Wilbough De-Ultimate Nig Ltd and Chief O.O Okonkwo v Ibtc Chartered Bank Plc – A Comment

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1. Introduction

The issue of excessive charges by commercial banks over loan facilities granted to customers is a long standing problem. It is so germane that it is one of the primary issues of concern to the Banker's Committee. It is thus a serious matter not only for the businessmen but also for the lawyers to ascertain how and when these charges may be lawfully made. This is of particular interest in any economy such as an economy in recession like ours where the cost of doing business is so prohibitive that putting more onerous obligations on businesses can only spell one thing - collapse of businesses. *Wilbough De-Ultimate Nig Ltd. v IBTC Chartered Bank Plc*[1] is one of those cases dealing with the issue of excessive charges by banks on loan accounts. Experience has shown that most of the time, these charges only come to the knowledge of the customer after the loan agreement has been completed and running. The case is of particular interest because of the interpretative acumen that was brought to bear on the resolution of the dispute and the principles(s) which the case suggests or seems to establish. In arriving at the decisions in this case, the learned Judge appeared to have been faced with a novel situation and the dexterity with which he dealt with the novelty deserves some commendation.

2. Facts of the case

The 1st plaintiff was a customer of the defendant at its Maitama Branch, Abuja. The defendant granted to the 1st plaintiff a loan facility in the sum of ₦5.5M at an interest rate of 22.5% per annum

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1 Unreported judgment in Suit No. FCT/HC/CV/859/2007 before His Lordship, Hon Justice Peter N. Affen delivered on Tuesday 10th February 2009.

"subject to changes in money market rate as may apply from time to time." The purpose of the loan facility was to enable the 1st plaintiff to part – finance the execution of a contract valued at ₦11.4M awarded to the 1st plaintiff by Bouygues Nigeria Ltd for the construction of road network around the fence of the National Stadium, Abuja. The tenor of the loan facility was ninety (90) days. The 2nd plaintiff, who is the Managing Director of the 1st plaintiff, gave a personal guarantee. Two (2) landed properties both situate at Suleja in Niger State were used as security against the loan. The loan has not been repaid. The defendant debited the 1st plaintiff's account with interest rate of up to 35% per annum and, as alleged by the plaintiffs, initiated steps to dispose of or deal adversely with the two landed properties used as security against the loan. The plaintiffs therefore commenced this action against the defendant claiming for the following orders:

a. A declaration that the fees, charges, commissions and interests debited against the 1st plaintiff's account by the defendant are unjustified, unlawful and oppressive.
b. An order of court directing the defendant to:
i. Cancel, delete or remove all entries relating to the aforesaid fees, charges, commissions and interest from the 1st plaintiff's account;
ii. Determine the current sum due from the plaintiffs to the defendants by calculating interest and other legitimate charges on the principal loan at rate prevailing in the banking industry on such facilities as the one granted to the 1st plaintiff at all material times;
iii. Allow the 1st plaintiff to nominate an accountant to represent its interest while the order in b(i) and b(ii) are complied with;
iv. A declaration that the defendant cannot sell, alienate or purport to sell or howsoever interfere with the plaintiff's property situate at and known as No 3 People's Club road, Suleja Niger State and No 7 Dalhatu Street, Suleja Niger State respectively.
v. An order of injunction restraining the defendant, its

servants or agents from continuing to debit undue or unauthorized fees charges, commissions and interest in the plaintiffs account; and

vi. An order of injunction restraining the defendant, its servants or agents from selling, alienating or howsoever transferring any interests in the aforesaid property to anybody in purported exercise of its right as unpaid mortgage.

The defendant on the other hand filed out of time with leave of the court a statement of defence and a counterclaim wherein it claimed against the plaintiffs jointly and severally as follows:

i. A declaration that the 1st plaintiff is in breach of the indicative terms and conditions under which the loan of ₦5.5m was advanced to her.
ii. A declaration that the 2nd plaintiff as absolute and unconditional guarantor to the 1st plaintiff is liable to pay in full the current loan advance and accrued interest therein;
iii. A declaration that the defendant /counterclaimant is entitled to exercise its power of sale as mortgagee;
iv. The total sum of ₦13,865,844.16 only being the total amount due and unpaid as at 31 October 2007 consequent upon the loan advanced by the counterclaimant to the 1st plaintiff and guaranteed by the 2nd plaintiffs;
v. An order of court empowering he counterclaimant to sell the plaintiff's two landed properties in satisfaction of the debt;
vi. 35% Interest calculated monthly from 30th November 2007 till judgment is delivered and 6% thereafter until the judgment sum is liquidated; and
vii. The sum of N1,300,000.00 only being legal expenses incurred by the defendant / counterclaimant consequent upon the default of the plaintiffs in failing, neglecting or refusing to fulfil their obligations to the counterclaimant.

3. The State of the Pleadings and Evidence

The plaintiffs averred in their statement of claim that the 1st plaintiff religiously paid money into its account with a view to amortizing the debt but these payment were not credited and the debt continued to swell rather than decrease. The plaintiffs averred that ten payments were made as can be gleaned from the statement of account which they sighted in court; that the defendant did not do anything to remedy the situation in spite of complaints in this regard because it had targeted the plaintiff's two landed properties used to secure the loan; that the defendant imposed arbitrary interest rates and other charges such as automatic loan repayment charge, commission on turnover, overdrawn interest charge, extension fee charges and loan advance transfer charge which were not part of terms and conditions of the loan; that it is a fundamental term of the loan agreement that repayment of the loan shall be made from the proceeds of the contract of ₦11.4M awarded to the 1st plaintiff by Bouygues Nigeria Ltd, and the defendant is not entitled to any payment from the plaintiff unless the contract sum is paid and the plaintiffs have taken out action against Bonygues Nig Ltd which action is pending; that by charging compound interest instead of simple interest and other undue and underserved charges, as well as not reflecting ten payments made by the plaintiffs, the defendants overcharged the plaintiffs to the tune of ₦7,905,140.16 and is consequently in breach of the contract and has perpetrated fraud which vitiated the entire contract. The plaintiffs maintained that the defendant is entitled to only ₦5.5 million which is the principal amount advanced as loan to the 1st plaintiff.

The defendant on the other hand averred that it granted the loan of ₦5.5 for a 90 day term on indicative terms and conditions which the 1st plaintiff unqualifiedly accepted; that the 1st plaintiff satisfied the said indicative terms and conditions which included a full personal guarantee by the 2nd plaintiff; deposit of title documents to two properties owned by the 1st plaintiff as security against the loan; execution of a legal mortgage; acceptance of the offer letter by the obligor and a board resolution accepting the facility. The defendant further averred that the 1st plaintiff made only one payment in the sum of ₦337,212.00 vide an Intercontinental Bank Plc cheque

dated 11/3/04; that it is more interested in the recovery of the debt than the outright sale of the plaintiff's property; that the defendant did not impose arbitrary interest rates or charges on the plaintiff's account different from the terms contained in the offer and acceptance letters; that allegation by the plaintiffs to the effect that the defendant engaged in unwholesome practices by building undue and underserved interests, charges and commissions is utterly false and a calculated attempt by the plaintiff to repudiate their liability to the defendant in that the plaintiffs had in several letters accepted liability for the principal sum and accrued interest thereon and pleaded for time to liquidate the debt.

Under cross-examination, the plaintiffs admitted their liability to pay interest on the loan. The defendant on the other hand admitted that by exhibit P. 3, i.e., the indicative terms and conditions of the loan, a rate of 25% per annum was to be paid. The defendant however stated that the bank did not at any time charge interest over and above the agreed interest rate of 25%. Under cross- examination, the defendant admitted that the plaintiffs made deposits which apparently were not credited when it confirmed from exhibit P. 4 (statement of account) the deposits made by the plaintiff which amounted to ₦1,350,572.18 during the tenor of the facility. The defendant admitted that the interest rate of 22.5% was applied to the loan facility but that the interest rate later rose to 35% per annum; that the current lending rate is 13%; that even though the loan document did not specify that penal charge will be 35% per annum, it nevertheless did state that the bank could charge penal interest on any amount due and unpaid; and that the penal interest was determined unilaterally by the bank as the plaintiff had accepted the condition upfront by accepting the terms and conditions for granting the facility. Pressed for further explanation, the defendant explained the accepted the condition for granting the facility. Pressed for further explanation, the defendant explained that overdrawn interest charge is the interest charged on the outstanding balance of the account; that extension fee charge means the fee charged to extend the tenor of a facility; that automatic loan payment charge is generated by the system on the expiry date of the facility and the principal amount and any

outstanding interests are automatically debited to the customer's account. The defendants also admitted that it charged compound interest on the facility, i.e. the principal plus interest being subjected to interest charge.

4. The Issues for Determination

Having jettisoned the issues framed by the parties because the issues pandered to the parties' purposes, the court proceeded to raise two issues which captured the gravamen of the matter. The issues were:

i. Whether in the light of the pleadings and the evidence adduced by the parties, the 1st plaintiff (as obligor) has defaulted in meeting its obligations to the defendant (as lender) having regard to the indicative terms and conditions of the loan agreement contained in the letter of offer dated 13/8/03 (i. e. exhibit P 3) pursuant to which the defendant granted the loan facility of ₦5.5M to the 1st plaintiff; and

ii. Whether the defendant debited the 1st plaintiff with unjustified or unauthorized interest rates, fees, charges and/or commissions at all material times.

5. The Arguments

The plaintiffs argued that they have not defaulted in repaying the loan since the source for repayment of the loan as stipulated in the indicative terms and conditions of the loan agreement, i.e., from the contract proceeds totaling ₦11.4m has not materialized. They also argued that the several fees, charges and or commissions which did not form part of the loan agreement were unjustified and oppressive. The defendant on the other hand argued that the plaintiffs were in default after the 90 days tenor of the facility especially as the loan was terminated on 8/7/04. The defendant further contended that it was entitled to charge compound interest on the basis that there is a custom to that effect and that the plaintiffs impliedly consented to this custom.

6. The Judgment

Ruling on the first issue, i.e., whether in the light of the pleadings and evidence, the 1st plaintiff has defaulted in repaying the loan; the court held that on a proper construction of the indicative terms and conditions of the loan agreement between the parties, the 1st plaintiff has not defaulted in its obligation to repay the loan. In coming to this decision, the court relied on the indicative terms and conditions of the loan agreement which "make it crystal clear that the loan is to be repaid from contract proceeds totaling ₦11.4 and there was uncontradicted evidence that the said contract sum had not been paid till date while the plaintiffs had already instituted action to recover contract sum.

On the second issue, i.e., whether the defendant debited the 1st plaintiff with unjustified or unauthorized interest rates, fees, charges and or commission at all material times, the court held that the compound interest and /or penal interest rate of 35% debited against the 1st plaintiff over and above the agreed 22.5% per annum are unjustified, unauthorized and manifestly unsupportable. The court also held as unjustified and unauthorized the various automatic loan repayment charges, commission or transfer charges etc debited against the 1st plaintiff. It is worthy of note that the defendant had started charging penal and or compound interest even before the termination of the facility.

7. A Comment on the Decision

This case brings to the fore a problem encountered by several Nigerians in the hands of commercial banks on a daily basis. That is, the problem of un-agreed and unknown charges built into loan advances without the knowledge of customer, which has turned loan-taking from any commercial bank today in Nigeria into a nightmare. The banks usually hide under the provision for unilateral change of interest rate. The situation is so bad that at the end of the day, interests and charges grossly overwhelm the principal amount advanced. A case like *Union Bank of Nigeria Ltd v Ozigi*[2] readily comes to mind.

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2 [1994] 3NWLR (pt. 333) SC 385.

In that case, the respondent was a customer of the appellant. In 1982, he obtained a loan of N250,000.00 from the appellant to complete a restaurant. The terms of the loan were set out in deeds of mortgage which were admitted in evidence as exhibits 5 and 6. He was making payments on the loan until 1988 when there was a disagreement on the question of the rate of interest chargeable on the loan. Whilst the respondent insisted that the interest rate of 11% was chargeable throughout the period of repayment, the appellant contended that the rate of interest chargeable was not fixed and that it was empowered by the mortgage deeds to stipulate the rate of interest from time to time and pursuant to that power, it had from time to time, after the granting of the loan stipulated and charged interests higher than the 11% as a result of credit guidelines issued by the Central Bank of Nigeria to Commercial Banks. As a result, the respondent claimed that the balance of the loan was N116,076.10 while the appellant contended that it was N353,632.09.

As the disagreement could not be resolved, the respondent sued the appellant at the High Court claiming inter alia declarations that the appellant was only entitled to charge interest prevailing at the time the loan was granted and that it cannot arbitrarily increase the interest. At the trial, the respondent led evidence to the effect that before he was granted the loan, he had a discussion or negotiation with the Assistant General Manager of the appellant in charge of operations and they agreed on the interest rate of 11%. This was contained in a memorandum, (Exhibit "1"). The contention of the appellant was that all the terms regulating the rate of interest are those contained in clause 3 of each of the mortgage deeds, Exhibits "5" and "6". The trial court rejected the memorandum on the ground that it was inadmissible to vary the provisions of the mortgage deeds, but held that the respondent led sufficient oral evidence of the negotiation which allegedly fixed the rate at 11%. The court then entered judgment for the respondent and granted four of his six claims. The appellant was dissatisfied and it appealed to the Court of Appeal, which dismissed the appeal and upheld the judgment. The appellant then further appealed to the Supreme Court. Clause 3 of the mortgage deeds stipulates that:

> All interest payable on the money hereby secured shall accrue due from day to day at the rate from time to time stipulated by the Bank and may be capitalized at such intervals as the bank may from time to time prescribe but not more often than monthly and added to the money hereby secured and shall thereupon bear interest accordingly at the rate aforesaid.

The Supreme Court after a consideration of the above clause and section 132 of the evidence Act on admissibility of parole evidence to alter or modify the contents of a document allowed the appeal and held that the words "at the rate from time to time stipulated by the bank" clearly show that the appellant is at liberty to fix the interest rate as it would deem fit. In other words, the appellant is not bound to adhere to the rate of 11% per annum negotiated between the respondent and the Assistant General Manager of the appellant.[3] According to the Supreme Court: [4]

> … where as in this case, a Bank lends money to its customer on an agreement that the rate of interest shall be the rate as stipulated from time to time in response to the Central Bank Guidelines, then, such a rate cannot be fixed as the prevailing rates by the Central Bank also vary. Consequently, where the bank changes interest rate, a customer cannot complain that the bank has arbitrarily or unilaterally varied the interest rate at will.

The Supreme Court decision in *Union Bank of Nigeria Ltd v Ozigi* appeared to have laid a solid foundation for the arbitrary charges in interest rates by commercial banks in Nigeria on loan advances even when the banks have led their customers to believe that they are taking a loan at a particular interest rate and that the rate would not be changed during the lifetime of the loan. It was a case won on technicality based on the admissibility of the memorandum Exhibit "1" because, as found by the trial judge, there was no doubt that the appellant through its Assistant Manager Operations agreed

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3 Per Uwais JSC at 408 – 409.

4 Per Adio JSC at 403 – 404.

and negotiated 11% with the respondent. However the case may be justified on the ground that the mortgage deeds were later in time and therefore, it was negligence on the part of the respondent to have allowed the provisions of clause 3 in the mortgage deeds in view of exhibit 1. But then, one must not lose sight of the fact that this was a case of standard form contract.

Wilbough is somehow distinguishable from *UBN v Ozigi* in that in *Wilbough,* what was in issue was not just the arbitrary and unilateral change of interest rate but the charging of fees, charges and commissions that the customer never gets to know about until it has probably become too late in the day. On this score, *Wilbough De-Ultimate Nig Ltd. v IBTC Chartered Bank Plc* is a very bold decision in charting the way on the legal landscape on the vexed issue of un-agreed and little known charges that have made loan-taking in Nigeria a nightmare.

This case has established that the so-called automatic loan payment charge, extension fee charge, and several other yet-to-be-identified charges that are hardly ever brought to the customer's knowledge as forming part of the loan agreement are not justified by law. The case is a signal to the commercial banks that it will no longer be business as usual. The courts will now be more than ever ready to go into the minute details of the so called loan agreement and interpret strictly any oppressive provision or clause against them. The decision is also a wake-up call on all other courts to rise up to the occasion and use their interpretative powers to aid the course of justice and not to merely wallow in literalism and mechanical approach to the interpretative function of the court which a case like *Union Bank of Nigeria Ltd v Ozigi* exhibits. Of course, the banks would react by now seeking to expressly incorporate these charges as part of their standard form contracts. It is therefore absolutely imperative that general public be educated on their rights to negotiate and vary these so-called standard form contracts to meet individual needs.