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Razaq Justice Adebimpe*

AN EXAMINATION OF THE EFFECTS OF A DISHONOURED CHEQUE

I. INTRODUCTION

A bank's legal responsibility under its contract with its customers to exercise reasonable care and skill in regard to his affairs is undoubted. The duty extends over the whole range of banking business including interpreting, ascertaining and acting in accordance with the instructions of the customer[1], thus a cheque being payment instruction and mandate by a customer to his banker must when properly drawn and the account is in sufficient fund be strictly complied with, a breach of which might fix the banker with liability for not only negligence arising from contract but also libel.

Be that as it may, this paper examines the consequence that follows from absence of sufficient care and skill especially failure to act in accordance with the written order of a customer as evidence in the issuance of cheques. The nature of the relationship between a bank and its customer as well as that of a cheque is extensively examined. And the principles governing award of damages for a wrongful dishonour of cheque by a banker is exhaustively highlighted. In the final part of the paper, far reaching suggestions particularly to the bankers are made in order to reducing the incidences of the situation on the banker.

II. NATURE OF THE RELATIONSHIP BETWEEN A BANK AND ITS CUSTOMERS

A customer to a bank in relation to the business of banking is any person having an account with a bank[2] or for whom the bank has agreed to collect items and this includes a bank carrying an account with another bank.[3] In law, such legal relation between a bank and its customer where the bank accepts money either in current or deposit account from the customer is basically that of contract.[4]

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* Barrister and Solicitor of the Supreme Court of Nigeria and Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Nigeria. E-mail: adebimpe. rj @unilorin.edu.ng.

[1].Diko v African Continental Bank Ltd [2000] 5 N W L R (Pt 657) 441; Agbanelo v Union Bank of Nigeria Ltd [2000] N W L R (Pt 666) 534, 551; Selongor United Rubber Estates Ltd v Cradock no 3 (1968) 2 All E R 1073.

[2]. It is not necessary that the account should have been opened for a minimum length of time, or that it should have been operated by the customer making a certain minimum number of payments into it or drawings against it: See Commissioner of Taxation v English, Scottish and Australian Bank Ltd (1920) A C 683 (PC); see also R R Pennington, A H Hudson and J E mann, Commercial Banking Law (Macdonald & Evans Ltd; Plymouth 1978) 18-9.

[3]. N D I C v Okem Enkem Enterprises Ltd & 1 Anor (2004) All F W L R (pt 210) 1176, (2004) WRN 1, 108.

[4]. WEMA Bank Plc v Osilaru [2008] 10 N W L R (pt 1094) 170; Afribank (Nig) Plc v A I Investment Ltd [2002] 7 N W L R (pt 765) 40; Royal Petroleum Co Ltd v First Bank of Nigeria Ltd [1997]6 N W L R (pt 501) 548, 599; Allied Bank (Nig) Ltd v Akubueze [1997] 6 N W L R (pt 509) 374; Balogun v National Bank of Nigeria Ltd (1978) 11 N S C C 135, 3 S C 155. In Foley v Hill (1848) 2 H L 28, 9 E R 1002, Lord Campbell treats the relationship as one of contract, while in Joachimson v Swiss Bank Corporation (1921) 3 K B 110 (CA) Lord Atkin, in a judgement which is regarded as one of the most important ever delivered on the subject of Banking Law took the same view: See Lord Chorley, Law of Banking (6th edn Sweet & Maxwell, London 1974) 26.

The relationship may also be described as that of creditor and debtor. The creditor being the customer and debtor the bank. The receipt of money from and in account of a customer by a bank constitutes the banker the debtor of the customer.[5] And the proceeds so received are not to be held in trust for the customer,[6] rather the bank borrows the proceeds and undertakes to repay to the creditor when demanded a sum equivalent to that paid into his hands to any person so named on the cheque as the payee against the written orders of the customer.[7]

However, unlike an ordinary debtor, a banker is under no duty to seek out the creditor or to repay the loan immediately it is due (i.e. directly after the customer had the money paid into its account). It is unrealistic to permit a customer like any ordinary creditor to demand payment of the deposit at any time and place. Indeed, it is well established in a number of cases that the obligation of the bank is not a debt pure and simple, such that the customer could sue for it without warning or previous demand for payment.[8]

The relation so constituted is equally that of principal and agent as the banker from time to time act as his customer's agent. For instance, the banker does from time to time act as his customer's agent when he collects for him bills of exchange and cheques. Such cheques drawn on him by the customer represents the order of the principal to his agent to pay out of the principal's money in his hands, the amount stated on the cheque to the payee endorsed on the cheque.[9]

III. NATURE OF CUSTOMER RIGHT OVER MONEY IN HIS ACCOUNT

In view of the relationship between the banker and his customer, and of the contract that exists between them, the customer has neither '*the custody*' nor '*the control*' of monies standing in his credit in an account with the bank, such remains the property in the custody and control of the banker payable to the customer only when a demand is made.[10] This is because if any thing happens to the money, for

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[5]. This enabled the banks to treat money deposited with them as their own. What they are obliged to do is only to return an equivalent amount: Mai v Standard Trust Bank Ltd (2008) All F W L R (pt 10) 563, 566; Haston (Nig) Ltd v African Continental Bank Plc (2002) F W L R (pt 119) 1476, (2002) 39 W R N 1, 22-3, (2002) 1 S C M 119; Yesuf v A C B Ltd (1981) 1 S C 74, 98-9, (1981) 12 N S C C 36, (1979) 1 All N L R (Pt 1) 323; Badaru v Somolu Community Bank (Nig) Ltd [2003] 10 N W L R (Pt 827) 91, 101.

[6]. To have held that the banker was a trustee of the moneys deposited with him would have limited how the funds could be employed, rather, characterization of the bank as a debtor enables it to use his customers money freely as his own, and he is guilty of no breach trust in employing it. Thus, in Foley v Hill (n 4) the House of Lords per Cotteham L C at 1005-6 held inter alia that the money placed in the custody of a banker is to all intents and purposes the money of the banker, he is to deal with it as his own, there is no duty on the banker not to make secret profits and he retains it to himself. See also Joachimson v Swiss Bank Corporation (n 4) 127.

[7]. Standard Trust Bank Ltd v Anumnu [2008] 14 N W L R (Pt1106) 150; Joachimson v Swiss Bank Corportation (n4); Diamond Bank Ltd v Ugochukwu [2008] 1 N W L R (Pt 1067)1, 23; Agwarangbo v Union Bank of Nigeria (2001) 4 N W L R [Pt 702] 1, 25; Allied Bank (Nig) Ltd v Akubueze (n 4); Yesufu v A C B Ltd (N5).

[8]. Joachimson's case (n 4).

[9]. Standard Trust Bank Ltd v Anumnu (n7) 151; AfriBank Plc v A I Investment Ltd (n 4); Access Bank Plc v M F C C S [2005] 3 N W L R (Pt 913) 460, 474, (2003) F W L R (Pt 141) 1814; Balogun v National Bank of Nigeria Ltd n4); Badaru v Somolu Community Bank (Nig) Ltd (n 5).

[10]. WEMA Bank Plc v Osilaru (n 4); Yesuf v A C B (n5); Purification Technical (Nig) Ltd v A G Lagos State & 31 others [2004] 9 N W L R (pt 879) 665.

instance, armed robbery or theft of the money it is the banker and not the customer that bears the loss.

IV. THE NATURE OF CHEQUE

Cheques are unconditional payment instructions or orders from the drawer authorizing the drawee bank to make payment to the holder of the cheque. And by its nature it is a bill of exchange within the meaning and intendment of the *Bill of Exchange Act*.[11] In effect a bank is under a duty to honour cheques drawn on it by a customer unless it is not properly drawn or if at the material time the account is not in a sufficient funds, or if paying the cheque would take the account beyond an agreed overdraft.

It follows therefore that, when a customer makes a demand by issuing a cheque, a refusal by a banker to pay the cheque when he holds in hand by reason of keeping the account of the customer, such an act of refusal amounts to a breach of contract. And the customer's action lies in damages under their relationship,[12] even if he is simply requested to represent.[13]

V. WHEN A PAYING BANK CAN DISHONOUR CHEQUES

Generally, a paying bank is under a duty to honour cheques drawn on it by a customer. However, under certain circumstances the obligation is restricted and as such a bank may dishonour a cheque in the following situations:

Firstly, it should be noted that a cheque is not as good as cash or an absolute or irrevocable order (like a bill of exchange) to appropriate a certain sum to the payer. Thus when issued, it is still in the control of the drawer.[14] It follows therefore that a drawer of a cheque may for his own special reasons effectively countermand his own mandate and stop payment.[15] And the bank will be bound to comply with such instructions.[16]

To be effective however, a countermand should actually come to the knowledge of the banker, or his servants,[17] and be absolutely unequivocal.[18]

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[11]. Cap B8 L F N 2004 as reflected in s 2; see A Lewis, Law of Banking Services: The Principle (Tudor Business Publishing Ltd; Kent 1991) 6. Thus, where a matter borders on wrongful dishonouring of a cheque presented, the awarded of damages recoverable are as set out in s 57 of the Bills of Exchange Act if the claim is based on breach of contract. But the section may not apply where the action is based on Negligence which must be properly averred, pleaded and proved: Koya v United Bank of Africa Ltd [1997] 1 N W L R (Pt 481) 251.

[12]. Dike v A C B Ltd (n1); Salami v Savannah Bank (Nig) Ltd [1990] 2 N W L R (Pt 130) 106, Access Bank Plc v M F C C S (n9); Royal Petroleum Co Ltd v First Bank of Nigeria (n4).

[13].Ide Chemists Ltd v National Bank of Nigeria Ltd (1976-1984) 3 N B L R 111, 118, (1978) All N L R 63, (1978) 3 S C 155; Ashubiojo v African Continental Bank (1966) 2 All N L R 203; Balogun v National Bank of Nigeria Ltd (n 4); WEMA Bank Plc v Osilaru (n 4); Baker v Australian & New Zealand Bank (1958) N Z L R 907; Access Bank Plc v M F C C S (n 9).

[14]. United Bank of African Ltd v Ibhafidon [1994] N W L R (Pt 318) 90.

[15]. Ibid.

[16]. If the banker pays after an effective countermand, he can not debit his customer's account with the amount: Gutire v London City & Midland Bank Ltd (1908) I K B; Reade v Royal Bank of Ireland (1922) 2 L R 22.

[17]. Curtice v London City & Midland Bank (1908) I K B 293.

[18]. West Minster Bank Ltd v Hilton (1926) T L R 124.

Furthermore, a bank will ordinarily refuse to honour a customer's cheque on the ground of insufficient funds.[19] For insufficient funds to meet the cheque, the bank usually marked the cheque *R/D* meaning '*Refer to Drawer'* and it is entitled to do so.[20] It should be added that as the instruction or order is for a specific sum a banker is not obliged to pay part of the sum for which cheque is drawn where the account is not sufficiently in funds to pay the whole. That is not '*sufficient fund to meet'* within the meaning of the law.[21]

In the same vain, the account must actually be in credit, so that if the bank has though received funds which it has not had time in the ordinary routine of business and within a reasonable time after the receipt of money to pay to the credit of the account, the banker is not obliged to pay, he is not liable for dishonouring cheque which can only be met with the use of such fund.[22]

A paying banker will also be justified in refusing to honour the cheque, or in postponing payment pending enquiries or clarification where though there is availability of funds for the customer's withdrawal but the signatories is/are not regular.[23] And if fraud is detected the matter is referred to the police for investigations.[24]

It is an implied term in the relationship between a bank and its customer that a debt owed by a customer to a banker is not payable and there is no right of action for the payment until there has been a demand, or notice given or upon any other condition agreed upon by the parties.[25] But when this condition is fulfilled (i.e. a final demand request for payment has been made) any fund which comes into the customer's account does not belong to the customer when he is indebted to the bank, it goes to settle the indebtedness.[26]

Thus, a bank may refuse to pay and even further demand for an outstanding sum from a customer to defray a customer's indebtedness to her. In other words, a bank may appropriate any sum from a customer to defray that customer's indebtedness to her. In other words, a bank may appropriate any sum paid to her on behalf of the customer even if it is for specific purposes by paying same into the account of the customer to defray his due indebtedness to the bank.[27]

Accordingly, whenever a customer of a bank whose account has been blocked and the outstanding sum therein appropriated to offset his indebtedness to the bank overdraft facility granted him by the bank issues a cheque on that account,

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[19]. Union Bank of Nigeria v Nwoye [1996] 3 N W L R (Pt 435) 135 S C; Lagricon Co. Ltd v Union Bank of Nigeria [1996] 4 N W L R (Pt 441) 185.
[20]. Union Bank of Nigeria v Nwoye (n 19) 143.
[21]. Carrow v Duckworth (1869) L R 4 Exch 313.
[22]. See Marzetti v Wiliams (1830) L & Ad 415, 424; Underwood v Bank of Liver Pool (1924) 1 K B 775; Lord Chorley (n 4)
[23]. Babalola v Union Bank of Nigeria Ltd (1980) N C L R 201.
[24]. Lagricom Co Ltd v Union Bank Ltd (n 19).
[25]. See generally Ishola v Societe General Bank (Nig) Ltd [1997] 2 N W L R (Pt 480) 405; Bank of the North Ltd v Akorede [1995] 1 N W L R (Pt 374) 736; Nigerian Deposit Insurance Corporation v Oranu [2001] 18 N W L R (Pt 744) 183; WEMA Bank Plc v Osilaru (n 4) 178.
[26]. WEMA Bank Plc v Osilaru (n 4).
[27]. Ibid.

the customer is deemed to be asking for a loan and the bank would be right to dishonour such a cheque.[28]

Furthermore, a bank may be justified in refusing to honour cheques drawn by its customer if it has been ordered to do so by a Court of competent jurisdiction,[29] or where a suit is pending in the court.[30] And where clearance is necessary, placing of money to customer's credit does not necessarily put the account in funds, the cheque may thus be dishonoured.[31]

Other instances when a banker may dishonour a cheque include when there are alterations on the cheque. Alteration in words and figures usually to increase the amount of the mandate or when the amount in figures differs from the amount in words and there is/are irregularities in the signatures[32] or where only one signatory signs in a joint account or where two signatories are required.[33]

Wrongful Dishonour of a Cheque

Having examined the circumstances in which a banker may dishonour a cheque, it is important to add that there are different situations in which a banker may be held to have unwarrantedly refused to honour a cheque which is supposed to have been paid. The most common cases are where a banker's refusal is on the basis that the customer had no sufficient fund in his account to pay the cheques when in fact the account in question is well funded.[34]

Another form in which a cheque may be wrongfully dishonoured occur is where the banker, acting under a mistake of fact wrongfully marked *'closed'* an account when in fact the account has not been closed or when an account is wrongfully frozen.[35]

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[28]. Gateway Bank of Nig. Plc v Abosede (2001) F W L R (pt 79) 1316, 1344; Union Bank of Nigeria v Sax Nig Ltd (1994) 8 N W L R (Pt 361) 150; High Grade Maritime Services Ltd v First Bank Ltd [1991] N W L R (Pt 167) 290.

[29]. Plunckett v Barclays Bank Ltd (1936)2 K B 107 where it was held that in the circumstances of the case, the bank was justified in refusing to pay the cheque since a garnishee order attaching the customer's balance had been served on the bank.

[30]. Balogun v National Bank of Nigeria Ltd (n 4). In Agwarangbo v Union Bank of Nigeria (n 7) 25-6 it was held that in the circumstances, the bank was justified in refusing to honour the cheque as doctrine of lis pendens applied and availed the respondent- bank refusal to honour the appellant's cheque drawn against the money while the suit against the appellant in respect of the money was pending in court : see also Majekodunmi v Co operative Bank Ltd ([1997] 10 N W L R (524) 198; Doma v Ogiri [1997] 1 N W L R (pt 481)322; Osagie v Oyeyinka [1987] 3 N W L R (pt 390)144.

[31]. In Union Bank of Nigeria v Nwoye (n 19) the Supreme Court held that the moment a bank places money to its customers credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right such as that a cheque which has not been cleared where clearance is necessary does not put the account in funds.

[32]. In Agbanelo v Union Bank of Nigeria (n 1) '1st signature irregular' was held not to be defamatory by the Supreme Court of Nigeria.

[33]. Diamond Bank v Ugochukwu (n 7) 1, 24, where it was held that a bank was correct in making the cheque 'Incomplete mandate' and refusing to pay same due to omision on the cheque of the signature of one of the two signatories in a joint account.

[34].See n 19.

[35].Royal Petroleum Co Ltd v First Bank of Nig Ltd (n 4).

It also occasionally occurs when the bank write upon the cheque words which state contrary to the truth, e.g. *'No account'* i.e. that the drawer has no account at the drawee bank.[36]

In most of these situations the words *'Refer to Drawer' 'Drawer Attention Required' 'Drawer Confirmation Required' 'Not sufficient' 'Present Again'* etc are usually written on the cheque.

VI. IMPORTS OF THE PHRASES: (A) REFER TO DRAWER (B) REFER TO DRAWER (C) DRAWER CONFIRMATION REQUIRED AND (D) PRESENT AGAIN ETC.

In the construction of these phrases, it is pertinent to adopt the meaning attached to them in decided cases. Where a customer has sufficient funds to meet his cheque, the words *'Refer to Drawer'* have been interpreted to amount to a statement by the bank that *'we are not paying, go back to drawer and ask why or else go back to the drawer and ask him to pay.'*[37]

Similarly, the expression *'Drawer Attention Required'* and *'Not sufficient'* connotes non-availability of funds in the customers account,[38] while *'Drawer Confirmation Required'* may be interpreted to mean *'let the customer confirm if he is ready to take an extra-debit or indebtedness in his account'*. In other words, that the level of his debit balance can no longer be tolerated.[39]

Accordingly, the terms *'Refer to Drawer' 'Not sufficient' 'Drawer Attention Required'* and *'Present Again'* where a customer has sufficient fund means the same thing and have the same effect in banking operations. They are warnings to dishonouring a cheque. And as a cheque is returned unpaid after being so marked, their effect and connotation to a third party is that there is no fund or no sufficient fund in the account to accommodate the dishonoured cheque.[40]

VII. PRINCIPLES GOVERNING AWARD OF DAMAGES FOR WRONGFUL DISHONOUR OF CUSTOMERS CHEQUE BY A BANK

Defining the term *'damages,'* the learned author of Macregor on damages[41] cited with approval by the Supreme Court per Ayoola JSC said:

> Damages are pecuniary compensation, obtainable by success in an action for wrong which is either a tort or a breach of

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[36]. Wilson v Midland Bank Ltd 1963]2 All E. R 685.

[37]. Dike v African Continental Bank Ltd (n 1); . Access Bank Plc v M F C C S (n 9) 474. See also Flach v London & South Western Bank (1915) 3 1 T L R 334, 336; Davidson v Barklays Bank Ltd (1940) 1 All E R 316; Phyke v Hibenian Bank Ltd (1950) I R 195.

[38]. Standard Trust Bank Ltd v Anumnu (n 7); Davidson v Barclays Bank Ltd (n 37).

[39]. Anumnu (n7).

[40]. As a general rule, 'each of the answers import the clear intimation that the maker of the cheque so answered has defaulted as to time for performance of the legal and ethical obligations to provide for payment by the bank on presentation of a cheque issued for immediate payment' Per Shorland J in Baker v Australian & New Zealand Bank (n13); see the Nigerian cases of Standard Trust Bank Ltd v Anumnu (n7); Allied Bank Nig Ltd v Akubueze (n 4) 493; Balogun v National Bank of Nigeria Ltd (n 4).

[41]. Macgregor on Damages (16th edn) 997.

contract, the compensation being in the form of a lump sum awarded at the time, unconditionally and generally.[42]

It is to be noted that if a cheque is wrongfully dishonoured, the paying banker can incur liability under one or two heads. Firstly, for breach of contract, and secondly for libel. Thus, before a Court can commence a meaningful assessment of damages it must be sure of the nature of the claim, that is to say, whether the claim is in breach of contract or in tort, and if in tort, the nature of the wrong alledged.

This is because the principles guiding the award of damages in torts are different from those guiding the award of damages in contract. For instance, while the object of tort damages is to put the plaintiff in the position he would have been in if the tort had not been committed, the object of contract damages is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed.[43]

In addition, it is trite that different considerations governs award of general damages for an action based on contract and an action based on tort. For while consideration of damages into special and general damages are for cases founded on tort,[44] it is improper and indeed misleading to categorize damages by the use of *'general'* and *'special'* in a cases involving breach of contract, for apart from general damages naturally resulting from the breach of contract, no other form of damages can be contemplated.[45]

In the same vein, a plaintiff cannot be entitled to exemplary damages in a cases involving purely breach of contract.[46] Thus, any specific loss of earning or loss of use is a matter which falls in the realm of special damages which must be averred and proved.[47]

This non-applicability of the dichotomy of special and general damages (which is not applicable) to cases of breach of contract, also extent to cases of dishonoured cheque.[48]

VIII. MEASURE OF DAMAGES

(A) Damages for Breach of Contract

It has long been established that refusal by a bank to pay a cheque when the account is well funded amounts to a breach of contract for which the banker is liable to pay damages.[49] The only question is as to the amount.

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42. Agbanelo v Union Bank of Nigeria Co Ltd (n1)551.
43. See James v Mid-motors Nigeria Co Ltd (1978) N S C 536; Agbanelo v Union Bank of Nigeria Ltd (n1)
44. United Bank for Afirca v Tejumola [1986] 4 N W L R (Pt 38) 815; Okongwu v N N P C [1984] 4 N W L R (Pt 115) 296.
45. Nigeria Produce Marketing Board v Adewunmi (1972) 1 All N L R (Pt 2) 438; Maiden Electronics v A G Federation (1974) 1 S C 53; Swiss – Nigeria Wood Industries Ltd v Bogo (1970) 6 N S C 235.
46. See Addis v Gramaphone Co Ltd (1909) A C 488.
47. Kalu v Mbuko [1988] 3 N W L R (Pt 80) 66.
48. Nigeria Produce Marketing Board v Adewunmi (n 45).

The law with respect to measure of damages for breach of contract has not changed ever since the famous dictum of Alderson, B in the leading case of *Hadley v Baxandale*[50] where he observed as follows:

> Now we think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party sought to receive in respect of such breach of contract should be such as may be fairly and reasonably be considered either as arising naturally in accordance to the usual course of things, from such breach of contract itself, or such as may be reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach.[51]

Thus, the assessment of damages is calculated on the loss sustained by the injured party which loss was either in contemplation of the contract or is unavoidable consequence of the breach.[52]

The principle and rational in civil cases being *restitution in integrum*- that is, that in so far as money can do it, into the position in which he would have been if the breach or the act complained of had not occurred. The principle is not *restitution in opulentium, i.e.* giving him a windfall.[53]

However, it rarely happens that a banker has any knowledge as to the circumstances in which a customer has had to issue a cheque which he refused to honour. Supposing, for example, the customer losses the benefits of an exceptionally profitable contract through the wrongful dishonour of his cheque, is the bank liable to pay him the whole of the loss? This makes it very difficult to apply the rule in *Baxendale Case* in measuring damages in those circumstances. It is on this account that damages awarded for wrongful dishonour of cheque by a banker without proof of actual damage or injury to credit to be generally nominal[54] but this also depend upon whether or not the customer is a trader.

(i) Where Customer is a Trader

The principle has since crystallized that where a banker wrongfully dishonours the cheque of its trading customer in business, the law Presumes injury to him without proof of actual damage and he is entitled to substantial although

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[49]. R A Salami v Savannah Bank of Nigeria Ltd [1990] 2 N W L R (Pt 130) 591; Access Bank Plc v M F C C S (n 9) 476; Balogun v National Bank of Nigeria Ltd (n 4); Dike v A C B Ltd (n1) 458; United Bank for Africa v Ademuyiwa [1999] 11 NWLR (Pt 628) 570, 591.

[50]. (1854) 9 Exch 341.

[51]. Ibid 354.

[52]. See Shell B P v Jammal Engineering Ltd (1974) 4 S C 33; Ijebu Ode Local Government v Adedeji Balogun & ors [1991] 1 N W L R (Pt 166) 136, 158.

[53]. Okongwu v N N P C [1988] 4 N W L R (Pt 115) 296, 316; Royal Petroleum Co Ltd v First Bank of Nigeria (n 4) 599.

[54]. See Halsbury's Laws of England (4th edn) Vol 12, 147.

temperate and reasonable damages for injury to his commercial credit even without pleading and proofing any actual damages.[55]

In the case of *Salami v Savannah Bank of Nigeria* Limited[56] it was observed that:

> *Damages in cases of breach of contract of banker to its customer are at large, that is in such cases, the Court may award such amount as it seems reasonable in the circumstances of the breach of the contract even though there is no proof of actual loss. Where it is a wrongful dishonour of a cheque, the amount involved in the cheque may not even be large but the dishonour of the cheque may be regarded as injuries and for a man who is trader it may be detrimental to his trade or business and, as such, the award is always made substantial irrespective of whether the amount in the cheque is small or large.*

Much earlier, it has been laid down by a long line of cases beginning with that of *Marzett v Williams*[57] that damages for wrongful dishonour of cheque in cases of trading customers are *'at large'* which is to say, that in such cases Courts may within reason make an award of any sum as they consider reasonable in the circumstance of the breach of the contract or dishonour of cheque warrant though there has been no proof of actual loss.

Marzetti's case was followed in the case of *Rollin v Steward*[58] which was an action for dishonour of three cheques due to the inadvertence of the clerk in the office of the bank. The plaintiffs were in business- they were in fact merchants and ship owners but gave no evidence that they actually suffered injury.

The jury awarded the plaintiffs £500.00 damages. On appeal it was held that though in the circumstances this amount was excessive, they were entitled to substantial damages, and the sum of £200.00 was substituted.[59]

In Nigerian case of *Allied Bank (Nig) Ltd v Akubueze,*[60] the respondent duly established in evidence that he was a business man, and that as a result of the dishonour of his cheque and refusal of the appellant bank to have any further transaction on his account, he had to dispose at a loss the goods in his Supermarket worth about ₦200,000.00 in order to meet the demands of his creditors. The Court

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55. Balogun v National Bank of Nigeria Ltd (n 4); Akubueze (n 4); Wilson v United Countries Bank Ltd (1920) A C 102.
56. [1990] 2 N W L R (Pt 130) 106, 127.
57. (1830) 1 B & ad 415.
58. (1830) 14 C B 595; see also Wilson v United Countries Bank Ltd (n 55)112-3.
59. The Marzetti's case (n 57) therefore put beyond doubt that where a banker without justification dishonour his customer's cheque, he is liable in damages while that of Rollin v Steward (n 58) makes it clear that if the customer is also in trade or is a customer in business, the law presume injury to him without proof of actual damage and he is entitled to substantial damages though he neither pleaded nor proof damage.
60. [1995] 4 N W L R (390) 493, 508.

held that he need not do more than plead and establish that he was a businessman to be entitled to substantial damages as explained above.[61]

(ii) Who is a Trader?

There does not appear to be much judicial authorities in Nigerian Law which defines who a *'trader'* is for the purpose of this rule. The expression, it is submitted would clearly include all merchants who buy and sell goods, commercial agents and brokers as well professional men such as legal practitioners, architects, builders etc, whose standing is likely to suffer as a result of the dishonour of their cheques and to whom the consequences of a dishonoured cheque may be no less disastrous than to a trader. It would be unfair to limit the right to recover such damages to traders.[62]

Thus in *Balogun v National Bank of Nigeria Ltd* [63] the question before the Supreme Court was whether the appellant, a practicing Solicitor was entitled to substantial damages for the dishonour of her cheque by the respondent bank without any alledgation in her pleadings showing actual damage flowing from such dishonour of the cheque and proof of same. The Court *held in the affirmative and awarded the sum of N1000.00 damages against the sum of N10.00 awarded by the lower court.*

(iii) Where Customer is not a Trader

It is quite clear from decided cases that in case of a customer who is not in trade, proof of actual damage to credit is very necessary to secure substantial damages for wrongful dishonour of cheque, otherwise he would only be entitle to a nominal damage.

In *Mai v Standard Trust Bank Limited,*[64] the appellant issued cheques in favour of his daughter and one T. Y. Both cheques were returned unpaid by the respondent bank. At this point, the appellant's account was well funded to meet the cheques. The appellant upon making enquiries through his solicitor found that the bank was acting on a *'stop order payment'* given by S, another customer of the bank.

The appellant who was not a trader brought an action against the respondent bank for substantial damages for breach of contract arising out of the wrongful dishonour of the cheques.

On appeal it was held that though the bank was liable to the appellant in damages for injury to his credit but as the appellant was not a customer in business, proof of actual injury to credit was very necessary to secure substantial damages.[65]

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[61]. See also Omoetuk v Union Bank of Nigeria Plc [2001] F W L R (Pt 81) 1863.

[62]. See Gibbons v West Minster Bank Ltd [1939] 2 K B 882; Lord Chorley, Law of Banking (6th edn Sweet & Maxwell London 1974)111; see also J M Holden, The Law and Practice of Banking (5th edn Pitman Publishing 1999) 1,110.

[63]. (n 4).

[64]. (n 5) 567.

[65]. See also Gibbons v West Minster Bank Ltd (1937) 2 K B 882, where the plaintiff, a non trader sued the bank for damages for breach of contract arising out of the wrongful dishonour of the cheque which she had drawn in favour of her landlord. The plaintiff had earlier lodged in a sum of money and this had been

B. Damages for Libel

Direct and /or natural damages arising from a breach of contract by a banker to honour the cheque of his customer apart, there is also the serious likelihood of considerable danger to the reputation of the customer and generally to his business if he is engaged in business. For people generally whether or not in business do not deal with a person whose cheques are not paid.

Thus, a paying bank may incur liability for libel where the dishonour of a cheque on the face of the materials placed before the Court is found to be wrongful. If however, the dishonour, based on the materials before the Court is not found to be wrongful, those words can not be adjudged to be libelous.[66]

As earlier noted, none of the meaning of the phrases *'refer to drawer' 'drawer attention required' 'drawer confirmation required' 'insufficient' 'present again'* paint a good picture of a man of business. Indeed, the phrases do no inspire confidence in people who do business with a drawer of a cheque so endorsed. That is why the Courts regard them as actionable libel that attracts substantial damages without proof of any actual loss.[67]

In *Baker v Australia and New Zealand Bank* [68] the plaintiff claimed damages from the defendant bank in respect of the wrongful dishnonour of his three cheques which the bank had returned unpaid with the answer *'present again.'* The plaintiff who was held to be a non-trader claimed damages (a) for breach of contract and (b) for libel. she was awarded £2 nominal damages in respect of each cheque and as the words *'present again'* have been held to be libelous, she was awarded damages amounting to £ 100 for libel. And particularly so if the endorsement is made by a bank which unjustifiably placed the drawer of the cheque in a position where by the words could be used on him.[69]

Libel is a form of defamation and the cause of action is based on the statement made lowering the reputation or esteem of the plaintiff in the eyes of the right thinking members of the society generally and causing the plaintiff to be ashamed or avoided.[70]

To be libelous, an imputation needs have no actual effect on a person's reputations, the law looks only at the tendency. Indeed, an imputation may be libelous even though it does not tend to make others think worse of the person to whom it refers. If it would tend to cause others to shun or avoid him, or to exclude him from the society of his fellowmen, or place him in a position where others

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mistakenly credited to a wrong account, thus the bank was under a wrong impression that the plaintiff account was not funded to meet her cheque.
The bank argued that since the plaintiff was not a customer in business, she was entitled to only nominal damages, because she had not proved any actual damage. The Court upheld this argument. See also J Paget, Law of Banking (8th edn Butterworth, London 1972) 12.

66. Access Bank Plc v M F C C S (n 9) 474 -5.

67. Balogun v National Bank of Nigeria Ltd (n 4) 140-6.

68. (n 13).

69. Dike v A C B Ltd (n 1) 458; Allied Bank (Nig) Ltd v Akubueze (n 4) 493; Balogun v National Bank of Nigeria Ltd (n 4) 135.

70. Jarson v Midland Bank Ltd (1968) 1 Lloyd's Rep 401; see also Royal Petroleum Co Ltd v First Bank of Nigeria (n 4); 599; Sim v Stretch (1936) 2 All E R 1237, 1240 per Lord Atkin.

would not want to enter into any business transaction with him, then the words can not but be defamatory.[71]

To return a cheque with the endorsement *'Refer to Drawer'* for example in the present day, can not but on the face of it be libelous, though the truth of such endorsement may find expression in the non availability of funds in the account of the customer as a defence to any action founded on it[72].

On the contrary, there is no libel where a customer of bank presents a cheque payable to self to the bank and such cheque is dishonoured.[73] This is because *'publication'* in respect of libelous matters means the making of the libelous matter after it has been written to some other person(s) other than the person to whom it is written. Accordingly, where a cheque which was payable to *'cash'*[74] is dishonoured or simply returned to the respondent no one is libeled thereby.[75]

However, the tort of defamation is committed when a customer's account is wrongfully frozen regardless of whether or not the freezing is actually published to the whole world or in the press that the customer is fraudulent.[76]

C. Other Relevant Considerations

The measure of damage in an action against a bank for breach of contract to honour a cheque and libel would also depend on the status or standing in life of the customer. In *Access Bank Plc v M F C C S*,[77] there was an unchallenged and uncontroverted evidence that the respondent was a financial consultant serving both the government and corporate bodies to expediate loans to build the gateway (a five star) Hotel, Ota. The Court held thus:

> The measure of damages in action against a banker for breach of contract to honour a cheque that has been drawn by a customer against his account would depend on the status or station in life of customer. If the customer is able to prove that by reason of the said breach he suffered considerable damage to his reputation and generally to his business he will be entitled to substantial damages.[78]

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71. Youssoupoff v MetroGoldwyn Mayer (1934) 50 T L R 587; Watkin v Hall (1868) L R 3 Q B 399.
72. Mai v Standard Trust Bank (n 5) 567; Access Bank Plc v M F C C S (n 9) 475. Much earlier in a popular judgement on this subject matter in Baker v Australian & News Zealand Bank (n13) referred to with approval in Ide Chemists Ltd v National Bank of Nigeria Ltd (n13) where it was held that the answer 'Present again' endorsed on a cheque by a banker was libellious.
73. International Bank for West Africa v Kennedy Transport (Nig) Ltd [1993] 7 N W L R (pt 304) 252; Kinlan v Ulster Bank (1928) I R 171; Halsbury's Laws of England (4th edn) vol 3 para 62, 50.
74. 'Pay cash' where inscribed on a cheque means in banking practice 'pay self' that is, to pay directly to the owner of the account : see International Bank of West Africa v Kennedy (n 73).
75. International Bank of West Africa (n73) 252; see also Gatley on Libel and Slander (7th edn)Art 221, 103. It is otherwise if a man writes a libel on the back of a post card and sends it uncovered through the post, there is evidence of publication, so held A l Smith, M.R. in Sangrove v Hole (1901) 2 K B 1, 4.
76. Royal Petroleum Co Ltd v First Bank of Ltd (n 4), where the freezing of the appellant account did not only paralysed the business of the company, also customers were reluctant to deal with it, as they thought its affairs were under investigations by the government, thereby causing them serious embarrassment and apparently affected the image of the company.
77. (n 9) 640.
78. Ibid. 640; see also Afribank (Nig) Plc v A I Investment Limited (n4).

Similarly, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, and the whole conduct of the banker from time to time when the libel was published down to the very moment of verdict are relevant considerations.[79] The Courts have equally taken into consideration the low purchasing power of naira or global inflation.[80]

IX. ONUS F PROOF IN CLAIM ON DISHONOURED CHEQUE

Where a customer sued on a dishonoured cheque, he has the burden of establishing that the cheque was properly drawn and that at the time it was presented he had sufficient fund in his account to meet the obligations created by the cheque.[81] It is also the law that if he succeed in establishing this fact, then the onus shifts on the defendant bank to show that there was a legal impediment which justified non-payment or the dishonour of the cheque.[82]

Where the dishonoured cheque is that of a customer who is not a trader, actual injury or loss to credit must be pleaded and proved in order to be entitled to substantial damages.[83] For if actual damage or loss is not pleaded, a customer who is not a trader would be entitled to only nominal damages.[84]

X. CONCLUSION

So far the focus of this paper has been an analysis of the consequences of a dishonoured cheque. A Refusal by a banker to make payment to the payee endorsed on the cheque is a breach of contract, and may as well be a libel. There is a presumption of fact that every customer suffers injury to his credit and reputation when his cheque is wrongfully dishonoured. But the quantum of damages payable for the wrong would depend on the type of customer, his status and standing in life, the transaction involved, and where applicable, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, and the whole conduct of the bank from time to time when the libel was published down to the very moment of judgement.

If the customer is able to prove that by the dishonour of his cheque he suffered considerable damage or simply that he is a trading customer he will be entitled to substantial damages even without proof of actual damage, unless of course, if it can be shown that by reason of insolvency the customer's so called *'credit'* is completely lacking in any thing that has value.

However as long as bankers must dishonour cheques for any reason, they must expect occasional litigations. Thus, they should as much as practicable take precautions with view to ensuring that no error is made in relation to the customers

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79. Bakers Case (n13) per Shorland J.
80. Usman v Abubakar (2001) 6 W R N 160, 175, [2001] 12 N W L R (Pt 728) 685.
81. Dike v A C B Ltd (n 1) 457; Oyewole v Standard Bank West Africa (1968) 2 All N L R 32.
82. Dike v A C B Ltd (n1) 457.
83. I B W A v Kennedy Transport (Nig) Ltd (n73); Oyewole v Standard Bank of West Africa (1968) 2 All N L R 32.
84. I B W A v Kennedy (n 73), in the case of a trading customer, the Law presumes injury to him, thus, he is entitled to substantial damage though he neither pleaded nor proved actual damage. In Balogun v National Bank of Nigeria Ltd (n4) 374, the Supreme Court of Nigeria awarded the sum of N1000 damages against the sum of N10.00 awarded by the lower court.

account. They should also make sure that as much as possible their remarks is lacking in unnecessary details, even though with such colourless devised they may still be so to speak at risk. Thus '*No Answer Yet*' devised instead of *'Drawer Confirmation Required', 'Not Sufficient,' etc* is safer. And as damages payable also depends on absence or otherwise of an apology and conduct of the banker, an immediate retraction and apology is recommended with a view to at least minimizing the injury suffered by the customer and thereby mitigating the bank's liability.[85]

It is strongly believed that if the suggestions made herein are taken seriously, litigations arising from dishonouring of cheques would be avoided.

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[85]. This is dictated not only by the sound rule that if one makes a mistake to the detriment of others, one should as a matter of courtesy tender an apology immediately, but also by the clear indication given by the courts that any failure by the banker to acknowledge its mistake may increase the damages awarded against the bank, see Bakers Case (n79), See also generally, J M Holden, The Law and Practice of Banking (5th edn Pitman Publishing 1991)115.