In The Supreme Court of Nigeria

On Friday, the 20th day of May 1977

S.C. 466/75

Before Their Lordships

Atanda Fatayi-Williams ..... Chief Justice of Nigeria
Mohammed Bello ..... Justice, Supreme Court
Andrews Otutu Obaseki ..... Justice, Supreme Court

Between

Obi Obembe ..... Appellant

And

Wemabod Estates Ltd ..... Respondent

Judgement of the Court
Delivered by
Atanda Fatayi-Williams, CJN

In these proceedings commenced in the High Court of Lagos State, the plaintiff claimed against the defendants the sum of £37,41O.18.2d being balance of fees and reimbursable expenses due to the plaintiff for services rendered for the defendants at their request in respect of the construction of "Unity House" at 37, Marina, Lagos. The particulars of claim, as set out in paragraph 14 of the plaintiff's amended statement of claim, read

(i)	Fees for structural and civil engineering services	£44,662.0.0d.
(ii)	Re-imbursable expenses	367.5.8d.
(iii)	Resident supervision	5,079.7.6d.
(iv)	Deposit on behalf of Wemabod Estates Ltd. in respect of special steel	3,000.0.0d.
		£53,108.13.2d.
	Payment up-to-date by Wemabod Estates in purported satisfaction of all claims	15,697.15.0d.
	Balance	£37,410.18.2d

At the hearing, the plaintiff admitted that the two sums of £367.5.8d. and £3,000.0.0d.which he claimed as reimbursable expenses and as deposit in respect of special steel respectively, had been refunded to him since the commencement of proceedings and that he no longer wished to claim these amounts. This admission has therefore reduced the total claim to £34,043.12.6d. which when converted to Naira is now approximately ₦68,087.25k.

The evidence adduced by the plaintiff in support of his claim may be summarised as follows. The plaintiff is a consulting engineer operating under the name and style of "Obi Obembe and Associates". The defendants, in May 1969, appointed him as the consulting engineer in respect of the building known as "Unity House" which they proposed to erect at No 37, Marina, Lagos. The conditions of the engagement of the plaintiff and his scale of fees were to be governed by those laid down in a booklet published by the Association of Consulting Engineers in London (Ex.3.). Pursuant to this, it was agreed that the plaintiff's fees for work done by him were to be calculated as a graded percentage of the engineering works as presented at page 38 of the booklet (Ex.3).

Soon after commencement of the building project, the parties had a disagreement about the quantity of the steel recommended by the plaintiff for the project. As a result, the plaintiff's appointment was terminated by the defendants by letter dated 9th October 1970 (Ex. 10). The claim is, however, not for wrongful termination of his

appointment but for the work which he had done pursuant to the project; it is based partly on the scale of fees laid down in the booklet (Ex.3) and partly on the letters exchanged by the parties.

With respect to the amount claimed by him for structural and civil engineering services, the plaintiff testified that his claim for £44,662.0.0d. is for work done by him as shown in the document (Exhibit 11), that it is in accordance with the booklet (Ex.3) and that it is based on a percentage of the cost shown in the bill of quantities (Ex.13) sent to him on 20th March, 1970, by Messrs. Roland & Partners, the quantity surveyors in charge of the project. He said further that all his figures in Exhibit 11 are taken from the bill of quantities except for the sum of £75,000 shown as the cost of the disputed quantity of steel. Under cross-examination, he testified further as follows

> "My claim relates to what I actually did up to the time my services were terminated. I now say that my claim relates to work which I actually did and also work which I might have done had the contract not been terminated …….. In fact I am saying that I only claimed for work which I did. I did not measure the job at the stage at which my work was stopped. I know that there is a progress chart in the building industry. I had not got the progress chart up to the stage at which I was stopped. I have a record of the services which I rendered up to the stage I stopped but I have not got it here. The records are in loose sheets, but they are complete. "

(The underlining is ours).

When asked why he did not bring the records to court, the plaintiff replied

> "I did not bring it to court because I understood that if I brought it the defendants would like to see it. These records are drawings."

The records were not produced throughout the trial. The significance of this omission *vis-a-vis* the claim for work done will emerge later. Finally, the plaintiff contended that his fees did not depend on the amount spent on the project and that if he did some work for a client and the client did not execute the work, he (the plaintiff) would still get paid for the work which he had done.

In his testimony about the sum of £5,079.7.6d. claimed for the services of his resident engineers, he referred to Schedule "C" in Exhibit 11which contained all his claims from the defendants. The particulars shown in schedule "C" are as follows

> "Fees for Resident Supervision by Structural Engineers

¼ (Bonus)	£1,560	
	390	
Basic & Parking	150	(for 10 months)
	£2,100	

Rate per hour $\frac{3x2,}{100}$ 100 = 63/- per hour

January 1970	88 ½ hours	@63/-	£278. 15s 6d
February 1970	161 hours	@63/-	£507. 3. =
March 1970	177 hours	@63/-	£557. 11 =
April 1970	193 hours	@63/-	£607. 19. =
May 1970	181 ¼ hours	@63/-	£570. 18. 9d
June 1970	193 hours	@63/-	£607. 19. =
July 1970	201 hours	@63/-	£633. 3. =
August 1970	181 ¼ hours	@63/-	£570. 18. 9d
September 1970	188 ¾	@63/-	£594. 11. 3d
October 1970	47 ¾	@63/-	£150. 8. 3d
	1,612 ½		£5,079. 7s 6d

He thereafter testified as follows:

> "Schedule 'C' shows the work done by Israel Okwudiarue from 19/1/70 - 22/5/70 and Mr. Aliu Adisa Disu from 22/5/70 to 12/10/70. Their basic salary was £1,560 per annum with bonus being a quarter of

the salary. There was also a car allowance of £150 per annum. This makes a total of £2,100 per annum. I prepared the Schedule in accordance with the number of hours they worked. "

When cross-examined about the particulars in Schedule "C" the plaintiff replied

"In schedule 'C' I claimed 1,612 ½ hours for the resident engineers. The defendants agreed by letter to pay by number of hours worked. Exhibit 12 is the letter and it is dated 7/8/70. I accepted the terms of Exhibit 12 and asked my lawyer to accept."

The relevant portion of the letter (Exhibit 12) dated 7th August, 1970, written by the defendants' Managing Director to the plaintiffs reads:

"Finally, you will also note that the matter of your resident engineer's expense was raised and a proposal was discussed that it should be agreed at £250 per month. We have had an opportunity of studying the provisions of the conditions of engagement of the Association of Consulting Engineers on this matter and we are of the view that the more appropriate manner of determining the reimbursement of the Resident Engineer's fee is to be the calculation on the following principles set out by the Association of Consulting Engineers:

'Fees of your site engineer will be calculated as follows: and payable monthly:

On a time basis at the rate of 2s.0d per £100 (or part thereof) of annual salary (including any bonus).

'We hope that you will consider the above proposals and respond to us without any delay whatsoever. In the circumstance therefore, we would like to have your immediate assurance that your firm is proceeding with your assignment without any interruption."

The reply to the letter (Ex.12) was written by the plaintiff's solicitors and addressed to the defendants' Managing Director. It is dated 14th August, 1970 and was admitted in evidence as Exhibit 42. The last paragraph of the reply reads:

"Finally, on the question of the resident engineer, our clients accept your new proposal on hourly basis, and will be re-presenting their bills accordingly."

The plaintiff was neither cross examined on his evidence about the resident engineers nor was any reference made to the figures shown in Schedule "C" of Exhibit 11. One of the resident engineers testified for the plaintiff. He is Aliu Adisa Disu (1st P/W). Part of his testimony reads:

"I know the Unity House of 37 Marina. I went there on 22/5170 as a resident engineer. Mr. Okwudare was the resident engineer before me. I stopped working there on 12/10170. Our hours of work was 7 a.m. till 4 p.m. with an hour break for lunch. My salary at the time was £1,560 per annum plus a quarter of my annual salary as bonus. I got a car basic allowance of £150 per annum. Okwudare left our firm and so I succeeded him on the site. He is no longer in the Company. I kept records on the site showing the hours of work. We worked on Saturday from 7 a.m. till 11.15 a.m.: when it rains we still worked. I produce my record of hours of work for September, 1970

(no objection, admitted Exhibit 25).

I produce the record for the last 12 days in October 1970

(no objection, admitted Exhibit 26).

Before September, 1970 I was not keeping hourly records. In August 1970 we received instructions from the defendants that payment would be on hourly basis. I then had to go to the calendar and calculated the days. That was how I got the hours from May to August. My predecessor observed the same hours as I did taking out Sunday calculating the public holidays and calculating from 7 a.m. to 11.15 a.m. for Saturdays.

In his testimony for the defendants, Adekunle Ojora (1st D/W) admitted that the plaintiff elected that his fees should be calculated on the basis of the structures and engineering works of the project. After giving the reasons for the termination of the plaintiff's appointment as the consulting engineer, he explained why they rejected the additional claims for structural works made by the plaintiff as follows:

"The total amount we paid to the plaintiff was based on the contract and covers the cost on the bills of quantities of the structural aspects of the project. In this connection, there are three engineering specialists consultants on the project, i.e. plaintiff, mechanical and plumbing consultants, and electrical contractors. We paid the plaintiff on a calculation on the structural engineering works as stated in Exhibit 1. We paid the other consultants also on the bills of the architects with regard to their respective specialities …….. Exhibit 9 which was submitted to us by plaintiff was claiming on items which the other consultants were claiming on. Plaintiff was on item 6 of Exhibit 9 claiming a percentage of plumbing and engineering installation on which we had another consultant.

Plaintiff is also asking us to pay in respect of generating plant on which we had electrical consultants ……. The following items were taken into account in paying the plaintiff, soil investigation, sub-structure concrete and steel work, piling and all other preliminary items and reinforced concrete items."

When cross-examined about the resident engineers, the 1st DIW replied

"We agreed that the man should be paid according to the work he did. I now read the conclusion of the letter Exhibit 12 ……. The letter Exhibit 42 does not accept our proposals in Exhibit 12 …….. Before the plaintiff engaged a resident engineer he should have sought our views and our agreement as to the cost. At the time there was no work going on on the site and I did not see any justification for paying a resident engineer. I did not include any fees for the resident engineer. We never thought of him. At no time was our consent sought for the appointment."

(The underlining is ours).

In a reserved judgement, the learned trial judge observed as follows:

"I have paid due attention to the oral evidence led by both parties and the documents which formed the contract between the parties especially Exhibit 1, 2, 10 and 12. In a claim of this kind a plaintiff has the burden of proving that which he asserts. It is therefore the duty of the plaintiff to prove his entitlement to every item of claim as stated in his statement of claim and set out in his analysis of fees Exhibit 11. I must say at once that the plaintiff has not shown by evidence that he is entitled to the claims which he is making on his writ."

The learned trial judge then proceeded to consider the evidence in support of the plaintiff's claim as follows:

"The Plaintiff admitted that he did not measure the work which he had done; that he never prepared a progress chart up to the stage at which he stopped the work; and that there is no provision in the conditions of engagement and scale of fees, Exhibit 3, for the wrongful termination of the services of Consulting Engineers. The plaintiff stated that he kept a record, in loose sheets, of services which he rendered (for which he is now claiming) up to the stage when he had stopped work. When asked to produce it he said he did not bring it to the court because he understood that if he did the defendants would wish to see it!

The preliminary and general works shown in the calculations of the plaintiff in Exh .11 is costed at £228,286 as against £141,350 shown in the Bill of Quantities Exh.13. The plaintiff was unable to give a satisfactory explanation for this difference. It seems clear to me that the plaintiff was unable to give a satisfactory explanation for this difference. It seems clear to me that the plaintiff did not release the working drawings for the project and this had led the defendants to write their letter Exh.19. the plaintiff based his claims as to the amount of remuneration due to him on his own oral evidence and the scale of fees Exhibit 3. He did not call any Consulting Engineer or such other expert to testify for him. Assuming that the conditions of engagement and scale of fees of the Association of Consulting Engineers, Exh.3, apply to the case, the fantastic fees charged by the plaintiff are not supported by the provisions in Exh.3. The plaintiff relies on the provisions of Exh.3 at page 30 Clause 3, Clause 9, at pages 33 and 34; and page 38 at the Schedule to Part 1 ……. I do not consider that the scale of fees relied upon Exh.3 is applicable. The plaintiff is entitled to be paid at the rate of the work he actually did. If the work were measured then it would have been possible to determine the sum due to the plaintiff. It seems to me that the plaintiff for reasons not unconnected with the determination of his engagement put up a fantastic claim which is out of all proportion with the actual work done."

The learned trial judge then dismissed the plaintiffs claim in its entirety after considering the claim made for the resident engineers as follows:

> "With regard to the fees for the Resident Engineer although the plaintiff has shown by Exhs. 1 and 2 that the defendants are under obligation to pay for the services of a Resident Engineer he has not proved that the fees actually due in respect of this is £5,079.7s.6d as stated in Exh. C which is attached to Exh. ll. If anything over and above what the defendants had already paid to the plaintiff had been due to him, he has greatly inflated his claims and failed to prove them. Had I been in a position on the facts to find any of the plaintiff's claims proved I would have been unable to enter judgement in his favour in view of the Arbitration Clauses 17of Exh. 3 at page 37 which the parties had agreed would govern their contract. "

(The underlining is ours)

It is against this judgement that the plaintiff has now appealed to this Court. Briefly stated, the complaints of learned counsel for the plaintiff/appellant at the hearing of this appeal are these. Firstly, the learned trial judge misdirected himself in law by stating in his judgement that if he had found the plaintiffs claim proved, he would have been unable to enter judgement in his favour in view of Clause 17 in Part 11 of the Association of Consulting Engineer's booklet (Ex.3) which provides for reference to arbitration in case of disputes. This misdirection is all the more glaring when, on the facts, the defendants themselves had expressly refused to proceed to arbitration. Secondly, he erred in law in holding that the scale of fees in Exhibit 3 was inapplicable to the calculation of the plaintiff's fees when the parties specifically agreed in Clause 12 thereof that the said scale of fees would apply. He consequently also erred by refusing to give judgement for the plaintiff on the items based on that scale of fees, and by observing, before coming to that conclusion, that the fees claimed are fantastic. Finally, the learned trial judge erred both in law and on the facts in refusing to grant the amount claimed for the resident engineers when the plaintiff himself in his letter (Ex.12) agreed to the basis of that claim.

With respect to the complaint about the observation of the learned trial judge on the failure of the plaintiff to submit his claim first to arbitration before coming to court, Mr Sofola, with his characteristic frankness, was also of the opinion that the learned trial judge was in error in making the observation. We also agree that the trial judge did not state the law correctly. As the learned counsel for the plaintiff/appellant has rightly pointed out, arbitration clauses, speaking generally, fall into two classes. *One class* is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom an action may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to that procedure to which they have agreed. *The other class* is where arbitration followed by an award is a condition precedent to any other proceedings being taken, any further proceedings then being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause. Such provisions in an agreement are sometimes termed "*Scott v Avery*" clauses, so named after the decision in *Scott v Avery (1856) 5 H.L. Cas. 811*, the facts of which are as follows. An insurance company inserted in all its policies a condition that, when a loss occurred, the suffering member should give in his claim and pursue his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitrators. In considering the scope of these provisions, the court held that this condition was not illegal as ousting the jurisdiction of the courts.

In the case in hand, clause 17 of the "Model Form of Agreement B" at page 37 of the Booklet (Ex.3), which on the evidence, both oral and documentary, adduced by both parties, has been incorporated by reference into the agreement between the parties, reads:

> "Any dispute or difference arising out of this Agreement shall be referred to the arbitration of a person to be mutually agreed upon or, failing agreement, of some person appointed by the President for the time being of the Institution of Consulting Engineers."

This clause is clearly different from the "*Scott v Avery*" clause. As a matter of fact, it belongs to the first class of arbitration clauses. We pause here for a moment to point out that when the dispute between the parties arose, the plaintiff, through his solicitors (the letter dated 9th January 1971- Exhibit 24 - refers) asked that the dispute should be referred to arbitration. The defendants, through their own solicitors, replied that a submission of the dispute to arbitration would serve no useful purpose. (See letter dated 19th January 1971-Exhibit23).

As we have pointed out earlier, any agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission (See *Harris v Reynolds (1845) 7 O.B. 71*). At common law, the court has no

jurisdiction to stay such proceedings. Where, however, there is provision in the agreement, as in Exhibit 3, for submission to arbitration, the court has jurisdiction to stay proceedings by virtue of its powers under section 5 of the Arbitration Act (Cap. 13 of the Laws of the Federation). The section reads

> "(5) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission or any other party claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order by staying the proceedings."

No stay was asked for by the defendants/respondents after they were served with the writ of summons. On the contrary, they accepted service of the statement of claim, filed their own statement of defence, testified in their defence, and took part in the proceedings until judgement was delivered. In order to get a stay, a party to a submission must have taken NO step in the proceedings. A party who makes any application whatsoever to the court, even though it be merely an application for extension of time, takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings (see *West London Diary Society Ltd. v Abbot (1881) 44 L.T. 376)*. Moreover, if the court has refused to stay an action, or if the defendant has abstained, as in the case in hand, from asking it to do so, the court has *seisin* of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. (See *Doleman & Sons v Ossett Corporation (1912) 3 K.B. (C.A.) 257* as per Fletcher-Moulton, L.J. at p.269; also *Hasting v Nigerian Railway Corporation (1964) Lagos High Court Reports 135 at pp.136-137*). In these circumstances, it was erroneous of the learned trial judge to observe as he did that even if the plaintiff/appellant had proved his case, he (the trial judge) would have been unable to enter judgement in the plaintiff/appellant's favour.

With respect to the complaint about the decision of the trial judge that the scale of fees in the 'Association of Consulting Engineers' booklet (Ex.3) was not applicable to the calculation of the plaintiff/appellant's fees there is no doubt, having regard to the contents of the documentary exhibits tendered at the hearing, that it was the intention of the parties that the whole of that part of the booklet dealing with "Model Form of Agreement between a client and Consulting Engineers " at pages 28 to 38 thereof was incorporated into the agreement. Part 1 of the Schedule to the said Form provides for the scale of fees. The whole form of Agreement deals with the design and supervision of structural engineering work. In this connection, we refer to the letter of appointment of the plaintiff/appellant as Structural Engineer to the project. Part of the letter (Ex.1) dated 2nd May 1969, reads

> "We are pleased to invite you to accept appointment as Structural Engineers to the scheme on the following terms and conditions
>
> (1) Your term of engagement to be subject to the conditions presently laid down by your appropriate Professional Institute. You are required to submit details of these to us for our prior approval.
>
> (2) The amount of your fee to be subject to agreement but generally in accordance with the scale authorised by the appropriate Professional Institute. We require you to submit details to us of the basis upon which you propose that fees should be paid."

Part of the letter dated 7th May, 1969 (Ex.2) by which the plaintiff/appellant accepted the appointment reads:

> *"Terms and conditions*
>
> We will gladly serve you in accordance with the Conditions of Engagement and Scales of Fees (copy enclosed) of the Association of Consulting Engineers, as stated in paragraph 2 (i) of your letter. You will observe that all terms and conditions enumerated in your letter are embodied therein. The conditions and scales are identical to that of the Institution of Structural Engineers and are adopted by the Institution of Civil Engineers of which the writer is a member. A copy of the letter is also enclosed, but as it is the only copy we have at the moment we shall be glad to have it returned to us at your earliest convenience.
>
> *Fees*
>
> Engineering fees have been set in all engineering codes as graded percentage of engineering works and not as fixed percentage for total cost of construction, and for project of considerable magnitude it is safer

for all concerned to adhere to this pattern. Our fees will be as at Schedule of model form "C" without prejudice to the application of Schedule 11 when necessary. For the purpose of estimating however, we may advise that the fees for structures around Lagos (and other coastal towns) would lie between 3% and 5% while up land between 2 ¼ % and 3 ¼ %."

In order to be entitled to the fees, however, it is provided at pp.29-30 of the booklet (Exh.3) that the plaintiff/appellant would be required to carry out certain duties at the preliminary stage, the tender stage, the working drawings stage, and the construction stage. The plaintiff/appellant has claimed the sum of £44,662 as fees for structural and civil engineering services in addition to the sum of £15,697.15/- which the defendants/respondents have paid to him in satisfaction of all his claims. But he never produced the records of the services which he had rendered in this respect throughout the trial. We repeat here what he said when he was asked about the records

"I have a record of the services which I rendered up to the stage I stopped but I have not got it here. The records are in loose sheets but they are complete. I did not bring it to court because I understand that if I brought it the defendants would like to see it. These records are drawings."

Admittedly, in a letter dated 10th September, 1970, which he wrote to the defendants/respondents (Ex.34), the plaintiff/appellant said

"We are pleased to inform you that all the engineering working drawings including revisions in the above project have been completed."

But on the next day, 11th September, 1970, he wrote to Messrs. Cappa & D'Alberto Ltd., the building contractors in charge of the project in the letter (Ex.35) as follows:

"We wish to confirm to you that our engineering drawings as given to you are valid from the foundation to ground floor slab level ONLY."

He confirmed the contents of the above letter to the defendants/respondents in the letter (Ex.37) which he wrote to them on 14th September, 1970. On 5th October, 1970, the building contractors wrote a letter (Ex.39) to the plaintiff! appellant in which they said

"Would you kindly note the drawings received by us are contrary to those listed in your letter. "

In view of the non-production of the working drawings, and the extracts from the letters referred to above, we do not see how any court would have given him a kobo in respect of the fees claimed by him for structural and civil engineering services. The learned trial judge was therefore justified in dismissing the plaintiff/appellant's claim for £44,662 although we think his reasons for doing so are erroneous. The appeal against this decision therefore fails.

We will now proceed to consider the complaint about the dismissal of the claim for the resident engineers. There is no doubt that the plaintiff/appellant did provide the services of the resident engineers from January to October, 1970 when his appointment was terminated. He testified in support of the claim and he also called one of the engineers as a witness. No evidence was adduced by the defendants/respondents in rebuttal. The denial of the only witness called by the defendants/respondents is inept and does not carry the matter much further. Their solicitors wrote a letter (Ex.23) to the plaintiff/appellant about this claim on 19th January, 1971, as follows:

"(ii) resident supervision:

our clients require to be satisfied that there was, for the whole period of the time to which the claim relates, actual supervision on the site by a suitably qualified engineer with sufficient practical experience to supervise the construction works on the site."

It is significant, to say the least, that notwithstanding the above letter, when the plaintiff/appellant and his engineer (1st P/W) testified as to the supervision, no question was asked about the length or the sufficiency of the supervision. The hours of work put in the claim was not even challenged. It is pertinent in this respect to refer to the decision in *Doobay & Ors. v Mohabeer (1967) 2 ALLE.R. (P.C.)760* at p. 765 where Lord Wilberforce observed

"With regard to the cost of installing the mill, the appellants are, in principle, entitled to damages, since such expenditure has been thrown away. The trial judge seems to have accepted this, but held that the

figure claimed - 1,5000 dollars - had not been properly established. The appellant, however, gave evidence about this expenditure; as recorded in the judge's note he said

> 'the cost of the installation was 1,500 dollars including workmanship',

and no challenge to this by cross-examination seems to have been made, nor did the judge give any reasons for holding the sum excessive. In these circumstances, the right course, in their lordships' view, is to award to the appellants the sum claimed."

Again, in *Boshali v Allied Commercial Exporters Ltd. (1961) All N.L.R 912* (another decision of the Privy Council on an appeal against the judgement of the Nigerian Federal Supreme Court), Lord Guest who delivered the judgement of the Privy Council, observed at p.921 as follows:

> "The Federal Supreme Court took the view that the figure of 6d per yard for loss of profit on the sale of the goods awarded by the trial judge rested on the *ipse dixit* of the appellant that he would have made a profit of 6d and that this was not sufficient proof of his actual loss of profit. The only evidence as to loss of profit came from the appellant who was an expert in the trade and whose evidence was accepted by the trial judge. He was not cross-examined on the basis that his claim was excessive. The trial judge was in their lordships' view fully entitled in the absence of contrary evidence to take the figure of 6d per yard as the appellant's loss of profit."

It only remains for us to add that since the plaintiff/appellant and his witness were not cross-examined about the claims made by them for the work of the resident engineers, the trial judge, in the case in hand, should have done what was done by the trial judge in the *Boshali* case and accept the claim made out by the plaintiff/appellant in respect of the resident engineers. He was in error in stating that the plaintiff/appellant

> "has not proved that the fees actually due in respect of this is £5,079.7.6d as stated in Exhibit C which is attached to Exhibit 11."

For the above reasons, the appeal succeeds but only in respect of that part of the judgement of the trial judge dismissing the plaintiff/appellant's claim for resident supervision by his engineer. The appeal against that part of the judgement of the High Court of Lagos State in Suit No LD/8SI71, delivered on 28th September, 1973, dismissing the claim of£ 5,079.7 .6d for resident supervision is allowed and the particular order is accordingly set aside. The plaintiff/appellant is awarded the sum of £5,079.7.6d. (now ₦10,158.75k) under this item of his claim and this shall be the judgement of the Court. For the avoidance of doubt, the order dismissing the claim for the sum of £44,662 as fees for structural and civil engineering services is hereby affirmed. The plaintiff/appellant is never the less awarded costs of this appeal assessed in the court below at ₦30.00 and this Court at ₦220.

Counsel

Chief B. Olowofoyeku *with him* S. Igbokwe	.....	For the Appellant
Mr. K. Sofola	.....	For the Respondent