

In The Supreme Court of Nigeria

On Friday, the 9th day of May 1986

S.C. 241/1984

Before Their Lordships

Andrews Otutu Obaseki	.....	Justice, Supreme Court
Anthony Nnaemezie Aniagolu	.....	Justice, Supreme Court
Augustine Nnamani	.....	Justice, Supreme Court
Saidu Kawu	.....	Justice, Supreme Court
Chukwudifu Akunne Oputa	.....	Justice, Supreme Court

Between

Bookshop House Ltd Appellant

And

Stanley Consultants Ltd Respondent

Judgement of the Court

Delivered by

Chukwudifu Akunne Oputa. J.S.C.

The facts of this case are quite straightforward and simple. The appellant, the Bookshop House Ltd., wanted to erect a multi-storey ultra-modern office block. Their architects Messrs Godwin and Hopwood then invited the respondents, Stanley Consultants Ltd., to undertake the engineering design of the said building known as Bookshop House. After the usual negotiations and exchange of correspondence, the appellant, the Bookshop House, accepted the proposals submitted by the respondents (Stanley Consultants Ltd.). These proposals were tendered in evidence. Stanley Consultants Ltd executed their own part of the contract. But a dispute arose between the parties over one single solitary issue, namely "The Fees" to be paid by the Bookshop House Ltd. to Stanley Consultants Ltd. as per the contract documents.

This dispute was referred to arbitration. During the arbitration, Stanley Consultants Ltd. tendered a series of documents marked Exhibits A1 to A10. Exhibit A10 is of special importance to this appeal as it is the A.C.E. Conditions of Engagement. The Bookshop House Ltd tendered Exhibits B to B9. Both sides called witnesses to testify in addition to tendering the documents referred to above. In the arbitration proceedings, the gordian knot was the proper interpretation of the phrase - "the total construction cost of the project". At the end of their deliberations, the arbitrators held:

"We are of the view that when Exhibit A1 is read in the light of other documentary evidence and the whole body of oral evidence adduced in these proceedings, the true and correct intention of the parties was as contended by the claimants that the fee of 3.85% stipulated in the last paragraph at the bottom of page 4 of Exhibit A1 should be based on the total construction cost of the project, that is the overall construction cost of the building and should certainly not be based, as contended by the respondents, on

'the engineering works designed by the claimants'.

We hereby make an award accordingly and direct that calculation of fees under the last paragraph (headed "Fee A") on page 4 of Exhibit AI) shall be in accordance with this award".

The firm of Stanley Consultants Ltd. won before the arbitrators.

The Bookshop House Ltd was not satisfied with the arbitration award which in effect means the interpretation given by the arbitrators to the expression "the total construction cost of the project" to mean and include the

overall construction cost of the building now known as Bookshop House. The Bookshop House Ltd then applied to the Lagos High Court by Notice of originating motion for an order:

1. Setting aside the award of Chief C. O. Madarikan and Messrs. J. A. Oweseri and Akintola Williams dated 19th day of September, 1977.
2. Remitting the same to the said arbitrators for reconsideration and that the costs of and incidental to his application may be paid by the respondents".

In its ruling, the Lagos High Court at p.61 of the record of proceedings observed:

"The term which the court is called upon to consider here, and which the arbitrators had earlier considered appears simple, though by the importation of reference to the definition by the Association of Consulting Engineers it had acquired some technicality

The words to be construed here as rightly pointed out by the arbitrators are 'total construction cost of project', if that was all, there would appear to be no difficulty for we only need to ascertain the total cost of the project in this case, the Bookshop House as it stands and nothing more, but it did not stop here, it went further and provided, that construction cost in that context should be interpreted as generally defined by the Association of Consulting Engineers. This last clause, in my own considered view, imports a technical meaning to the word 'construction costs' in the earlier clause, which tends to modify the literal meaning of the said words."

After considering a number of authorities, the Lagos High Court per Johnson, J. (as he then was) exercised the powers conferred on the court under section 11(1) of the Arbitration Law, Laws of the Federation of Nigeria & Lagos 1958 and remitted the award to the arbitrator:

"for consideration on the basis that the interpretation to be accorded to the terms in dispute is as decided by this court, i.e. assessing the fees due to the respondent, not on the total cost of the construction of the C.S.S. Bookshop building, but on the cost of work done by them as engaged by the applicant. It is ordered that an award based on the combined meaning of 'project' and 'the works' as defined in Exhibit C and adjudged by this court be used as a guide in reconsidering the award"

The High Court thought (see p.63 of the record) a marriage of the definition of "project' and 'the works' "would serve as a useful aid to ascertain the meaning of the words 'cost of construction' because those words relate to 'project' and 'the works' in connection with which the services of the respondent were engaged"

Rather than go back to the arbitrators, Stanley Consultants Ltd. preferred to march forward. They appealed to the Court of Appeal, Lagos Division (Nasir, P., Kazeem & Ademola, JJ.C.A.). In a lead judgment, Kazeem, J.C.A. (as he then was) dismissed the idea of any marriage between 'construction cost of project' and 'the works' He interpreted "total construction cost of the project" to mean "the total construction cost of the C.S.S. Bookshop House, and it is on that amount the parties agreed that a fee of 3.85 per cent should be paid to the appellant" The Court of Appeal set aside the order of Johnson, J. (as he then was) and restored the award of the arbitrators made on 19th September, 1977.

The Bookshop House Ltd. has now appealed to this court against the judgment of the Court of Appeal on six grounds dealing with errors in law and misdirections. In the brief filed by learned counsel for the appellant, only one solitary issue is admitted to arise for determination. That issue is

"Whether the decision of the Court of Appeal is wrong in interpreting the terms of the agreement between the parties relating to the payment of fees on the basis of the total construction cost of the project as generally defined by the Association of Consulting Engineers".

Arguing the above, the brief alleged that:

"The judgment of the Court of Appeal is founded on the expert evidence of Willie Haigh alone. The court appeared to be unconcerned with the evidential value of the evidence given by Akindele Olufemi Shebanjo and John Fox".

It is not correct that the Court of Appeal's judgment was founded on the evidence of Willie Haigh. To quote from the lead judgment - p.89 lines 10 -12 of the record:

"What however appears to be in dispute is the interpretation to be put on the clause of Exhibit A1 headed 'fee' which provides for the fees payable to the appellants by the respondents for services rendered . Whereas the appellants contended that it was the intention of the parties as clearly shown in the clause in question that it should be calculated on 3.85% of the total cost of the project, that is, the total cost of constructing the whole Bookshop House, the respondents contended that the fee payable is the said percentage of the total cost of the engineering works performed by the appellants alone."

Having thus stated the position and the contention of either party, the Court of Appeal continued at p.90 of the record:

"What they finally agreed to be bound by, was the agreement postulated in Exhibit A1; and the clause that regulated the fee payable was the one headed 'fee' It is therefore that clause alone which called for interpretation in this matter and nothing else."

The court below then looked at the interpretation given to that clause by the arbitrators and the suggested marriage of "cost of project" and "the works" propounded by the High Court and dismissed the idea of any such marriage as completely irrelevant and incompatible with the terms and tenor of the contract document Exhibit A1. The court below preferred the arbitrators interpretation of the "fees" payable to the marriage suggested by the High Court. It was after thus arriving at the correct interpretation that the court casually observed at p.91 lines 15-17 of the record:

"This view is supported by Mr. Willie Haigh, the 1st expert witness called by the respondent".

It is one thing to use the evidence of Willie Haigh in interpreting a written document. It is an entirely different thing to interpret the document as Willie Haigh interpreted it.

Now leaving Willie Haigh, Akindele Olufermi Shebanjo and John Fox alone, what did Exhibit A1 stipulate regarding "fee"? It is this:

"Fee

Based on the estimated scope of work and the total construction cost, we propose that for the Preliminary and Final Design as described in paragraph 'Scope of Services sub-paragraph A and B', a fee of 3.85 (three and eighty five hundredths) per cent of the total construction cost of the project. Construction cost being as generally defined by the Association of Consulting Engineers."

It is the above that the arbitrators construed, that the High Court tried to construe, that the Court of Appeal construed and that this court is again indirectly being asked to construe. The proposal made by the present respondent to the appellant if broken up and analysed will be quite easy to follow:

- Step 1 For the Preliminary and Final Design we propose a fee of 3.85%
- Step 2 How and on what is this percentage 3.85% to be calculated? In other words 3.85% of what?

The obvious answer seems to be:

We are basing this percentage of 3.85% on the estimated scope of work and the total construction cost.

- Step 3 Total construction cost of what?
- Ans. Total construction cost of the project.
- Step 4 What will be the meaning of construction cost?
- Ans. Construction cost will be as generally defined by the Association of Consulting Engineers.

The Conditions of Engagement approved by the Council of the Association of Consulting Engineers on the 14th December 1970 was tendered as Exhibit A10. In Exhibit A1 "Project", is defined and "Works" also is defined:

"Project" means the project with which the client is proceeding and of which the works form a part".

The client here is the C.S.S. Bookshop House Ltd. The project is the erection of a multi-storey office block in Lagos known as the Bookshop House.

"Works" mean the works in connection with which the client has engaged the consulting engineers to perform professional services and which are summarised in the Technical Schedule attached to and comprising part of these conditions of engagement".

From Exhibit A1 p. 1, the respondent was engaged by the appellant to carry out "the professional consulting engineering services" for the project. Exhibit A1 made it abundantly clear what the project was:

"The building will be comprised of a three-storey podium and basement with a ten storey tower of offices and other commercial facilities".

In this one project there are so many "works as defined above but the important thing is that the proposals of the respondent in Exhibit A1 (which the appellant accepted as the basis of their contractual relationship) was "our proposal for providing the engineering consulting services for the project. It is therefore my view that the proper interpretation of "fee" as used in Exhibit A1 will take into account the whole contract documents Exhibits A1 to A10. If this is done, it will be obvious that the fee agreed upon by the parties will be based on:

1. Estimated scope of the "work" of the respondent.
2. Plus the total construction cost of the project.

It cannot be the total construction cost of the "work" for two reasons:

1. As defined in Exhibit A10, it will be absurd to talk of the total construction cost of the "work". One may have the cost of the "work" but certainly not the total construction cost of the work.
2. Fee as proposed in Exhibit A1 at the bottom of p.4 clearly and in a univocal and unequivocal language referred to "total construction cost of the project" and project as defined in Exhibit A10 is made up of many "works".

The engineering work of the respondent formed but merely a part of the "works" envisaged in the project. This notwithstanding, the scale of "fee" was agreed at 3.85% of the total construction cost of the project. The use of the word total above amply suggests that the cost of all the construction "works" has to be added up to get the total construction cost of the project. This, in my view, means the total cost to the client - here the appellant - of putting up the Bookshop House as it now stands. That was the interpretation of the Court of Appeal. That is my interpretation.

There is absolutely no need for any extrinsic evidence either of a Mr. Haigh or of a Mr. Fox or of a Mr. Shebanjo to interpret the clear and unambiguous words of Exhibit A1 at the bottom of p.4 defining "fee". The court need not look beyond Exhibit A1 to A10 for the meaning of "3.85% of the total construction cost of the project". The parties seemed to be agreed on this for Mr. Sofola's first submission was that in interpreting the provisions of these documents no addition or subtraction is allowed.

"The words used must be given effect to and no word should be ignored in interpreting the intention of the parties otherwise the court will be rewriting the agreement".

I am in entire agreement with the above proposition. Also, in his very short brief, learned counsel for the respondent submitted that

"the court need not look beyond Exhibit A1 for the meaning of the word 'project' which it defines"

I also agree but with a slight modification - project is defined in Exhibit A10.

In the final result and for all the reasons given above, this appeal ought to be dismissed. It is hereby dismissed. The judgment of the court below is upheld and affirmed. There will be costs to the respondents which I assess at ₦300.00.

Judgement delivered by
Andrews Otutu Obaseki. JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Oputa, JSC, and I hereby express my concurrence with his opinions on all the issues raised in this appeal.

This appeal raised the issue as to the proper interpretation of the "total cost of project" in building contract documents Exhibit A1 (exchanged and agreed by the parties) in respect of the construction of the Bookshop House. The importance of the issue lies in the fact that on it depends the fees charged and payable to the respondent by the appellant, the fee having been charged as a percentage of the total cost of project. The appellant placed one construction on the agreed terms for calculation of the fees while the respondent placed a different construction on them. The matter was later referred to arbitrators agreed on by the parties. When the arbitrators made their award, the appellant was not satisfied so he filed an originating motion in High Court of Lagos State, Lagos for an order:

- (1) setting aside the award and
- (2) remitting the matter for reconsideration.

The High Court, Johnson, J. (as he then was) interpreted the clause of the contract in the terms acceptable to the appellant and remitted the matter to the arbitrators

"For consideration on the basis that the interpretation to be accorded to the terms in dispute is as decided by this court, i.e. assessing the fees due to the respondent, not on the total costs of the construction of the C.S.S. Bookshop Building, but on the cost of work done by them as engaged by the applicant. It is ordered that an award based on the combined meaning of 'Project' and 'the works' as defined in Exhibit C and adjudged by this court be used as a guide in reconsidering the award."

Stanley Consultants Ltd. being dissatisfied took the matter to the Court of Appeal. The Court of Appeal interpreted "total construction cost of project" to mean

"total construction cost of the C.S.S. Bookshop House and it is on that amount the parties agreed that a fee of 3.85 per cent should be paid to the appellant".

The Court of Appeal then set aside the order of Johnson, J. (as he then was) and restored the award of the arbitrators made on 19th September, 1977. The Bookshop House Ltd was not satisfied with the decision and so lodged this appeal to this court. At the hearing, the parties agreed that only one single issue arises for determination. It is:

"whether the decision of the Court of Appeal is wrong in interpreting the terms of agreement between the parties relating to the payment of fees on the basis of the 'total construction cost of the project as generally defined by the Association of Consulting Engineers' ."

This issue has been examined and dealt with exhaustively in the judgment of my learned brother, Oputa, JSC. the draft of which I had the privilege of reading in advance. I agree with all the opinions expressed therein on the issue raised and for the reasons stated therein, I too would dismiss this appeal and I hereby dismiss it with costs to the respondent fixed at ₦300.00.

Judgement delivered by
Anthony Nnaemezie Aniagolu. JSC

I agree completely with the judgment just delivered by my learned brother, Oputa, J.S.C., the draft of which I had been privileged to read before now.

I also would dismiss this appeal, and hereby dismiss it, with costs to the respondents which I hereby assess at ₦300.00.

Judgement delivered by
Augustine Nnamani. JSC

I had a preview of the judgment just delivered by my learned brother, Oputa, J.S.C., and I entirely agree with his reasoning and conclusions.

The controversy here centres around the fees for engineering consultancy services provided by the respondent for the appellant's project - a three storey podium and basement with a ten storey tower of offices and other commercial facilities. A reference of the dispute to arbitration did not resolve the matters to the satisfaction of both parties. The matter having gone through the High Court and the Court of Appeal has now reached this court.

My brother, Oputa, J.S.C., has carefully analysed all the issues in this matter, and to attempt to do anything in that direction would be no more than a needless repetition. I shall merely content myself with referring to Exhibit A1 in which FEE was said to be:

"Based on the estimated scope of work and the total construction cost, a fee of 3.85 (three and eighty-five hundredths) percent of the total construction cost, being as generally defined by the Association of Consulting Engineers".

(Underline mine).

Exhibit A10 contains the conditions of engagement approved by the Association of Consulting Engineers in England which is what the parties accepted in their agreement. These conditions of engagement were contained in Exhibit C and these were copied and are in Exhibit A10. In Exhibit A10,

project means the project with which the client is proceeding and of which the works forms a part.

The works means the works in connection with which the client has engaged the consulting engineer to perform professional services, and which are summarised in the Technical Schedule attached to and comprising part of these conditions of engagement.

From the facts of this case, the project is the construction of the entire Bookshop House whereas works is limited to the particular engineering service which the respondent rendered. There was no need for the evidence of Haigh or any other person for they cannot supplant Exhibit A10.

When therefore the respondent was to be paid 3.85% of the total construction cost of the project, this means 3.85% of the cost of construction of the entire project and not 3.85% of the cost of the particular works undertaken by the respondent as contended by learned Senior Advocate for the appellant.

I would, therefore, dismiss this appeal and abide by the orders made by my learned brother, Oputa, J.S.C.

Judgement delivered by
Saidu Kawu. JSC

I have had the advantage of reading, in draft, the judgment of my learned brother, Oputa, J.S.C. which has just been read. For the reasons stated in the said judgment, I agree the appeal lacks merit and should be dismissed. The appeal is accordingly dismissed, and the decision of the lower court affirmed. Costs assessed at ₦300.00 are awarded to the Respondents.

Counsel

Mr. K. Sofola, S.A.N For the Appellant
with him
C. F. Ogundare (Miss)

Mr. A. Odofin For the Respondent