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

BEFORE HIS LORDSHIP: THE HON. JUSTICE PETER O. AFFEN

TUESDAY, FEBRUARY 4, 2020

SUIT NO. FCT/HC/CV/2601/2016

BETWEEN:

NIGERIAN EXPORT-IMPORT BANK … … CLAIMANT

AND

1. JOMMIE NIGERIA LIMITED
2. ENGR. JOHN ADAKOLE AMEH } **… … DEFENDANTS**
3. MADAKI OMADACHI AMEH

J U D G M E N T

1. **THIS ACTION** revolves around a ₦90m Medium Term Direct Lending Facility granted on 18/8/11 by the Claimant, *Nigerian Export-Import Bank* ["NEXIM"] to the 1st Defendant, *Jommie Nigeria Limited* ["JNL"] at an interest rate of 11% per annum for the purpose of procuring water bottling equipment. The facility was for a tenor of three years, and all the four directors of JNL, including the 2nd and 3rd Defendants [who are the Chairman and Managing Director/Chief Executive Officer respectively] executed a Deed of Guarantee. NEXIM alleged that the facility remains unpaid and has taken out this present action against the Defendants, jointly and severally, claiming the reliefs endorsed in the writ of summons issued out of the Registry of this Court on 22/11/16 [as well as in the accompanying statement of claim] as follows:

   "a. AN ORDER that the Defendants jointly and severally pay to the Plaintiff the sum of ₦162,999,877.71 (One Hundred and Sixty Two Million, Nine Hundred and Ninety Nine Thousand, Eight Hundred and

Seventy Seven Naira, Seventy One Kobo), being the total indebtedness of the Defendants to the Plaintiff as at May 2016.

b. **AN AWARD** of interest payable on the judgment sum at the rate of 10% per annum from the date the judgment in this suit is delivered till the date the Defendants fully liquidates (sic) the said facility.

c. **AN AWARD** of the sum of ₦3,000,000.00 (Three Million Naira) as cost of this action.

d. **AND** any other Order or Orders the court may deem fit to make in the circumstances of this case."

2. The Defendants filed a statement of defence dated 16/12/16 to which the Claimant filed a reply dated 13/1/17. At the plenary trial, the parties fielded one (1) witness apiece.

3. *Joyce Ekanem* [who is an Assistant Manager in the Remedial Management Department of the Claimant] testified as PW1. She adopted her statement on oath dated 22/11/16 and tendered Exhibits P1 – P23. Under cross examination by *Osigwe Ahmed Momoh, Esq.,* of counsel for the Defendants, the PW1 maintained that she has been with the Claimant for 13 years; that there is a loan agreement in respect of this facility which sets the terms and conditions thereof, but she does not know whereabouts of the loan agreement; that a project finance agreement is an agreement for the financing of a project which is midwifed by the Project Finance Department whilst a loan agreement is an agreement between the bank and its customer. She could not recall if direct payment was made to the Defendants but maintained that the source of repayment in this particular transaction is proceeds of the business undertaking or by JNL and its directors in the event of failure; that the bank's role in the transaction was to make finance available to JNL; that a Deed of Guarantee was

duly executed but could only recall one of the guarantors in Exhibit P2; and that the bank made a formal demand on the directors before approaching this court. She stated that there are different types of security for the facility including deposit of title documents, all-assets debenture as well as a joint and several guarantee by the directors; that JNL submitted a valuation report to the bank which did not undertake any independent valuation of assets and she could not remember the value of assets; that she has visited the JNL's premises but could not remember the date; and that JNL requested to restructure the facility backed by a resolution of the board of directors. The PW1 rejected the suggestion that in the light of the restructuring, the loan had not fallen due when this suit was filed and insisted that it was not alleged at any time that JNL did not have sufficient assets, nor did she know whether or not JNL has sufficient assets to satisfy the facility. She maintained that the facility had not been repaid despite the demand letters issued to JNL; and that NEXIM did not ascertain that JNL could not meet its obligations before they approached the guarantors.

4. *Madaki Ameh*, who is MD/CEO of JNL testified as DW1. He adopted his statement on oath dated 16/12/16 and stated under cross examination by *Ayodeji Ademola, Esq*. of counsel for the Claimant, that JNL passed a resolution to borrow ₦90m from NEXIM; that based on that Resolution, an offer was made to JNL for a project finance facility, which offer was accepted by JNL; that the offer made to JNL [Exhibit P6] states in Clause 16 that it is for project financing; and that all the four directors of JNL gave personal guarantee to repay the facility. The DW1 rejected the suggestion that he deposited the title documents of his property as an additional security, and denied signing the memorandum of deposit [Exhibit P10], but conceded that

JNL executed an ALL ASSETS DEBENTURE in favour of NEXIM; and also that the principal and accumulated interest are yet to be paid. He maintained that because there was delay in the commencement of the project which affected repayment period, the facility was restructured by NEXIM on the application of JNL which subsequently received the equipment financed by NEXIM; and that payment was made directly to the suppliers. He stated that JNL merely carried out test production at some point after the installation but has not commenced commercial production, but conceded that it was NEXIM's responsibility to provide funds for the equipment whilst the provision of logistics/working capital was the responsibility of JNL. The DW1 could not produce any Joint Venture Agreement (JVA) between NEXIM and JNL but maintained that the nature of the transaction is that of project finance. He equally did not have any document to show payment of ₦13m as demurrage, but maintained that NEXIM was aware of the payment; and that only skeletal production to test the equipment was done upon obtaining NAFDAC approval in 2015, but not commercial production/sales.

5. Re-examined by *Osigwe Ahmed Momoh, Esq.* of counsel for the Defendants, on how NEXIM was aware that they paid ₦13m as demurrage, the DW1 stated that there are correspondence between NEXIM and JNL to that effect.

6. At the close of plenary trial, the parties filed and exchanged final addresses as enjoined by the Rules of this Court. The Defendants' final address is dated 23/9/19, whilst the Claimant's final address is dated 26/9/19. Addressing the court, *D. G. Odubitan, Esq.* adopted the Defendants' final address and urged the court to discountenance the reliefs sought by NEXIM for lacking in merit. On his part, *Ayodeji*

Ademola, Esq. adopted the Claimant's final address and urged the court to enter judgment as claimed. He referred to **KOLO v FBN PLC [2003] 3 NWLR (PT. 806) 216 at 232 – 233H-G** and **NIDOCCO LTD v GBAJABIAMILA [2013] 14 NWLR (PT. 1374) 350 at 388A-D** on a solicitor's power to institute action on behalf of a company without being authorised to do so; as well as **UTC v LAWAL [2014] 5 NWLR (PT. 11400) 221 at 240** on the proposition that evidence given by a servant or agent of a company is relevant and admissible; and that it was the Defendants' responsibility to register the All Assets Debenture and they cannot benefit from their wrong. The court was urged to dismiss the claim for lacking in merit.

7. The two (2) issues for determination identified in the Claimant's final address are:

    1. Whether from the state of pleadings and evidence adduced before this Honourable Court, the Plaintiff has proved that she advanced a loan of Ninety Million Naira (₦90,000,000.00) to the Defendants.

    2. Whether from the facts and evidence before this Honourable Court, the Plaintiff [has] proved [its] case and therefore entitled to [its] claims against the Defendants before this Honourable Court.

8. On the other hand, in the Defendants' final address two (2) issues are also distilled for determination as follows:

    i. Whether having regard to the totality of the evidence adduced and in the light of Exhibits P12, P13 & P14, this matter can be said to be premature and cannot be adjudicated upon giving the date of the filing of the case before this Honourable Court.

ii. Assuming without conceding that question One (1) above is answered in the negative, in the light of the nature of this transaction, whether the Plaintiff can thus move against the 2nd and 3rd Defendants without first satisfying itself that the assets and the Debenture of the 1st Defendant is insufficient to satisfy the sum for the facility having regard to the provisions of extant laws.

9. The foregoing are the issues identified by the parties in this intriguing litigation. Judging by the pleadings and the evidence adduced, it does not seem to me that NEXIM's first issue properly arises for determination. As there is no dispute whatsoever that NEXIM advanced a loan facility of ₦90m to JNL which was subsequently ungraded and restructured, no useful purpose will be served by formulating any issue on the point. The second issue distilled by NEXIM subsumes the Defendants' second issue, whilst the Defendants' first issue as to whether this action as presently constituted is not premature is in the nature of a preliminary objection even though it is being raised at the close of trial, which will be disposed before delving into the merits of the case, if at all. The issues distilled by the parties can therefore be conveniently condensed into one composite all-embracing the issue, namely:

> **Has the Claimant [NEXIM] discharged the *onus probandi* cast upon it by law to be entitled to the reliefs sought.**

10. It is on the basis of the above sole issue for determination that I shall proceed presently to dispose of this matter. As stated hereinbefore, the parties filed and exchanged written final addresses, and I will refer to the submissions contained therein as I consider relevant or necessary. The reliefs sought and the evidence adduced by or on behalf of the parties are set out hereinbefore. Evidence is the basis of

justice, and the rule of evidence is that he who asserts the positive must prove. See ***OKAFOR v EZENWA [2003] 47 WRN 1 at 11*** *(per Uwaifo, JSC),* ***VULCAN GASES LIMITED v GESELLSCHAFT [2001] 26 WRN 1 at 59, ABIODUN v ADEHIN (1962) 2 SCNLR 305*** and ***MOROHUNFOLA v KWARATECH [1990] 4 NWLR (PT. 145) 506.*** In a civil action such as the present, the burden of proof rests on the party who would fail if no evidence were adduced on either side. See ***NATIONAL BANK OF NIGERIA LIMITED v U. C. HOLDINGS LIMITED [2004] 13 NWLR (PT. 891) 436 at 454 F-H, 461 G*** and ***UMEOJIAKO v EZENAMUO [1990] 1 NWLR (PT. 126) 253 at 267.*** The burden of proof rests upon him who affirms and not upon him who denies, since by the nature of things he who denies a fact cannot produce any proof. See ***AROMOLARAN v KUPOLUYI [1994] 2 NWLR (PT. 325) 221; ARASE v ARASE (1981) 5 SC 33 at 37; ELEMO v OMOLADE (1968) NMLR 259*** and ***OSAWARU v EZEIRUKA (1978) 6-7 SC 135 at 145.*** This burden is not static: it shifts. Also, where a party wishes the court to believe in the existence of any fact, the burden of proving that fact lies on that party. See generally ***ss. 133 - 137*** of the ***Evidence Act, 2011.***

11. The facts of this case are straightforward and are by no means complex or convoluted. JNL passed a resolution [Exhibit P5] and made an application [Exhibit P4] for a ₦90m medium term direct lending facility to enable it purchase equipment for setting up a table water bottling factory at New Karu in the outer reaches of the Federal Capital Territory, Abuja. NEXIM granted the said facility to JNL on the terms and conditions contained in a letter of offer dated 18/8/11 [Exhibit P6]. JNL's acceptance letter is dated 5/9/11 [Exhibit P7]. The agreed interest rate was 11% per annum and the tenor was three years (inclusive of 18 months moratorium on principal and 6 months moratorium on interest). The facility was secured by an all assets

debenture [Exhibit P11], personal guarantee of JNL's directors [Exhibit P2] backed by notarised statements of net worth [Exhibits P9A-D], memorandum of deposit [Exhibit P10] and deposit of 3rd Defendant's title document to Plot 31, Democracy Crescent, Gaduwa, Abuja (Ref. No. FCT/SAS/GAD/31/Vol. 1/3) [Exhibit P1]. Crucially, clause 5 stipulate that repayment would be made "*from proceeds with Principal amount paid half yearly and the interest accrued paid quarterly*", whilst clause 16 dealing with "sources of repayment" provide thus: "*From receivables under the contract(s) or other sales through debits of funds in the Collection Account or direct repayment by Jommie Nigeria Limited if funds in the collection account are insufficient to cover due amounts*". Upon JNL's application dated 7/10/13 [Exhibit P12], NEXIM restructured the facility vide an offer dated 14/10/13 [Exhibit P13] on the terms and conditions stipulated therein, whereupon the principal loan sum was upgraded to ₦117,665,334.56 comprising of the initial principal of ₦97,800,000.00 and accrued interest of ₦15,534,591.78 and unpaid Letter of Credit Commission and shortfall of ₦4,330,742.78 owed to NEXIM. In the restructured facility, the tenor was increased to 4 years from the initial 3-years, just as the interest rate was raised to 14% per annum from the initial 11%. Of course, the right of a bank (such as NEXIM) to charge interest on loans and overdrafts is taken for granted as it is generally accepted that banks are never known to be charitable institutions *ex gratia*: they keep afloat and thrive on interest rates. See ***AFORKA v AFRICAN CONTINENTAL BANK [1994] 3 NWLR (PT. 331) 217 at 224*** and ***M. H. (NIG.) LTD v OKEFIENA [2011] 6 NWLR (PT. 1244) 514 at 533.*** The 2nd and 3rd Defendants signified acceptance of the 'fresh' terms and conditions of the restructured facility on behalf of JNL by executing a duplicate copy of the offer on 29/11/13. Exhibit P13, which stated that the "facility [was] capitalised as at 26/09/2013", fixed the tenor

at "4 years (48 months)" and moratorium of 270 days on both principal and interest. JNL was required to make quarterly repayment of principal and interest in accordance with the loan Repayment Schedule attached thereto on specified due dates of payments between 7/7/14 and 7/1/18. The effective date of the restructuring was put at 26/9/13 whilst "*other terms, conditions and covenants in the original letter of offer … remains (sic) valid*". The equipment for which the facility was granted was purchased and installed, but JNL is yet to commence commercial production. The DW1 conceded under cross examination that NEXIM was to provide funds for the purchase of the equipment whilst JNL was responsible for logistics/working capital, but Exhibit P16 is a letter dated 17/3/16 by which JNL solicited further support in the form of working capital to the tune of N15m to enable it "*fully take off and commence production*", which request was declined by NEXIM; and even though the debit balance in the statement of Account [Exhibit P8] stood at ₦164, 353,834.99 as at May 2016, the NEXIM's claim in relief 1 is for ₦162,999,877.71 "being the total indebtedness of the Defendants to the Plaintiff as at May 2016"

12. I have given a careful and insightful consideration to the pleadings filed and exchanged between the parties as well as the documentary and testimonial evidence adduced before me. It is common ground that the ₦90m medium term loan facility granted by NEXIM to JNL on the terms and conditions contained in Exhibit P6 was subsequently restructured with effect from 26/9/13 [as shown in Exhibit P13] for a tenor of four (4) years on an agreed Repayment Schedule terminating on 7/1/18 when JNL was expected to complete the repayment of a total sum of ₦165,001,800.27 comprising of principal and interest. The Repayment Schedule [which is Exhibit P23 in these proceedings,

and equally annexed to the offer of restructured facility in Exhibit P16] enjoined JNL to make repayments on various due dates beginning from 7/7/14 and ending on 7/1/18. NEXIM initiated this action on 22/11/16 claiming the sum of ₦162,999,877.71 [comprising of the entire restructured principal and interest thereon] as JNL's total indebtedness as at May 2016 on the footing that JNL had failed or neglected to make any payment on the various due dates.

13. The DW1 testified that the water treatment equipment for which the facility was granted has since been acquired and installed but JNL is yet to commence commercial production owing to working capital constraints. He equally conceded under cross examination that the principal and accumulated interest are yet to be paid. The law is well settled that a debtor who benefitted from a loan facility from a bank has both moral and legal duty and obligation, express or implied, to repay the loan as and when due. See ***AFRIBANK v ALADE [2000] 13 NWLR PT. 685) 591, NATIONAL BANK v SHOYOYE (1977) 5 SC 181*** and ***FCMB v ROPHINE NIG LIMITED & ANOR (2017) LPELR-42704(CA)***. For good measure, the Defendants' contention, as I understand it, is not that JNL is not obligated to repay the facility. No. Rather, their contention is that the 4-year tenor of the restructured facility had not expired and this action was filed prematurely on 22/11/16 when JNL had up till 1/7/18 to discharge its obligations, hence no cause of action is disclosed against them; that there is no evidence of any resolution authorising counsel to institute this suit on behalf of NEXIM, which ought not to proceed against the 2nd and 3rd Defendants until it is satisfied that JNL had insufficient assets to meet its obligations under the restructured facility; and that the transaction between JNL and NEXIM is a joint venture for which repayment was

expected from proceeds of the project but production has not commenced owing to working capital constraints.

14. Without much ado, the Defendants' contention that a resolution authorising counsel to initiate a suit is prerequisite for the competence of this action is misconceived. Aside from the fact the case of ***PROVINCIAL HIGHWAY CHEMISTS (NIG) LTD v UMARU & ORS*** upon which the Defendants have heavily relied is a non-binding decision of the Federal High Court that was not made available to this court, the legal basis for the decision is not stated in the excerpt quoted in counsel's final address. The law, as I understand it, is that only a company can sue to remedy a wrong done to it or to ratify any irregularity committed in the course of its affairs: ***s. 299 CAMA;*** and it is the prerogative of the company's board of directors to authorise the institution of legal proceedings, whether by means of a board resolution or otherwise. At any rate, the Defendants did not raise any questions in the pleadings on counsel's authority to institute this action on behalf of NEXIM. It is therefore to be presumed that he was duly authorised so to do, and the Defendants are certainly not at liberty to raise this issue as an ambush in their final address. Since the parties are bound by, and must limit themselves severely, to the pleadings filed and exchanged, NEXIM could not have been expected to produce evidence of the authorisation given for the filing of this action when no issue was joined in the pleading on the point.

15. Again, the contention that NEXIM ought to first satisfy itself that JNL had no sufficient assets to satisfy the facility before it can legitimately proceed against the 2nd and 3rd Defendants misconstrues the nature and effect of the obligation a guarantor undertakes. There is no disputation that the directors of JNL, inclusive of the 2nd and 3rd

Defendants, executed a Deed of Guarantee [Exhibit P2] as well as duly Notarised Statements of Personal Networth [Exhibits P9A - 9D] as part of the security requested by NEXIM for the facility, even though the Defendants contend that the guarantee is invalid. We shall grapple with the validity *vel non* of Exhibit P2 in due course, but the point to underscore here is that the liability of a guarantor becomes due and mature, and his liability is said to have crystallised, immediately the borrower (*qua* debtor) becomes unable to pay his outstanding debt. See ***ROYAL EXCHANGE ASSURANCE (NIG) LTD v ASWANI TEXTILES LTD [1992) NWLR (PT. 227) 1 (1992) 2 SCNJ 346*** *and* ***AUTO IMPORT EXPORT v ADEBAYO & ORS [2005] 19 NWLR (PT. 959) 44, (2005) LPELR-642 (SC)*** *at pp. 90-91 –per Ogbuagu JSC. , **JSC** (, paras. E-A)*. It would seem that the tendency is that the law appears to have moved to the centre to make the right of the creditor less conditional such that he is now entitled to proceed against the guarantor without, or independent of, the principal debtor. In both ***AFRICA INSURANCE DEVELOPMENT CORPORATION v NIGERIA LIQUEFIED NATURAL GAS LTD [2000] 4 NWLR (PT. 653) 494 at 505-506*** *(per Ayoola JSC)* and ***FORTUNE INT'L BANK v PEGASUS TRADING OFFICE (GMBH) & ORS [2004] 4 NWLR (PT. 863) 369 at 389*** *(per Uwaifo JSC),* the Supreme Court quoted with approval the following passage from ***Andrew & Millet, Law of Guarantees, 1st ed., pp. 162-163***:

> "The fact that the obligations of the guarantor arise only when the principal has defaulted in his obligations to the creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety. Nor does he have to commence proceedings against the principal, whether criminal or civil, unless there is an express term in the contract requiring him to do so."

16. The relationship between a banker and its customer is a continuing one in which the banker's cause of action is usually triggered by a formal demand for payment and the customer's refusal, failure or neglect to pay within a stated deadline or within a reasonable period. See ***THADANT v NATIONAL BANK OF NIGERIA LTD (1972) 1 SC 105, FIRST BANK OF NIGERIA v KARUSTA-AKPARIDO [1996] 8 NWLR (PT. 469) 755*** and ***ISHOLA v SOCIETE GENERALE BANK NIG. LTD [1997] 2 NWLR (PT. 488) 405.*** But where there is an expiry date for any credit facility, a written demand for payment is not mandatory and the debtor's obligation to repay, and therefore the cause of action, arises upon the expiration of the facility and need not be triggered by a demand. See ***IDS v AIB LTD (2002) 4 NWLR (PT. 758) 660***. Unless otherwise agreed, the liability of a guarantor to the creditor arises on the principal debtor's default, so that time begins to run from that moment. The liability of a guarantor (in this case the 2nd and 3rd Defendants) crystallises immediately the borrower (in this case JNL) was unable to pay its outstanding debt. Thus, the 2nd and 3rd Defendants (as guarantors) are technically debtors in their own right because where JNL (as principal debtor) fails to repay the loan, they will be called upon to pay. They will only be absolved from liability if they can show that the principal debtor has already paid the loan. See ***TRADE BANK PLC v CHAMI (2003) 13 NWLR (PT. 836) 158***. But if the guarantor undertakes to pay on demand, the creditor's cause of action accrues when a demand is made on him and not complied with. See ***I. D. S. LTD v A. C. B. LTD (2002) 4 NWLR (PT. 758) 660*** and ***AUTO IMPORT EXPORT v ADEBAYO [2005] 19 NWLR (PT. 959) 44*** which also donates the proposition that "*it is not equitable to discharge a debtor only on the ground that the method by which he intends to pay as per the earlier arrangement which was not adopted for and which led to the debt not being paid had failed*". A borrower is not relieved of his

obligation to repay a loan used to execute a contract even where the contract sum remains unpaid. See ***EJIOGU v NDIC [2001] 3 NWLR (PT. 699) 1 (CA).*** Thus, the obligation to repay a loan facility is not dependent on whether the purpose of the facility was realised. Insofar as the loan or other credit facility has become due and payable under the terms and conditions of grant and the banker makes a formal demand for payment, his cause of action is triggered. In the case at hand, Exhibits P17 and P19 are demand letters that should ordinarily trigger NEXIM's cause of action. But the Defendants contend that the 4-year tenor of the restructured facility had not run its course and JNL still had up till 7/1/18 to repay the principal loan and accrued interest in accordance with the agreed repayment schedule when NEXIM filed this suit prematurely on 22/11/16. We shall return to this anon.

17. The Defendants' unsubstantiated assertion that the transaction was a joint venture between NEXIM and JNL need not detain us here. The DW1 conceded under cross examination that there is no JVA between NEXIM and JNL, just as Exhibit P4 [i.e. JNL's application dated 7/3/11] and Exhibit P5 [i.e. JNL's Board Resolution] leave no room for conjecture that what JNL sought, and what NEXIM granted, was a loan facility *simpliciter*. Clause 17 of Exhibit P6 [to the effect that "*Jommie Nigeria Limited shall operate a collection account … and shall be joint signatories to the account with NEXIM Bank*"] being bandied by the Defendants is certainly not a valid basis to infer the existence of a joint enterprise between JNL and NEXIM. The ***Business Dictionary*** defines a 'collection account' as a delinquent or past-due account transferred from routine account to the collection department (or a collection agency). Need we say more?

18. What is more, the reliance placed by the Defendants on the original offer [Exhibit P6] as basis for contending that repayment of the facility was to be made from proceeds of the project equally loses sight of the effect of the fresh offer in Exhibit P13 which provide that only "*other terms, conditions and covenants in the original letter of offer … remains (sic) valid*". The obvious implication is that Exhibit P6 has been modified, if not supplanted, by Exhibit P13 such that the applicability of the terms and conditions contained in Exhibit P6 is subject to there being no corresponding stipulation in Exhibit P13. In different words, where any particular item is provided for in both Exhibits P6 and P13, the latter will override the former. Thus, the repayment clause in Exhibit P13 [which provides for 'quarterly repayment of principal and interest as per attached repayment schedule' without more] clearly supersedes Clause 5 of Exhibit P6 which talks about 'repayment from proceeds with principal amount paid half yearly and the interest accrued paid quarterly'. *Arguendo,* even if this were not so, Clause 16 of Exhibit P6 [dealing with 'Sources of Repayment'] provides for "*receivables under the contracts or other sales through debits of funds in the collection Account <u>or direct payment by Jommie Nigeria Limited if funds in the Collection Account</u> are insufficient to cover due amounts*", which is a clear indication that repayment is not confined to receivables under contracts or funds in the collection account. It hardly bears mention that parties have the freedom of contract and are bound by the terms of their agreement: they must be held to their bargain. This is encapsulated in the Latinism, *pacta sunt servanda,* which literally means '*agreements must be kept*'. *See* ***E. N. NWAKA v SPDC [2003] 3 MJSC 136 at 146 -147*** and ***JADESIMI v EGBE [2003] 36 WRN 79 at 102.*** It is not the preoccupation of the court to make a contract for the parties or rewrite the one they have made. Where the conditions for the formation of a contract are fulfilled by the parties

thereto, they will be bound by it. See ***OYENUGA v PROVISIONAL COUNCIL OF UNIVERSITY OF IFE (1965) NMLR 9*** and ***UNION BANK OF NIGERIA LIMITED v SAX NIGERIA LIMITED [1994] 8 NWLR (PT. 361) 124 at 165.***

19. Let us now grapple with the Defendants' contention that this action is premature for having been commenced before the expiration of the 4-year extension granted to JNL and the agreed loan repayment schedule in Exhibit P23 which shows that JNL had up till 7/1/18 [i.e. one year and 69 days] to repay the facility, and the suit is liable to be dismissed on this score. NEXIM claims ₦162,999,877.71 as JNL's total indebtedness as at May 2016, whilst the statement of account [Exhibit P8] states that JNL's indebtedness stood at ₦164,353,834.99 as at the same May 2016. It cannot escape notice that the debit balance shown in Exhibit P8 is almost equal to the full sum of ₦165,001,800.27 [comprising principal and interest on the facility] that was not due until 7/1/18 as per the Repayment Schedule [Exhibit P23]. What therefore appears in rather bold relief is that even though the DW1 conceded that the principal loan and accrued interest remain unpaid, NEXIM did not demonstrate by credible evidence how it arrived at and became entitled to debit balance claimed as at March 2016. A statement of account is a document of entries in a banker's book [see ***NDIC v K. B. & C. SERVICES LTD [2007] 41 WRN 34 at 51*** *(CA)*]. Save where admitted, the mere production of a statement of account without more does not constitute sufficient evidence upon which liability can be founded. See ***s. 51*** of the ***Evidence Act 2011*** and ***HADYER TRADING MANUFACTURING LTD & ANOR v TROPICAL COMMERCIAL BANK (2013) LPELR – CA/178/2000,*** where it was held *(per Abiru, JCA)* that:

> *"A statement of account cannot on its own amount to sufficient proof to fix liability on the customer for the overall debit balance shown in the account… [and] any bank which is claiming a sum of money on the basis of the overall debit balance of a statement of account must adduce both documentary and oral evidence explaining clearly entries therein particularly where the debt is constituted largely by interest charges to show how the overall debit balance was arrived at."*

20. See also ***COOPERATIVE BANK LTD v OTAIGBE (1980) NCLR 215, YUSUF v ACB (1986) 1-2 SC 49, HABIB NIGERIA BANK LTD v GIFTS UNIQUE NIGERIA LTD [2004] 15 NWLR (PT. 896) 405*** and ***WEMA BANK PLC v OSILARU [2008] 10 NWLR (PT. 1094) 150.*** The bank is required to proffer credible oral evidence through a member of its staff who is conversant with the account to demonstrate to the satisfaction of the court how the debit balance claimed was arrived at. See ***BILANTE INT'L LTD v N.D.I.C [2011] 15 NWLR (PT. 1270) 407 at 428 - 429.*** It seems to me that a general admission of indebtedness is not tantamount to an admission of any particular sum. Thus, the concession by DW1 under cross examination that the principal and accumulated interest are yet to be paid does not constitute an admission of the amount claimed by NEXIM in this suit.

21. Now, the tenor of the restructured loan facility was four (4) years and the Repayment Schedule [Exhibit P23] shows that JNL was required to make repayment instalments [after the moratorium of 9 months/270 days] on various 'due dates'. The principal was to be repaid in fourteen (14) equal instalments of ₦8,404,666.75 along with the interest element made up of differing amounts with effect from 7/7/14 and ending on 7/1/18. An examination of Exhibit P23 reveals that [re]payments by JNL fell due on 7/7/14, 7/10/14, 7/1/15, 8/4/15, 7/7/15, 7/1/16, 7/4/16, 6/7/16, 6/10/16, 6/1/17, 7/4/17, 7/7/17, 7/10/17 and finally 7/1/18 when JNL

was expected to have [re]paid a total sum of ₦165,001,800.27 [comprising of the restructured principal loan sum of ₦117,665,334.56 and accrued interest of ₦47,336,465.71]. Six (6) repayment instalments had fallen due and unpaid as at May 2016 (being the terminal date stated in the statement of claim), whilst eight (8) instalments were not due, which raises legitimate concerns as to whether NEXIM was entitled to the full sum claimed in this action.

22. I am not unmindful of the existence of clauses in some loan agreements that empower lenders to call-in or terminate a non-performing facility before its due date and demand immediate repayment of both principal and interest from delinquent borrowers. In the instant case however, neither the initial offer [Exhibit P6] nor the restructured offer [Exhibit P13] contain any such clause. Exhibit P13 merely states that "*[t]he Bank may be constrained to take strict measures in the event of default in repayments by your Company*" [whatever that means]; and even at that, I find nothing before me which shows that NEXIM called-in or terminated the facility on account of JNL's failure or neglect to make repayment instalments as and when due in accordance with the repayment schedule at all material times. Exhibits P17 and P19 are mere demand letters requesting JNL to make payments that had [allegedly] fallen due, and threatening to sue if the demand was not met: they do not amount to, and certainly did not have the effect of, calling-in the facility. This is amply buttressed by the fact that Exhibit P17 [jointly signed by *Joyce Ekanem* [PW1] and one *Dokpe Akele*] demanded the payment of ₦158,892,873.98 as JNL's indebtedness as at 31/3/16, whilst Exhibit P19 written by NEXIM's solicitors [*Messrs Ademola & Ademola*] demanded payment of ₦162,999,877.71 as JNL's indebtedness as at June 2016, which shows that Exhibit P17 did not call-in the facility and NEXIM continued to calculate and apply

interest in accordance with the agreed repayment schedule. Crucially, NEXIM's solicitors observed in Exhibit P19 that JNL was still indebted to NEXIM on the facility "*long after … the maturity of same*", which is not quite so. It was wrongly assumed that the facility had attained 'maturity' whereas Exhibit P13 reveals that the facility was upgraded and restructured for a tenor of 4 years effective from 26/9/13 and had not attained maturity as at 29/7/16 when Exhibit P19 was made [or even 22/11/16 when the action was filed].

23. NEXIM contends that it was a victim of fundamental breach of contract by JNL and therefore entitled to repudiate the restructured loan contract, citing ***OLUSOGA v ADETOLA [2018] NWLR (PT. 1634) 483.*** But even if it is assumed *arguendo* that NEXIM was entitled to repudiate the restructured loan contract by reason of JNL's fundamental breach, it occurs to me that being entitled to repudiate the transaction is one thing, but whether NEXIM exercised that 'entitlement' in fact or at law is a different matter entirely. The point has already been made that the 4-year extended tenor of the restructured facility had not expired and there is no evidence that NEXIM called-in the facility so as to render the entire principal and accrued interest immediately due and payable by JNL. It being so, whilst one can readily identify with NEXIM's right of action in regard to the repayment instalments [of both principal and interest] that had fallen due as at May 2016, the legal and/or factual pedestal upon which NEXIM could validly stand to claim the residue of the restructured principal that had not fallen due as at May 2016 is difficult to think through. I therefore cannot see my way clear that NEXIM has demonstrated any right/cause of action over the residue of the principal that had not become due and payable by JNL as at May

2016, but which is nevertheless incorporated in the sum of ₦162,999,877.71 claimed in this suit.

24. Cause of action and right of action are interrelated legal concepts. Cause of action is the entire set of circumstances giving rise to an enforceable claim: the fact or combination of facts giving rise to the right to sue. See ***IBRAHIM v OSIM [1988] 3 NWLR (PT. 82) 257, THOMAS v OLUFOSOYE [1986] 1 NWLR (PT. 18) 669*** and ***ELABANJO v DAWODU [2006] All FWLR (PT. 328) 604 at 644.*** This comprises the wrongful act of the party being sued which has given the claimant reason to complain of damage done to him or injury suffered in a court of law. See ***LABODE v OTUBU [2001] 7 NWLR (PT. 712) 256*** and ***CAPITAL BANCORP LTD v SHELTER SAVINGS & LOANS LTD & ANOR (2007) LPELR-828(SC).*** Cause of action has to do with the facts that establish or give rise to a right of action, which is the warrant to enforce presently a cause of action. See ***ADEKOYA v FEDERAL HOUSING AUTHORITY [2008] 11 NWLR (PT. 1099) 539*** *–per Tabai JSC* and ***EGBE v ADEFARASIN [1987] 1 NWLR (PT. 47) 1 at 20*** *–per Oputa JSC*. Right of action is the empowerment of the claimant to exercise the option of seeking redress for wrong done. See ***ADMINISTRATORS/EXECUTORS OF ESTATE OF SANI ABACHA v EKE-SPIFF [2003] NWLR (PT. 800) 114.*** We are confronted in the instant case with a scenario in which NEXIM's right/cause of action had partly accrued and also partly unaccrued as at May 2016. And since it is certainly not feasible for, nor is it the preoccupation of, the court to put NEXIM's case into different compartments by isolating those aspects for which a right/cause of action had already accrued from other aspects for which it was yet to accrue as at May 2016, it seems to me that this action was filed prematurely at a time NEXIM did not have a complete right/cause of action over the entire sum of

₦162,999,877.71 claimed as JNL's total indebtedness. I so hold. A thing is said to be 'premature' when it is developing or happening before the natural or proper time. See ***ABDULAHI v MILITARY ADMINISTRATOR &ORS (2009) LPELR-27(SC).*** The facts highlighted above show clearly that the filing of this suit on 22/11/16 happened before the proper time. A suit initiated by a claimant whose right of action has not wholly crystallised cannot but be premature and *ex ipso jure* incompetent see [***ADESOLA v ABIDOYE [1999] 14 NWLR (PT. 637) 28, OKORO v EXECUTIVE GOVERNOR OF IMO STATE [2001] 51 WRN 171, OLADOYE v ADMINISTRATOR, OSUN STATE [1996] 10 NWLR (PT. 476) 38 at 41***], and this renders academic a consideration of NEXIM's entitlement [or lack of it] to the reliefs sought.

25. Learned counsel for the Defendants has urged the dismissal of this suit for being premature, but binding case law donates the proposition that where a court finds that a suit was prematurely instituted in that the claimant's right of action has either not wholly arisen, or there is want of *locus standi,* or the action is otherwise incompetent so as to impinge negatively on the court's jurisdiction to adjudicate, the proper order to make is one of striking out rather than dismissal. See ***ADETUNJI v ADESOKAN [2004] 5 NWLR (PT. 364) 540*** *(per Ogundare, JSC).* A suit which discloses no cause of action is liable to be struck out *in limine* at the instance of the defendant. See ***AKPAN v UTIN (1996) 6 SCNJ 244 at 256.*** Indeed, the cases of ***OLORIEBI v OYEBI (1994) 5 SC 1, RTEAN v NURTW [1992] 2 NWLR (224) 281*** and ***DADA v OGUNSANYA [1992] 3 NWLR (232) 754*** (amongst a host of other cases) donate the proposition that a court whose jurisdiction to adjudicate is impaired by incompetence of the action cannot proceed to dismiss the action. The contrary position taken in cases such as ***THOMAS v OLUFOSOYE supra*** was roundly rejected in ***ADETUNJI v***

ADESOKAN supra where the Supreme Court reviewed all the earlier decisions on the point.

26. In the light of everything that has been said in the foregoing, the proper thing to do is to strike out this suit for being premature and *ex ipso jure* incompetent. I so order. There shall be no order as to costs.

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PETER O. AFFEN
Honourable Judge

Counsel:

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