcement referred to by the Defendant, it is a Subject Matter on Appeal.

In **DEFENCE TO THE COUNTER CLAIM**, the Claimants stated that the Offer of the 28<sup>th</sup> of June 2011 contained no such condition that the 1st Claimant must domicile its Account with the Defendant within 30 Days.

They restated that the Defendant's Claims that they re-applied 'or accepted any Offer on the 15<sup>th</sup> of August 2011, or that the Offer of the 28<sup>th</sup> of June 2011 expired by effluxion of time, were misleading and false facts.

Further, the Documents the Defendant claimed the Claimant submitted on the 15<sup>th</sup> of August 2011 was in furtherance to the Offer of the 28<sup>th</sup> of June 2011, and in compliance with the Condition Precedent to the Disbursement of the Mortgage Facility.

The Claimants claimed they did not commit any Breach of the Terms of the Loan Facility and denied further that the 2nd Claimant did not Guarantee or Indemnify the Defendant.

They also disagreed with the Defendant's Computation of the Outstanding Debt Balance, or that the Sum availed to them was from a Public Fund. They also denied, that they accepted the Recall of the Loan upon receipt of the Defendant's Letter to Recall.

The Claimants insisted on the Repayment Schedule as stated in the Letter of Offer of the 28<sup>th</sup> of June 2011, which must be followed to the letter.

Finally, it is the Claimants' Claim that the Defendants have no reasonable cause of action against them, and that the Counterclaim constitutes an Abuse of Court Process, whereof they urged the Court to dismiss the Defendant's Counterclaim.

**At the Trial**, which began on the 3<sup>rd</sup> of July 2014, the Claimants opened their Case and the 2nd Claimant, Otunba Collins Adewunmi, the Managing Director of the 1st Claimant, Fort Royal Homes Limited, testified as a Sole Witness and adopted his Affidavit filed in support of the Originating Summons, his Witness Statement, and Additional Witness Statement dated the 1<sup>st</sup> November 2013 filed in support of the Claimants' Claim.

He stated that he lives in Games Village Abuja, and tendered the following Documents: -

- a. Letter of Offer of Commercial Mortgage Loan, dated the 28<sup>th</sup> of June 2011, signed by the 2nd Claimant on all Pages as the Managing Director, and his Wife as a Witness admitted as **Exhibit A**.
- b. Letter dated the 17<sup>th</sup> of April 2012 Recalling the Loan facility admitted as **Exhibit B**.
- c. Copy of the Claimants' Response Letter to the Defendant's Letter of Recall, dated the 19<sup>th</sup> April 2011 admitted as **Exhibit C**.
- d. Defendant's Letter to the Claimants in Response to the Claimants' Plea for Extension, admitted as **Exhibit D**
- e. Certificate of Compliance with Section 84 and an Email received by Kehinde Adebayo as admitted **Exhibit E1 and E2**.
- f. Original Statement of Account, prepared by the Defendant, rendered to Plaintiff admitted as **Exhibit F**
- g. The Received Copy of the Claimants' Solicitors Letter to the Defendant admitted as **Exhibit G**
- h. Original Letter from Defendant's Counsel to the Claimants' Counsel in regard to the Recall of the Mortgage Facility admitted as **Exhibit H**
- i. Claimants' Counsel Response Letter to the Defendant Counsel's Letter dated the 20<sup>th</sup> of July 2012, admitted as **Exhibit I**
- j. Photocopy of a Petition written by the Defendant's Counsel to the EFCC against the 2nd Claimant on Grounds of Abscondment dated the 27<sup>th</sup> of July 2012, admitted as **Exhibit J**.
- k. Receipt of Payment for the Prosecution of the Action, admitted as **Exhibit K**.

Finally, the 2nd Claimant prayed the Court to grant their Reliefs, and Order the Bank to revert to back to the 24%, being the Terms of their Agreement.

**Under Cross-Examination**, the 2nd Claimant admitted that when he signed the Offer Letter of the 28<sup>th</sup> of June 2011, he was not under any compulsion, and that he complied with all the Conditions of the Loan before disbursement, even the

Domiciliation of Business Proceeds, where all the proceeds for One (1) year goes into the Bank, as stated in his Written Statement.

Further, at the time the Loan was recalled, the Account had in excess, Three Million Naira (N3, 000, 000.00) standing to its Credit, but when the Defendant recalled the Loan, all the Money in the Account was removed without the Claimants' Consent, despite the fact that the Claimants had made Monthly Payments in the Sum of Two Million, One Hundred Thousand Naira (N2, 100, 000.00), for Six (6) Months.

When asked how much of the Loan Facility was left outstanding, he answered that he could not say.

He was then shown **Exhibit B**, where the Defendant stated that the Outstanding was Sixty-Eight Million Naira (N68, 000, 000.00), and he answered in response, that it was in **Exhibit C** that he responded and requested for a Period of 60 Days Extension to repay the Debt. He explained that the reason he requested for the Grace Period was to avail him time to look into the Account.

Learned Counsel to the Defendant then caused the 2nd Claimant to read **Paragraph 2 of Exhibit C**, and he clarified further that the Plaintiff had Two Distinct Relationships with the Defendant; on one hand they had a Loan Facility, and on the other hand was the Sale of the Houses. Further, he believes that the reason for the Defendant's Recall of the Loan Facility was because he declined the Defendant's Offer to invest in the Bank, and he informed the Defendants that he was not interested in investing in Banking.

Learned Counsel to the Defendant referred the 2nd Claimant to **Paragraph 3 and 4 of Exhibit A 'Other Conditions'**, and he answered that the Loan was never in default, as the Defendant had deducted the Sum of Twelve Million Naira (N12, 000, 000.00) and he had a balance of about Three Million Naira (N3, 000, 000.00) remaining in the Account, yet the Defendant claimed that the Plaintiff still owed the Sum of Sixty-Eight Million Naira (N68, 000, 000.00).

The 2nd Claimant stated that he could not reconcile the fact that though the Offer Letter stipulated that he pay the Sum of One Million, Eight Hundred Thousand Naira (N1, 800, 000.00) per Month, the Defendant were debited the Account with the Sum of Two Million, One Hundred Thousand Naira (N2, 100, 000.00) monthly.

Learned Counsel then referred the 2nd Claimant to **Paragraph 22 of his Witness Statement on Oath**, where he promised to make a Bulk Payment of

Twenty Million Naira (N20, 000, 000.00). In response, he admitted that he made the promise, but it was as a result of the Defendant's Distress situation which he learnt from their Lawyer when he visited his Office, and based on this fact, he made a Bank Draft of Twenty Million Naira (N20, 000, 000.00) available, but before giving it to them he received an Email, and thereafter the Police and the EFCC visited his Office. They charged him for abscondment from his Office and his house. He was arrested by the Defendant, and the EFCC, and he had to call on his Lawyer to save him from their hands.

He re-stated that he is not in denial that he was granted the Loan, but disagrees with the Interest, and the Duration of Six (6) Months as opposed to the Five (5) year Term. He maintained that from the inception of the Loan, he never defaulted and the Account was always funded in excess of the Repayments, and he would always repay the Loan based on the Conditions that they agreed on.

**No Re-Examination** was done for this Witness and with his Testimony; the Claimants closed their Case.

**On the 14<sup>th</sup> of June 2017, the Defendant opened their Case**, and Mayokun Awolola, the Legal Officer of the Defendant Bank, testified as the Sole Defendant Witness. He adopted his Witness Statement on Oath dated the 17<sup>th</sup> May 2013, and tendered the following Documents: -

- a. The Offer Letter dated 15<sup>th</sup> August 2011 for Commercial Mortgage Loan made to the Claimants admitted as **Exhibit L1**.
- b. The Plaintiff's Board Resolution dated the 15<sup>th</sup> of August 2011, making the 2nd Claimant the Sole Signatory to the Account with the Defendant Bank, admitted as **Exhibit L2**.
- c. A Letter of Indemnity addressed to the Defendant Bank, written by the Claimants dated the 15<sup>th</sup> of August 2011, indemnifying the Defendant Bank of all Losses that may arise from the Facility, admitted as **Exhibit L3**
- d. A Letter of Undertaking addressed to the Defendant Bank, written by the Claimants dated the 15<sup>th</sup> of August 2011, undertaking to give priority to the Repayment of the Facility, admitted as **Exhibit L4**
- e. A Letter of Domiciliation addressed to the Defendant Bank, written by the Claimants, undertaking to domicile their Daily Business Proceeds in their Account with the Defendant Bank until the Facility is fully paid, admitted as **Exhibit L5**
- f. A Letter of Authority, addressed to the Defendant Bank, written by the Claimants, authorizing the Defendant Bank to dispose the Property in the

event of a Default in the Agreement, dated the 15<sup>th</sup> of August and admitted as **Exhibit L6**

- g. A Letter of Authority to Disclose Information, addressed to the Defendant, written by the Claimants, authorizing the Defendants to disclose the Plaintiff's Information to any Credit Reference Agency to determine her History and Rating, admitted as **Exhibit L7**
- h. A Letter of Authority to appoint Professional Valuers addressed to the Defendant, written by the Plaintiff, dated the 15<sup>th</sup> August 2011, admitted as **Exhibit L8**
- i. The Offer Letter of the Defendant, made to the Claimants for a Commercial Mortgage Loan, dated the 28<sup>th</sup> of June 2011, admitted as **Exhibit L9 (same as Exhibit A- this is the Defendant's Copy)**
- j. The Plaintiff's Application for the Mortgage Loan Facility to the Defendant dated the 10<sup>th</sup> of August 2011, admitted as **Exhibit L10** (*with strict emphasis as to weight*)
- k. A Certified True Copy of the Ruling of the High Court of the FCT in the Suit between Claimants and the EFCC before Hon. Justice S. Garba, admitted as **Exhibit M**

**Under Cross-Examination**, Mr. Mayokun admitted being conversant with the facts of the Case, stating that **Exhibits L9** and **Exhibit A** are Counterpart Copies. He identified the 2nd Claimant's Acceptance on 29<sup>th</sup> June 2011, in the Acceptance Column of **Exhibit L9**, which was witnessed by the 2nd Claimant's Wife, as the Accepted Conditions Precedent to the Loan Grant, and that the Parties had a Written Relationship, wherein the Loan's Tenure as seen in **Exhibit L9** was for Five (5) years (being Sixty (60) Months).

*On the Question of how much of the Loan Sum the Claimants had repaid, he answered that he did not know how much was on Record. He confirmed also, that the Claimants submitted Evidence of Payment of Borrower's Equity in the sum of Fifty-Six Million Naira (N56, 000, 000.00), as stated on face of Exhibit L9.*

However, according to him, the Offer in **Exhibit L9** lapsed owing to the failure of the Claimants to fulfill the Conditions Precedent to Draw Down. It is his contention that the Claimants were not informed of the said lapse in writing, but they reapplied anyway.

He was then asked to show where in **Exhibit L9** it mentioned that the Offer would lapse after Acceptance, and he answered that there was no Clause, but that the Singular Document provided Condition Precedents subject to the grant or disbursement of the Loan, and if the Claimants met with the Conditions, the

Offer would subsist. But, because the 1st Claimant was unable to supply all the Required Documents, and comply with the Conditions, the Claimants reapplied, as the Offer could not be taken in Piecemeal.

Learned Counsel to the Claimants then showed the Witness **Exhibit L1**, the Offer Letter of 15<sup>th</sup> August 2011, and he stated that it was accepted on the same day on behalf of the 1<sup>st</sup> Claimant by the 2nd Claimant and witnessed by Chuks Ekure who signed.

The Witness confirmed that the 2nd Claimant signed on all the Pages of Exhibit L9, the Offer Letter of the 28<sup>th</sup> of June 2011, but did not do so in Exhibit L1, the Offer Letter of the 15<sup>th</sup> of August 2011, which was witnessed by Ekure Chuks and not the 2nd Claimant's Wife. Further, **Exhibits L1 - L7** was not in compliance with the Conditions Precedent for in **Exhibit L9**, the Offer Letter of the 28<sup>th</sup> of June 2011.

He confirmed that he prepared **Exhibit F**, the Statement of Account of the Claimants from the Defendant Bank, and the Claimants were asked to supply the Defendant with Evidence of Payment of Equity Contribution to the Abuja Investment Property sold by Abuja Investments to the Plaintiff.

The Loan Sum of Seventy Million Naira (N70, 000, 000.00) was disbursed on the 9<sup>th</sup> of September 2011 and the Claimants began Repayments 30days after. Then on 7<sup>th</sup> of October 2011, there was the Maturing Loan Obligation, and the Claimants failed in the Loan Repayment.

In the Column of the Statement of Account there is an indication of a Debit Column of N2, 421,078 kobo, while in the Credit Column, it is Nil on the Loan Repayment. On 9<sup>th</sup> of November 2011, the Claimants' Loan Maturity Installment is Nil; the Account fell into a Debit, though the Amount is not stated, the Defendant debited the Account because the Claimants' Account was not Funded. On the 9<sup>th</sup> of December 2011 it was in the same Debit, and as such, the Loan fell due.

The Loan Repayment was meant to be effected as at when due, as clearly stated in **Clause 3** under Conditions of the Offer, and on the Day it fell due, the Account was not Funded, therefore showing a Breach of the Loan Agreement. As stated in **Exhibit B**, it was recalled on the 17<sup>th</sup> April 2012, however, there were no Written Demands made to the Plaintiff but only Oral Demands made via Telephone Calls.

The Witness was further shown **Exhibits E1 and E2**, the Email and its Certification, dated the 4<sup>th</sup> of July 2012, which had been sent subsequent to the Official Date of Recall, the 17<sup>th</sup> of April 2012.

He was also referred to the Interest Rate of 21%, and **Exhibits G and H** the Correspondence Letter written by the Defendant's former Solicitor dated the 9<sup>th</sup> July 2012, and in response, answered that an Extraneous Matter cannot validate a Written Agreement. According to him, the External Solicitors conducted due diligence, but their Report is not before the Court.

When confronted with **Exhibit L10**, that Chuks Ekure was neither a Staff Director nor Officer of the Plaintiff Company, this Witness stated that a Letter from the 1st Claimant held out Chuks Ekure as its Signatory in the Capacity of an Executory Director, and he also attested to other Documents.

Finally, he confirmed that in regard to **Exhibit J**, the Complaint to the EFCC, it was in regard to a Civil Transaction, but contended that the incidents that led up to the issues, made the Defendant to believe that the Claimants Absconded, and their Report was not malicious.

There was no **Re-Examination of the Witness**, and on this note the Defendant/Counterclaimant closed its Case.

**At the Close of the Trial**, the Parties filed their Respective Final Addresses. The Defendant filed its Final Written Address dated the 24<sup>th</sup> of October 2017 out of time via a Motion on Notice also dated same. After setting out a Brief Summary of Facts, they formulated Three Issues for Determination, namely: -

1. Whether the Parties can resile from the Contract they Voluntarily entered into.
2. Whether from the Evidence adduced, the Claimants are entitled to the Reliefs sought.
3. Whether the Defendant has proved its Counterclaim.

In response, the Claimants/Defendants to the Counterclaim filed their Final Address dated the 20<sup>th</sup> of October 2017 via a Motion on Notice for Extension of Time also dated same. After an Extensive Introduction and an Exhaustive Summary of the Facts, the Claimants also formulated Three Issues for Determination, namely: -

1. Whether from the Preponderance of Evidence, the Claimants established that **Exhibit A** (Offer of 28/6/2011) and not **Exhibit L1** (Offer of 15/8/2011) is the Regular and Valid Contractual Instrument between the Claimants and the Defendant with regard to the Commercial Loan of N70, 000, 000.00 granted the Claimants by the Defendant
2. Whether taking into consideration the totality of Evidence adduced by the Parties in the Proceedings, the purported Recall Letter (**Exhibit B**) of the Mortgage Facility by the Defendant is not contrary to the Contractual Terms as contained in **Exhibit A**, and therefore invalid, null, void and ought to be set aside
3. Whether with regard to the State of Pleadings and Evidence adduced by the Parties in this Proceeding, the Claimants are not entitled to the Reliefs sought.

In response to the Issues raised by the Claimants, the Defendant filed a Reply Address dated the 3<sup>rd</sup> of May 2018, wherein Learned Counsel to the Defendant formulated no Issues, but rather responded to all the Issues raised by the Plaintiff.

All Counsel Arguments and Submissions are duly noted on the Record.

After a Careful Consideration of all the Issues duly canvassed across the Divide, the Court finds Three Issues for Determination, and they are: -

- 1. Whether the Binding Contractual Agreement between the Parties on Record is affected by their diverse contentions as to the Validity Dates of the Letters Offer in Exhibit A and Exhibit L1 before the Court;*
- 2. Whether the Claimants were in Breach of the Contractual Obligation to the Mortgage Loan Facility availed to them by the Defendant*
- 3. Whether by the Defendant's Letter of Recall dated the 17<sup>th</sup> of April 2012, written to the Claimants, the Loan Facility in the Sum of Seventy Million Naira (N70, 000, 000.00) was validly recalled, making the Principal Sum and Interest immediately payable.*

It is initially important to understand the nature and elements of a Binding Contract, which are: (a) **an Unmistakable, Unequivocal and Precise Offer**; The Offeror must have completed his own share in the formation of the Contract by finally declaring his own readiness to undertake an Obligation upon certain

Conditions, leaving to the Offeree the Option of Acceptance or Refusal. See the Case Authorities of **MAJEKODUNMI VS NATIONAL BANK OF NIGERIA (1978) 3 SC 119; UNION BANK OF NIGERIA LTD VS OZIGI (1991) 2 NWLR (PT 176) 677; ORIENT BANK (NIG) PLC VS BILANTE INTERNATIONAL LTD (1997) 8 NWLR (PT 515) 37; OBAIKE VS B.C.C PLC (1997) 10 NWLR (PT 525) PG 435.**

**(b) An Unconditional Acceptance;** which is an Act of Compliance on the Part of the Offeree with the Terms of the Offer. It is the Element of Acceptance that underscores the Bilateral Nature of a Contract. An Acceptance of an Offer may be demonstrated: (a) by the Conduct of the Parties, or (b) by their Words, or (c) by the Documents that have passed between them traceable to the Transaction to constitute Acceptance. See **B. F. I. GROUP V. BUREAU OF PUBLIC ENTERPRISES (2007) LPELR-8998 (CA); ARBUCLY SMITH & CO. LTD V. ATTORNEY-GENERAL (1952) 20 NLR 68; BRODYEN V. METROPOLITAN RAILWAY CO. (1877) 2 AC 666; COLLEGE OF MEDICINE V. ADEGBITE (1973) 5 SC 149 AT 163.**

**(c) Consideration;** in the Case of **CURRIE VS MISA (1875) LR 10 EX 153, AT 162, LUSH J** stated that a Valuable Consideration, in the sense of the Law, may consist in some Right, Interest, Profit or Benefit, accruing to the One Party, or Some Forbearance, Detriment, Loss or Responsibility given, Suffered or Undertaken by the Other **(d) Capacity to Contract;** there are certain instances in which the Law limits the Capacity of Certain Persons to bind themselves by Contract, and it is purely for their Protection, and this category of Protected Persons includes Minors (under the age of 18 years), Unincorporated Associations, Persons lacking Mental Capacity and Drunken Persons, see the Cases of **LIPKIN GORMAN VS KARPNALE LTD (1991) 2 AC 548, and R VS OLDHAM MBC (1993) 1 FLR 645, 661-2 PER SCOTT LJ** and **(e) An Intention to Create a Legal Relationship;** the Presumption in Law is that Parties to Commercial Agreements do intend to create Legal Relations, but may be rebutted by an Express Term in the Contract to the Contrary, See the Case of **ESSO PETROLEUM LTD VS COMMISSIONERS OF CUSTOM AND EXCISE (1976) 1 WLR AT 1.** There must be Mutuality of Agreement and Mutuality of Obligation indicating Consensus Ad Idem as regards the Terms and Conditions freely and Voluntarily agreed upon by them. Reference on this point is made to the Case Law Authorities of **ODUTOLA VS PAPERSACK (NIG) LTD (2006) 18 NWLR PT 1012 AT 470 AND BILANTE INTERNATIONAL LTD VS NDIC (2011) LPELR-781 (SC) AND BFI GROUP CORPORATION VS BUREAU OF PUBLIC ENTERPRISES (2012) LPELR-9339 S.C.**

It is only when the above stated factors are established, that the Court would hold that the Agreement or Contract is binding and enforceable by both Parties. Reliance is placed on the cases of **LAMOUREU VS BURRILLVILLE RACING ASSOCIATION 91 R.1 94, 161 A, 2 d 213 AT 215; YARO V. AREWA CONSTRUCTION LTD (2007) 16 NWLR (PT. 1063) 333 AT 377-378; PETROLEUM TRAINING INSTITUTE V.UWAMU (2001) 5 NWLR (PT. 705) 112; OBAIKE V. B.C.C. PLC (1997) 10 NWLR (PT. 525) 435; ORIENT BANK NIG PLC V. BILANTE INTERNATIONAL LTD. (1997) 8 NWLR (PT. 515) 37; AND OKUBULE V. OYAGBOLA (1990) 4 NWLR (PT. 147) 723.**

In this instant case, the Court is duty-bound to consider all the Evidence led; the Documentary Evidence tendered and accepted by the Court as well as the Oral Testimony in line with pleaded facts.

Based on **Paragraphs 5 and 6 of the Claimants' Statement of Claim**, the 1st Claimant accepted the Defendant's Offer of a Loan Facility in the Sum of (Seventy Million Naira) N70, 000,000.00. The Defendant on their part, have confirmed these assertions in **Paragraph 3 of their Statement of Defence and Counterclaim**. Therefore, it is established that there exists a Contractual Relationship and Obligation between the Parties borne out of the Loan Facility, which is vested with reciprocal Legal Obligation or Obligations to do or not to do specific actions.

From this point on, the Parties differed in their narratives.

The Claimants have presented **Exhibit A**, a Letter of Offer of Commercial Mortgage Loan, dated the 28<sup>th</sup> of June 2011 signed by the 2nd Claimant (as Managing Director/Chief Executive Officer) in the Acceptance Column, which was witnessed by his wife. It is also clear that the 2<sup>nd</sup> Claimant affixed his signature on ALL Pages of the Offer Letter. The Claimants maintained that this Offer in **Exhibit A**, and NONE OTHER, was the Prevailing and Extant Offer Letter issued by the Defendant governing the Terms and Conditions of the Loan Agreement. Furthermore, it was ONLY based on this Offer Letter in **Exhibit A**, dated the 28<sup>th</sup> of June 2011, that their Acceptance was given.

On the part of the Defendant, they presented different facts. They admitted issuing **Exhibit A** to the Claimants in the first instance, but stated that due to the Non-Compliance of the Claimants to satisfy a Term of the Offer Letter, the Offer Letter in **Exhibit A**, dated the 28<sup>th</sup> of June 2011 lapsed. Subsequently, the

Claimants re-applied for the Loan Facility, and they were issued yet another Offer Letter in **Exhibit L1**, dated the 15<sup>th</sup> of August 2011. According to the Defence, it was on the strength of the Second Offer Letter that they disbursed the Sum of Seventy Million Naira (N70, 000, 000.00) to the 1st Claimant.

In their Reply, the Plaintiff vehemently disagreed with the Defendant's contentions, distancing themselves from receiving or accepting the Offer Letter in **Exhibit L1**, dated the 15<sup>th</sup> of August 2011. They also disagreed with the Terms and Conditions as contained in **Exhibit L1**, to the effect that they did not agree with such Terms and Conditions.

On this Premise, the Vital Question to be asked is, **WHICH** of the Contending Letters of Offer, between **Exhibits A and L9**, dated the 28<sup>th</sup> of June 2011, and **Exhibit L1**, dated the 15<sup>th</sup> of August 2011 is the Valid and Extant Offer before the Court?

A Critical Analysis of **Exhibits A&L9, and L1** are as follows: -

<b>EXHIBIT A&amp; L9-DATED 28<sup>TH</sup> JUNE 2011</b>	<b>EXHIBIT L1-DATED 15<sup>TH</sup> AUGUST 2011</b>
Addressed to the 1st Claimant	Same
Titled - Offer of Commercial Mortgage Loan	Same
Loan Amount is Seventy Million Naira	Same
The Purpose of the Facility is to Purchase a Four Bedroom Semi-Detached Duplex at Games Village	Same
The Monthly Repayment of N1, 893, 735.19	The Monthly Repayment of N3, 596, 995.57
Source of Repayment - Business Income	Same
Loan Tenure - 5years	Loan Tenure - 2years
Fees- 1% Admin, 1% Processing and 1% Legal Fees	Same
Interest Rate - 24% per annum	Interest Rate - 21% per annum
COT - N5 per Mil	Same
<b>Security/Comfort</b>	
Legal Mortgage over the Property located at Fairway Estate, Games Village, Abuja	Legal Mortgage over the Property located at Fairway Estate, Games Village, Abuja and <b>Certificate of Occupancy for Airport Rd Property</b>
Notarized Personal Guarantee	Same
Statement of Net worth of MD/CEO	Same
Monthly Post-dated Cheques to Cover Repayment of Loan Amount (Principal & Interest)	Same
Domiciliation of Business Proceeds	Same
<b>Conditions Precedent to Draw Down</b>	

The Facility will become available to the Borrower on receipt of the following:-	The Facility will become available to you on receipt of the following:-
Submission of Duly Executed Offer Letter accepting the Terms and Conditions of the Facility	Same
Upfront Payment of Fees	Same
Execution of SunTrust Savings and Loans Agreement	Same
Execution of Deed of Legal Mortgage in favour of SunTrust Savings and Loans Ltd	Same
Valuation Report on the Landed Property pledged as Collateral	Same
Submission of all necessary documents to perfect a Legal Mortgage	Same
Board Resolution accepting this Facility, undertaking to repay the Facility without default	Board Resolution accepting this Facility, undertaking to repay the Facility without default <b>and Consenting to the Mortgage</b>
None	Board Resolution to buy the Property from the Seller
Tax Clearance Certificate of Company	Tax Clearance of <b>the MD</b> and Company
Domiciliation of One (1) Month Repayment in his Sun Trust Account	Same
Submission of Evidence of Payment of Borrower's Equity <b>(N56, 000, 000.00)</b> for the Property	Submission of Evidence of Payment of Borrower's Equity for the Property
Submission of a Letter seeking Consent to Mortgage Property to Sun Trust Savings and Loans Ltd addressed to the Honourable Minister of FCT Abuja	Same
Letter of Authority to Dispose Landed Property pledged as Collateral in the Event of default	Same
Domiciliation of Original Title Documents with the Bank	Same
Letter of Domiciliation of Business Proceeds	Same
Notarized Personal Guarantee of MD/CEO of the Company	Same
Submission of Letter of Authority authorizing SunTrust to Debit their Account for Payment of Comprehensive Insurance Policies from any of SunTrust's Approved Underwriters in which SunTrust's Interest is noted as First Loss Payee: a) Property Insurance and b) Mortgage Indemnity Guarantee/Protection	Same
Submission of Duly signed Consent Form authorizing SunTrust to disclose your Information to Credit Reference Agencies to determine your History and Rating	Same

Submission of Irrevocable and Unconditional Letter of Authority granting SunTrust or any of its Appointed Professional Valuers the Unrestricted Access to Re-evaluate the Property periodically	Same
Submission of a Letter seeking Consent to Mortgage Property to SunTrust Savings and	<b>None</b>
<b>Other Conditions</b>	
All Legal and other Fees associated with this Facility shall be borne by the Borrower	Same
The Applicable Interest Rate shall be 24% P.A. on a Reducing Annuity for 5 years which is subject to change within the Duration of the Facility	The Applicable Interest Rate shall be 21% P.A. on a Reducing Annuity for 2 years which is subject to change within the Duration of the Facility
On the Default of Repayment, the Facility shall become due and Payable Immediately	Same
In the Event of Default, the Bank shall reserve the Right to Apply a Penalty Rate on the Sum due for the Period during which the Sum was not paid	Same
The Borrower shall not let/lease/rent the Property without the prior consent of the Bank. A Breach of which will make the Borrower liable to the Total Outstanding Loan Immediately	Same
The Bank has the Authority to foreclose, realize and sell the Collateral (i.e. the Property) if the Borrower is in default of any Terms and Conditions of this Offer	Same
The Bank reserves the Right to recall the Loan with all Accrued Interests at any time it deems fit within the Tenor of the Loan	Same
Disbursement of Funds is subject to availability of Liquidity in the Bank	Same
The MD/CEO shall undertake to Indemnify the Bank against all losses that may arise from this Facility	Same
The MD/CEO will undertake to give priority to the Repayment of the Facility	Same
Voluntary Prepayment is permitted during the Term of the Facility subject to 7Days prior Notice and Payment of 3% Processing Fees	Same
This Agreement shall take effect on the Acceptance Date of its Terms unconditionally	Same
<b>Expenses</b>	
All Costs and Legal Expenses arising from the Facilities or of enforcing the Terms and	Same

Conditions herein, should such Occasion ever arise shall be claimed from you	
<b>Waiver</b>	
No Failure or Delay by SunTrust Savings and Loans in exercising any Remedy, Power or Right hereunder shall operate as a Waiver or Impairment thereof nor shall it affect or impair any such Remedies, Power or Rights in respect of any other Subsequent Default	Same
<b>Acceptance</b>	
This Offer remains Valid for 14 (Fourteen Days) from the Date it is Communicated to you, after which it will lapse. Please indicate your Acceptance of the Above Terms and Conditions by Signing and Returning to Sun Trust Savings and Loans, this Offer Letter.	Same
<b>Signed By</b>	
For SunTrust: Bunmi Naiyeju-Adelaiye (Legal Adviser), AND Ado Sanusi (Business Development)	Same
<b>Memorandum of Acceptance</b>	
I/WE FORT-ROYAL HOMES LTD hereby accept the Terms and Conditions contained in this Offer Letter for Commercial Mortgage Loan Facility of N70, 000, 000. Only on this Day dated 29 <sup>th</sup> June 2011 of which this is a Copy	I/WE FORT-ROYAL HOMES hereby accept the Terms and Conditions contained in this Offer Letter for Commercial Mortgage Loan Facility of N.....only on this Day dated.....2011 of which this is a Copy
Signed Name: Otunba Collins Adewunmi Designation: MD/CEO Dated 29 <sup>th</sup> June 2011	Signed Name: Otunba Collins Adewunmi Designation: MD/CEO Dated 15 <sup>th</sup> August 2011
Witness: Name: Mrs Folakemi Collins Adewunmi Address: Block B16 Flat 2 Games Village Abuja	Witness: Name: Ekure Chuks Address:Fort Royal Homes

From the Above Analysis, it is clear that **Exhibits A and Exhibit L9** are CounterpartCopies of the Same Document.

However, **Exhibit L1** whilst Similar as to the Loan Sum, Purpose, Parties, Conditions of Draw Down, Other Conditions, Acceptance, Waiver Clauses, Signatures of Officers of the Defendant Bank and that of the 2<sup>nd</sup> Claimant, have certainDisparities as observed by the Court, which areas follows: -

1. **The Dates; Exhibits A and L9** were made on the 28<sup>th</sup> of June 2011, whilst **Exhibit L1** was made on the 15<sup>th</sup> of August 2011

2. **The Difference in the Loan Tenures; Exhibits A and L9** stated **5years**, whilst **Exhibit L1** stated **2years** respectively
3. **The Collateral; Exhibits A and L9** stated the Property Located at Fairway Estate, Games Village, Abuja only, but **Exhibit L1** stated the Property Located at Fairway Estate, Games Village, Abuja, **but** added the Certificate of Occupancy for Airport Rd Property
4. **The Monthly Repayment Sum; in Exhibits A and L9** it is N1, 893, 735.19, whilst in **Exhibit L1** it is N3, 596, 995.57
5. **Interest Rate; in Exhibits A and L9** it is 24%p.a., but in **Exhibit L1** it is at 21%p.a.
6. **Some Conditions Precedent to Draw Down; in Exhibits A and L9** it stipulated Evidence of Borrowers Equity in the **Sum of N56, 000, 000.00** amongst other Conditions, but **Exhibit L1 did not** stipulate the Sum stated above, but went further in its Conditions to stipulate:**a)** a Board Resolution accepting the Facility, undertaking to repay without default and Consenting to a Mortgage **b)** the Tax Clearance of not only the Company but of that of the Managing Director
7. **The Memorandum of Acceptance Column; in Exhibits A and L9**, the 2nd Claimant signed as the MD/CEO, the stated accepted Amount is N70, 000, 000. 00 and it was accepted on the 29<sup>th</sup> of June 2011. In **Exhibit L1**, the 2nd Claimant's Name and Signature is clearly seen on the Document, the amount accepted is not stated, albeit it was signed on the 15<sup>th</sup> of August 2011.
8. **The Witness Column; in Exhibits A and L9** the Document was Witness by Mrs Folakemi Collins Adewunmi (who the 2nd Claimant introduced as his Wife), but in **Exhibit L1**, it was Witnessed by Ekure Chuks (who the Defendant contends is a Staff of the 1st Claimant, and whose name and signature appears on the 1st Claimant's Documents)

From the Pleadings, the Claimants in **Paragraph 2 of their Reply** to the Statement of Defence and Counterclaim of the Defendant stated that **Exhibit L1**, the Offer Letter dated the 15<sup>th</sup> of August 2011 is unknown to them. They have discounted this Document as a Total Misleading Falsehood, and Concoction, that strangely imported Terms not contained in the Offer Letter of the 28<sup>th</sup> of June 2011. Furthermore, they strongly maintained that they neither reapplied for any Loan nor accepted any Offer of a Commercial Mortgage Loan on this Date, and that it was an Afterthought.

Interestingly enough, when the 2<sup>nd</sup> Claimant took the Stand to Testify, the Defence Counsel **NEVER** questioned him on this Document; particularly with regard the Re-Application, and his Signature on **Exhibit L1**.

Whilst on the other Hand, the Defendant claims the Offer Letter of the 28<sup>th</sup> of June 2011, on which the Claimants leaned heavily on, lapsed to the knowledge of the Claimants and they had subsequently re-applied on the 15<sup>th</sup> of August 2011, for another Loan Facility, necessitating the Defendant issuing a Second Offer Letter on the 15<sup>th</sup> of August 2011, being **Exhibit L1**.

It is pertinent to note that the Defence Witness, whilst testifying that the First Offer had lapsed, confirmed that the Claimants were not informed in writing, but orally. It is also worthy of note, that the Defendant did not establish how the Claimants came to know that the Offer of the 28<sup>th</sup> of June 2011 had lapsed. This Witness also noted that there was no Specific Clause in **Exhibit L9** that referred to a Lapse in the satisfaction of the Terms of Offer. Conveniently, there was no Written Notification of the Lapses and Demand for the Required Documentation in fulfillment of the Conditions Precedent to Draw Down. There was no satisfactory demonstration of a departure from the Terms of the Offer as contained in **Exhibits A and L9**.

The Letter of Recall in **Exhibit B**, did not specifically state which Offer and Loan Facility it was referring to, and neither did it say in anyway what Breach Occasioned the Recall in the first instance.

More strangely, there was no Written Complaint and Demand Notice for Late Payments on the Loan, and critically, there was no Written Demand for the Sum of N3, 596, 995.57, **ANYWHERE** in the Evidence presented by the Defence. As a matter of fact **Exhibit E1 and E2** relied upon by the Defence, which are the Certification and Email dated the 4<sup>th</sup> of July 2012 only referred to a Regularisation of his Account with the Sum of N69, 237, 944.08, reminding the Claimant of the Penalty Charge. Therefore, this Exhibit does not confirm the Sum of N3, 596, 995.57.

Yet another important factor is that the Defendant as Custodian of the Account of the 1<sup>st</sup> Claimant ought to have presented a Comprehensive Statement of Account, but the only Evidence of this Account is as contained in the Statement of Claim, and its attached Documents. Incidentally, this attached Statement of Account, is more comprehensive but it was not tendered into Evidence. However, the Court who is seized of all Documents filed before it notes it.

Now, the Claimants tendered the Certified True Copy of its Bank Statement with the Defendant as **Exhibit F**.

At the start-off, it is important to note that the Claimant had no Power of Deductions from its Account as regards the Repayment of the Loan. Logically, it is expected that the Defendant would automatically deduct whatever the True Figure of the Monthly Repayment Due on the Loan. There is nowhere the Sum of N3, 596, 995.57 is reflected in the Statement of Account, and if by a Combination of Figures, this was deducted, the Burden fell on the Defendant to demonstrate this Figure. There was no demonstration, and the Court notes that the Loan of Seventy Million Naira (N70, 000, 000.00) granted was posted and credited into the Account on the 9<sup>th</sup> of September 2011. It can also be seen that Fees of 3% on the Commercial Mortgage was deducted. It is therefore clear, that the Agreement between the Parties had formally and practically commenced. The Court notes that there were Six (6) instances of the Maturing Loan Instalments on or about the Period for Repayments, but one singular uniting fact, is the **Figure Deducted**, which is the Sum of N2, 000, 421. 78. This amount is **NOWHERE** comparative to the Sum of N3, 596, 995.57.

It is however foreseeable that the Loan Repayment Sum stated in **Exhibit A**, in the Sum of N1, 893, 735. 19 could with added Charges and Interests, amount to the Sum of N2, 000, 421. 78. If this were not so, the Defence would certainly have presented any Letter or Email of Complaint written to the Claimants that there were Persistent Underpayments on the Loan. The Defence Witness had agreed that the Relationship was formal, in that it was in Writing, and had stated that contrary to the expectations of a written complaint and demand, they had orally communicated the Breach to the Claimants. Who communicated, and to whom the Communication was made to, and the Number of Complaints, rests in the Bosom of the Defendant. Therefore, in the absence of any Evidence or Acquiescence by the Defendant, the Court can only conclude that the Repayment Structure, Solely Effected by the Defendant was the Correct Monthly Deduction. There was also Evidence or Admittance of Condonation of this Breach by the Defendant. If there had been Condonation, then they would be estopped by Conduct and by Performance.

Despite the Premature Settlement of the Loan on the 8<sup>th</sup> of February 2012, wherein the entire Amount Due on the Loan was Debited and Re-Granted on the Same Date, albeit of a Slightly Reduced Value, the Exact Amount Monthly Deductions of the Sum of N2, 000, 421. 78 still continued.

Further, the Court refers to the Letter of Correspondence from the Defendant's Lawyer dated the 9<sup>th</sup> of July 2012, in **Exhibit H**, which was a Specific Response to **Exhibit G**, the Claimant's Counsel's Letter dated the 5<sup>th</sup> of July 2012. At **Paragraph 2 of Exhibit H**, it is instructive that it was written thus "***Not only have we carefully perused your said Letter under reference, but we have also critically analyzed and dissected same and it is obvious from your response that your reaction flows out of misinformation or abridged information, backed by half-truths, dished out to you by your Client***"

Having taken the time for a careful perusal and critical analysis, as well as conducting a dissection, it was expected that Learned Counsel representing the Defence present a Clear and True Picture of the Position of the Defence **AFTER** the Recall. Therefore, it was most surprising to say the least that this same Counsel Mr. Frank Ikpe Esq., in **Paragraph 5 of Exhibit H**, went on to say thus "***Our Client's decision to exercise the Right conferred on it by the Offer Letter of 28<sup>th</sup> June (Paragraph 7 of other Conditions) stems from the facts contained and backed by Clause 3.3 of the Commercial Loan Agreement, Clause 6 and 8 of the Statement of Personal Network, and by the Undertaken given by your Client...***"

By the Date of this Letter in **Exhibit H**, the 9<sup>th</sup> of July 2012, the relationship of both parties had fallen apart, and the Guiding and Extant Letter of Offer would have been the source of debate, negotiations or counter-offers, because the Letter of Recall was dated the 17<sup>th</sup> of April 2012. This Letter is the **ONLY** Letter of Recall before the Court, and has to be based on an Extant Letter of Offer, whether of the 28<sup>th</sup> of June, or of the 15<sup>th</sup> of August, 2011.

It would have been reasonable for the Letter of Offer of the 15<sup>th</sup> of August 2011 and its Terms to be within the Scope of the Legal Representation, but it was not referred to. Instead, there was a Confirmation by the Defence Lawyer that the Letter of Offer dated the 28<sup>th</sup> of June 2011 was the Extant Letter of Offer.

It is noted that the Claimants used every conceivable word in the dictionary to describe the falsity of **Exhibit L1** except using the word "**FORGERY**", which word he appears allergic to. When Forgery is alleged in a Civil Suit, it is Settled Law that being a very serious imputation, it needs to be pleaded with particulars and proved strictly. Regard is placed on the cases of **FINNIH VS IMADE (1992) 1 SCNJ AT 87 AT 113 AND MUSTAPHA ARIJI & ORS VS ALHAJI W. ARIJI & ANOR (2010) LPELR CA/L/452/2007**. Here, in this case, the Claimant is saying that he did NOT IDENTIFY the documents relating to Exhibit L1 and was even

unaware of the Re-Application, yet his signature is on Exhibit L1 and his Official is seen to have signed the Application Letter. Forgery must be proved Beyond Reasonable Doubt and the burden rests on he who asserts. See **EYA & ANOR VS OLOPADE & ANOR (2011) LPELR S.C. 168 /2001, PER ONNOGHEN JSC.**

However, the Claimants are saved by the Bell, because they carefully did not contend Forgery, and therefore it is pointless for the Court to veer in that direction.

The Question now however remains, is **Exhibit L1** valid?

It can be seen that this Offer had the Signatures of the Representatives of the Defendants, as well as that of the 2<sup>nd</sup> Claimant as the MD/CEO and his Witness Mr. Ekure Chuks dated the 15<sup>th</sup> of August 2011. An Unidentified Party initialed each Page of the Offer Letter, BUT there was no Loan Facility Amount Accepted in the Memorandum of Acceptance Column.

There is also the fact that the Loan Facility was in other to Purchase a Single Four Bedroom Semi Detached Duplex in Games Village, and there was Borrower's Equity for the Property, albeit the Amount was not stated in this Offer Letter. Curiously, the Security extended not only to the Property in question, but also, to another Property on Airport Road, without any Specific Description. There was also a Vast Reduction in the Tenure of the Loan, from Five Years to Two Years, and this is very strange.

The Claimants must have been very desperate for the Loan, by agreeing to an increase in the Monthly Repayment, a Reduction in the Tenure, and an Additional Security for same Amount, which was a Part-Finance for the Property in question, within Two Months of Earlier Offer with Conducive Terms to the Claimants. It just does not make any logical sense.

Further, by the Defendant's claim that there was a Re-Application of the initial Offer dated the 28<sup>th</sup> of June 2011; there is a presumption that the Re-Application would have been on the same Terms. For there to be injections of new and far-reaching Terms and Conditions, there is likely to have been a Re-Negotiation. They ought to have furnished the Court with Evidence to justify the need for **Exhibit L1** in the first place, but this was absent.

Finally, by the initial Loan Agreement in **Exhibit A**, the Loan Fund was directly effected into the Account of the Claimants as validated in **Exhibit F**, the

Statement of Account. If therefore **Exhibit L1** was valid and extant, the supporting Document in **Exhibit L10** ought to validate it.

Now, a cursory look at **Exhibit L10**, the 1st Claimant's Letter to the Defendant, shows that it is an Application for a Mortgage Loan Facility, dated the 10<sup>th</sup> of August 2011. It states, ***"In furtherance to our earlier Meeting with you Sir, we wish to request for a Loan of N70, 000, 000.00 (Seventy Million Naira) only. This is to enable our MD/CEO to facilitate Payment of the Property. Please find attached Copy of the Letter in respect of the said Property. We will appreciate if the amount can be credited in to the Seller's Account as Detailed below as soon as possible as the Duration for Payment has lapsed: Acc. Name: Abuja Investment Company Limited Acc. Number: 321-252550-0110 Sort Code: 058083215 Bank: GT Bank Plc Branch: Area 3, Tarka Faskari Street, Abuja We hope this will foster our Relationship and also be the beginning of greater achievements of both Parties now and in the future. Please accept the assurance of my highest regards For: Fort Royal Homes Ltd Signed Ekure Chuks EXECUTIVE DIRECTOR"***

Therefore, the Defendant had the burden of showing that they paid the Loan Sum to the Seller Directly, and not to the Claimants at all, based on the Specific Instruction of Ekure Chuks. This they failed to prove.

Finally, it is pertinent to note that all the Supporting Documents from **Exhibits L2 to L8** were dated the 15<sup>th</sup> of August 2011. From **Exhibit L2**, the Board Resolution Document dated the 15<sup>th</sup> of August 2011, it can be seen that the Board at a Meeting held on the 1<sup>st</sup> of August 2011 resolved that the 2<sup>nd</sup> Claimant should be the Sole Signatory to the Account. If this Board Meeting Resolution was made in furtherance of **Exhibit L1**, as contended by the Defence, then that means the Resolution was made prior and not pursuant to the Offer of the 15<sup>th</sup> of August 2011. The Claimants contention that this Resolution was made in furtherance of the Offer of the 28<sup>th</sup> of June 2011 is more believable.

Therefore, the Court holds that **Exhibits A and L9**, the Offer Letter of the 28<sup>th</sup> of June 2011 is the Extant Offer Letter that Guided the Relationship, Conduct and Actions as well as Negotiations and other Surrounding Circumstances of the Loan Facility granted.

Therefore, this brings the Court to the Second Issue Raised for Determination of ***Whether the Claimants were in Breach of the Contractual Obligation to the Mortgage Loan Facility availed to them by the Defendant?***

In the case of **LARMIE V. DATA PROCESSING MAINTENANCE & SERVICES (D.P.M.) LTD (2005) 12 SC (PT. 1) 93 AT 103**. The Law is trite regarding the bindingness of terms of agreement on the parties. Where Parties enter into an Agreement in writing, they are bound by the Terms thereof. This Court, and indeed any other Court will not allow anything to be read into such agreement, terms on which the parties were not in agreement or were not ad-idem. See **BABA V. NIGERIAN CIVIL AVIATION TRAINING CENTRE, ZARIA (1991) 5 NWLR (PT. L92) 388; UNION BANK OF NIGERIA LTD. V. B. U. UMEH& SONS LTD. (1996) 1 NWLR (PT426) 565; S.C.O.A. NIGERIA LTD. V. BOURDEX LTD. (1990) 3 NWLR (PT. 138) 380 AND KOIKI VS MAGNUSSON (1999) 8 NWLR (PT.615) 492 AT 514**.

A Breach of Contract arises when a Party to a Contract has acted contrary to the Terms of the Contract either by Non-Performance or by Performing the Contract, not in accordance with its Terms or by Wrongful Repudiation of the Contract. Therefore, a Party who has Performed the Contract in consonance with its Terms cannot be said to have been in Breach. See the case of **PAN BISBILDER NIGERIA LTD VS. FIRST BANK OF NIGERIA LTD (2001) SC H @ 86/87**, and foror a Claimant to succeed in an action for breach of contract, he must establish not only that there was a breach but also that there was in existence an enforceable contract which was breached. See the case of **HALDO VS USMAN (2004) 3 NWLR (PART 859) 65**.

As regardsthe alleged breaches put forward in the Defence Pleadings, Counterclaim and Written Address, the Defendant has alleged Three Breaches; **the First**, is that the Claimants failed to domicile their Daily Business Proceeds into their Account contrary to their Undertaking as contained in **Exhibit L5**. To prove this fact, the Defendant as an Asserter needed to demonstrate this Piece of Evidence by Positive Documentary Evidence, such as the Statement of Account of the Claimant. They would then, as Counterclaimants, have had to

demonstrate the Non-Domiciliation of the Daily Business Proceeds contrary **Exhibit L5**, and this they failed to do. They did not tender any Statement, and neither did they Rely on and Utilize the Statement of Account tendered by the Claimants in **Exhibit F** to justify their contention of a Breach occurring. It is also worthy of note that the Defence Sole Witness, did not make any Complaints of Allusion to the Claimants alleged failure to domicile daily business proceeds.

Therefore, this Breach was largely unproved.

**Secondly**, the Defendant also alleged the Failure of the Claimants to pay as at when due. The Defence Witness, upon a perusal of from **Exhibit F**, demonstrated this fact. He initially confirmed that **Exhibit F** was prepared by him and was the actual Statement of Account of the Claimants. Had the Claimants not furnished his Statement of Account as an Exhibit, the Court would have been fishing in the Dark looking for reliable Evidence. He explained the instances where the Claimants Loan Repayments were late and referred to **Clause 3** of the Terms and Conditions. According to him, as at the time the Loan was recalled, the Position of the Claimant's Account was in breach of the entire loan agreement.

This is a different contention made by the 2<sup>nd</sup> Claimant during his Cross-Examination, where he stated that as at the time the loan was recalled, his account was in credit with an excess amount of Three Million Naira Only, and that they had made consistent repayments for Six Months.

The Defence Witness had agreed that there were no written demands made for payments **when due** but alluded only to oral demands made through phone calls and E-mails. The Email tendered by them was not related in any way to any demand, caution or request, or warning of late payments and so this again was unproved.

However, a careful perusal of the Statement on Exhibit F, would show that the dates for repayments were not consistently applied and there were instances of debit of the loan repayment sum, placing the entire account in a deficit. Thereafter, the Claimant would be seen to pay in a lump sum amount to put the account back into credit, and this was the pattern.

It is clear that one of the stipulated Conditions to the Draw Down was that upon a Default of Repayment, the Facility shall immediately become due and payable, and a Penalty Charge may be applied. The Defendants would have capitalized on

this fact of disobedience, had there been a formal written demand for the sum in the first instance a default of repayment occurred, and they would have been well within their rights to exercise and give effect to **Clause 3**.

However, they appeared to acquiescence this behaviour of late payments. Regard is had to **KAWU JSC** in the case of **ATUNRASE & ORS VS SUNMOLA & ANOR (1985) LPELR 634(SC)P14, PARAS C-D**, who held thus "Acquiescence, in its proper legal sense, implies that a person abstains from interfering when a violation of his rights is in progress." Further reference is made to **OGUNTADE JSC** in the Case of **CHIEF ADEFIOYE ADEDEJI V. J. O. OLOSO & ANOR (2007) LPELR-86(SC)**, who held that 'Acquiescence' means conduct from which it can be inferred that a person has agreed to a certain state of affairs affecting his legal right. If a person has agreed to his right to be taken away, he should not afterwards complain about it. He would be estopped by the fact of having consented to the act complained of. Since acquiescence operates by way of estoppel, it is a weapon of Defence under which the respondents can take refuge."

Therefore, by the lack of any visible and verifiable Evidence of any Warnings, Complaints, Positive Testimonies from the Warner and the Warned, the Court has not choice but to hold that they slept on their Rights, and had somewhat condoned the breach.

There is also the Claim in their **Last Breach**, that the Agreed Monthly Repayment of the Principal and Interest was N3, 596, 995. 57, and that the Claimant failed to comply with this Condition. The analysis of this Breach has been dealt with adequately Supra, and there is no point in analyzing what has already been determined by this Court not to be a Valid and Verifiable Breach. So without further ado, the Defendant failed to establish this aspect of Breach.

The Final Issue before the Court has to do with ***Whether by the Defendant's Letter of Recall dated the 17<sup>th</sup> of April 2012, written to the Claimants, the Loan Facility in the Sum of Seventy Million Naira (N70, 000, 000.00) was VALIDLY RECALLED, making the Principal Sum and Interest immediately payable.***

From **Exhibit B, the Letter of Recall of Mortgage Loan Facility** dated the 17<sup>th</sup> day of April 2012 the Defendants invoked **Clause 7 (Under Other Conditions) of the Offer Letter** that was duly accepted by the Claimants. It is worthy of note

that the date of the Offer Letter referred to, was not indicated. However, the two Offer Letters in Exhibits A and L1 contained the same **Clause 7**. “Clause 7 states as follows: -

***“The Bank reserves the right to recall the Loan with all accrued interest at any time it deems fit, within the Tenor (sic) of the Loan”.***

The defendant had stated that the Claimant willingly accepted the Offer after being aware of this Clause in the Offer Letter and therefore cannot resile from this Agreement but remain bound to the Terms.

On the other hand, the Claimant under Cross-Examination, testified that he was not compelled to sign the Agreement but however argued in their Written Correspondence between Counsel, that this Term is Unethical, and against the Banking Practice, Unreasonable, Untenable, Obnoxious, Repressive and Repugnant to Good Conscience

**Now**, the Court would apply Two Tests to determine this Clause, and they are the Reasonableness Test and the Good Faith Test.

**The Reasonableness Test-** The question to be applied by all Courts is whether the Term is a fair and reasonable one to have been included “having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the Parties when the contract was made.” The crucial time is the time of the making of the contract and not when the liability arises. The reasonableness of a contract term is not affected by the nature or seriousness of the loss or damage sustained, except to the extent that it was or ought to have been in contemplation at the time the contract was made. It is also clear that circumstances solely known to one Party, that is, the Person relying on the Exemption Clause, such as the Nature of the Product, Market Difficulties involved in Procuring it, are to be treated as irrelevant if they were not known, and could not reasonably have been known, to the other Party at the time the Contract was made.

It has been said that ‘it is impossible to draw up an Exhaustive List of Factors to be taken into Account’ in assessing the Reasonableness of an Exemption or Limitation Clause.

In order to assist the Court in determining whether the Term satisfies the Requirement of Reasonableness, there are ‘**Five Guidelines**’ as to Matters to be taken into account.

Strictly, these Guidelines are applicable to the Test of Reasonableness only in respect of the Exclusion or Restriction of Liability for Breach of the Implied Obligations as to Description, Sample, Quality, and Fitness for Purpose as in this Instant Mortgage Loan Facility.

The Considerations there set out are normally regarded as being of General Application to the Question of Reasonableness. However, even where the Guidelines are directly applicable, they are not exhaustive; the Court is required to have regard 'in particular' to those Matters, but it can also take account of any other relevant circumstances.

The **FIVE GUIDELINES**, which are also indicative of **Good Faith**, are as follows:

1. The **Strength of the Bargaining Positions** of the Parties relative to each other, taking into Account (among other things) alternative means by which the Customer's Requirements could have been met;
2. Whether the **Customer received an Inducement to agree to the Term**, or in accepting it had an opportunity of entering into a Similar Contract with other Persons, but without having to accept a Similar Term;
3. Whether the **Customer knew or ought reasonably to have known of the Existence and Extent of the Term** (having regard, among other things, to any Custom of the Trade and any previous Course of Dealing between the Parties);
4. Where **the Term excludes or restricts any relevant liability if some condition is not complied with**, whether it was reasonable at the Time of the Contract to expect that compliance with that condition would be practicable;
5. Whether **the Goods were manufactured, processed, or adapted to the Special Order of the Customer** (as in this Instant, which is a Mortgage Transaction, whether the Terms were adapted to suit the peculiar satisfaction of the Customer, i.e. the Obligor)

It is well seen that these Guidelines could open up quite Extensive Enquiries, and the Court should not be focused on Remote Possibilities, and neither should it conclude that a Clause fails the Test, by reference to relatively, uncommon or unlikely situations.

The Burden of Proving that a Contractual Term satisfies the Requirement of Reasonableness rests upon the Person who claims that it was Reasonable. The Court must entertain a Wide Range of Considerations, put them into the Scales, one side or the other, and decide at the end of the day on which side the Balance

comes down, see the Case of **PHILLIPS PRODUCTS LTD VS HYLAND (1987) 2 AC 803 AT 816**.

In this Case, it is significant to consider the Relative Bargaining Strength of the Parties. A Clause that has been imposed by One Side is less likely to be Reasonable than One that was the Product of Negotiations between Representative Bodies, or had evolved over time as a Result of Trade Practices, and in this Instant, Mortgage and Banking Practices in Nigeria.

The Clarity of **Clause 7** is an Overriding Factor, and Businesses must take the Consequences of the Uncertainty, which their 'small print' has created, and this includes Unfairness to the other side. See the Case of **GEORGE MITCHELL (CHESTERHALL) LTD VS FINNEY LOCK SEEDS LTD (1983) QB 284, and MONARCH AIRLINES LTD VS LONDON LUTON AIRPORT (1998) 1 LLOYD'S REP 403, AT 414**. However, a Contractual Term, which has not been Individually Negotiated, shall be regarded as Unfair if, contrary to the Requirement of Good Faith, it causes a Significant Imbalance in the Parties Rights and Obligations arising under the Contract, to the detriment of the Consumer.

A Term shall always be regarded as not having been Individually Negotiated, where it has been drafted in Advance, and the Consumer has therefore not been able to Influence the Substance of the Term. It shall be necessary for any Supplier, in this instance, the Supplier of the Loan Facility, to show to the Court that this Term in Clause 7 was Individually Negotiated.

Amongst the Terms, which are considered indicative of Unfairness are those Situations that authorize the Seller or Supplier to Dissolve the Contract *on a Discretionary basis*. Where the Same Facility is **NOT GRANTED** to the Consumer, and those Terms enabled the Supplier *the Right to Terminate* a Contract of Determinate Duration without Reasonable Notice, would be held to be Unfair, except and unless there are Serious Grounds for doing so.

The **Effect of an Unfair Term** in a Contract is Two Fold, and it is that it shall not be binding on the Consumer, and Furthermore, the Contract will be held to continue to Bind the Parties, if it is capable of continuing in existence without the Unfair Terms.

Before the Court can intervene into the Contract Voluntarily entered into by Consenting Parties, Three Elements are necessary to be present for the Court to hold **Unconscionable Bargains or Terms**, and they are:

1. That One Party must be at a Serious Disadvantage to the Other;
2. This Weakness must have been exploited by the Other Party in some Morally Culpable Manner; and finally
3. The Resulting Transaction must be, not merely Harsh or Improvident, but Overreaching and Oppressive. See the Case Law Authority of **ALEC LOBB (GARAGES) LTD VS TOTAL OIL (GREAT BRITAIN) LTD (1983) 1 WLR 87, 94-5**

Mr. Mayokun Awolola, the Defence Witness stated that the Offer Letter in Exhibit L9 was a Singular Document, that provides for the Conditions Precedent subject to which the Loan would be granted. He further stated that if the Conditions precedents are met, then the Offer would be deemed as still Subsisting. According to him, the Document cannot be taken piecemeal. By this Statement alone, it shows that the Offer Letter was not a product of a Negotiated and Joint Agreement on this particular **Clause 7**. It was a Singular Set Document, for which the Claimants had to either accept or reject.

Therefore, the Court is persuaded by the view that the insertion of this Clause 7 into the Loan Agreement was of Serious Disadvantage to the Claimants. It is certainly arbitrary, and the fact is there is no Limitation to this exercise of discretion is worrisome. In other words, Mr. Mayokun Awolola or any Official of the Defendant Bank could get up from the wrong side of the bed and Recall this Loan Facility without explanations or reasons.

This is certainly not the Banking or Mortgage Practice in Nigeria, as there must be certainty in the System. In the first instance, the Defendant has not impressed the Court with their actions in this Transaction. The Singular Variations, the Inclusion of certain Terms and Conditions, and their outright recall of the Sum of N67, 418, 028.48, constituting both the Principal Sum and Accrued Interest and the Requirement for the Liquidation of this Outstanding Obligation within Seven (7) Days, with any delay attracting additional accrued interests, is near heartlessness and cruelty.

There was also the divergent and inconsistent Sums of Money claimed by the Defendant in different Processes before the Court, with absolutely no explanation as to how they arrived at the Figures. The Figures were just popping up from the air, and the Court cannot conduct the Case for the Defence Counsel by justifying the Different Figures, and neither can it provide a reason for the different figures stated in the Statement of Defence and Counterclaim, and the Exhibits before the Court.

More so, when the Claimants had even pleaded for a Period of Sixty (60) Days as opposed to the Seven (7) Days to liquidate the Loan, in their Request Letter for Extension, admitted as **Exhibit C**, but this Request was refused in **Exhibit D**, dated the 26<sup>th</sup> of April 2012, wherein the Claimants was given Four (4) Days from the dated of the Letter to fully pay off the Loan Facility, or risk liquidation and attract Banks Default Interest Rate. This is unbelievable in a Civilized Society, and must never be allowed to stand. A Debtor must not be arm-twisted in this horrendous manner. In the first place there was no proof of the breaches alleged, except in the instance of late payments, which were acquiesced to and condoned by the Defendant.

Therefore, in conclusion the Court finds as follows: -

1. A Declaration of the Court is made that **Clause 7 of 'other Conditions'** contained in the **Defendant's Letter of Offer of Commercial Mortgage Loan dated June 28, 2011** is unlawful, unenforceable, and inconsistent with the usual Norms and Practice of Mortgage Financing generally, being found to be unconscionable, repugnant to natural justice, equity and good conscience, contrary to public policy and above all, malicious.
2. A Declaration is made that the **Act of Recalling the Loan Facility** is unlawful, unconscionable, arbitrary, unethical, unenforceable and flagrantly contrary to the Spirit and intendment of the **Terms and Conditions** as contained in the **Letter of Offer dated the 28<sup>th</sup> of June 2011, regarding the Credit Facility**.
3. An Order of this Court is made S restraining the Defendant from recalling in any manner howsoever the **N70, 000, 000.00 Commercial Mortgage Facility granted to the 1st Claimant for a 5year Tenor** until the 1st Claimant liquidates same in accordance with the **Repayment Schedule** as contained in the **Letter of Offer of the Commercial Mortgage Loan dated the June 28, 2011**.
4. An Order of this Court is made declaring the 40% punitive interest rate charged on the 1st Claimant's account domiciled with the Defendant as unlawful, illegal, unconstitutional, null and void.
5. Cost of Three Million Naira (N3, 000, 000.00) is awarded, being the Cost of prosecuting this Suit.

As regards the Counterclaim, the Court finds as follows: -

1. The Sum of **N67, 418, 028.48 (Sixty-Seven Million, Four Hundred and Eighteen Thousand Twenty-Eight Naira, Forty-Eight Kobo)** claimed as due and payable by the Claimants to the Defendant/Counter Claimant, being the Repayment of Loan Facility granted to the Claimants by the Defendant/Counter Claimant, has not been satisfactorily established as due, and therefore cannot be granted by this Court.
2. Interest on the said Sum of **N67, 418, 028.48 (Sixty-Seven Million, Four Hundred and Eighteen Thousand Twenty-Eight Naira, Forty-Eight Kobo)** at the Rate of 21% per annum as the agreed interest in the Loan Agreement from April 2012 cannot be granted as calculated by the Defendant. The Claimants are only obligated to pay at the Agreed Interest Rate as calculated in the Offer Letter dated the 28<sup>th</sup> of June 2011, and the Parties should meet to reconcile the Figures with an Expert, selected in accordance with the Arbitration Act.
3. Interest on the Judgment Sum at the Rate of 10% per annum until the whole Judgment Sum in liquidated sought fails for lack of satisfactory Evidence, and the Court will not make any Order under this Counterclaim for Cost of Litigation.

**HON. JUSTICE A.A.I. BANJOKO**  
**JUDGE**