IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAMA ABUJA

ON THE 7TH DAY OF JULY, 2017

BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH

(PRESIDING JUDGE)

SUIT NO: CV/4249/12

BETWEEN

PASTOR NMADU KEN.....PLAINTIFF

AND

EMERGING MARKETS TELECOMMUNICATION SERVICES LTD

(ETISALAT NIGERIA).....DEFENDANT.

JUDGEMENT.

The Plaintiff by a statement of claim filed on the 2nd of August, 2012, claims against the Defendant as follows:

a. A declaration that there existed an implied contractual relationship between the plaintiff; the defendant as a customer to the defendant and when the plaintiff participated in the defendant's 777 game.

b. A declaration that the defendant breached its implied contract with the plaintiff when after the plaintiff spent over N120,000.00 (One hundred and twenty thousand Naira) answering correctly the questions asked by the defendant and defendant after confirming the winning of the plaintiff of the Range Rover Jeep but failed to fulfil its obligation contrary to the implied contractual agreement; therefore a breach of contract.

c. A declaration that the defendant owes the plaintiff a duty of care as customers to the defendant.

CTC - ₦500
R/N - 25500
Date 14/7/17

d. A declaration that the defendant failed in its duty of care by not providing the plaintiff with the Range Rover Sport Jeep, and trip to spain to watch Barcelona and daily N500,000.00 (Five Hundred thousand Naira) cash as contained in the promotional 777 game and therefore a breach of the duty owed the plaintiff.

e. A declaration that the act of convincing the plaintiff through test message that if he answered the question worth 25,000 points he would win the Range Rover worth 15,000,000 (Fifteen Million Naira) and that confirming also that the plaintiff had answered the question correctly and now has 25,000 extra points without giving the plaintiff the Range Rover Jeep worth N15,000.00 (Fifteen Million) is deceitful and unlawful.

f. A declaration that plaintiff has lost several opportunities and income resulting from plaintiff's dedication and investment in playing the defendant's 777 game for over a month.

g. A declaration that the defendant not denying ownership of the 777 game is therefore liable to the outcome of the 777 game.

h. An order for the defendant to release to the plaintiff, the Range Rover Sport worth N15,000,000. (fifteen million Naira) won by the plaintiff in course of the 777 promotional game (FC Barca Promo).

i. An order of perpetual injunction restraining the defendant, its privies, assigns and agent from harassing or intimidating the plaintiff with the respect to matters arising from this suit. (sic)

j. An order for the sum of N10,000,000.00 (Ten million Naira) as general damages

k. An order for the sum of N150,000.00 (Eight Hundred and twenty Thousand Naira(sic) as special damages resulting from the several recharge cards bought by plaintiff in playing the 777 game and online internet searches for answers to questions from February 2012 to March 2012.

Particulars of Special Damages

a) cost of recharge cards from february -march = N120,000.00

b) cost of logistics and internet searches = N30,000.00

L. An order compelling the defendant jointly and severally to pay the cost of this suit.

M. Other reliefs this Honourable court may award in the circumstance.

The defendant in response to the plaintiff's claim against her, filed on the 17th of March, 2015 a further Amended Statement of defence with other accompanying processes.

The plaintiff had hitherto before the filing of further Amended statement of defence filed a reply to amended statement of defence and still relies on same after further amendment of the statement of defence.

The plaintiff in proof of his case on 30th of April, 2013 and 17 July, 2013, called his witness Ken Nmadu (PW1) who adopted his witness statement on oath filed on the 2nd of August, 2012, and tendered the following Exhibits:

1. Exhibit "A" is the letter from 1st Omega Solicitor's to the defendant's M.D, dated 27th of March, 2012.
2. Exhibit "B" is the letter from Etisalat to the Principal Partner 1st Omega Solicitors dated 3rd April, 2012.
3. Exhibit "c" is the letter from 1st Omega Solicitors dated 20th April, 2012
4. Exhibit D is the letter from Etisalat to 1st Omega dated 22nd May, 2012.
5. Exhibit E is the letter from NCC dated 14th of May, 2012.

6. Exhibit F1 and F2 are letters from NCC dated 25th of May, 2012 and 22nd June, 2012

7. Exhibit G is the letter from National Lottery Regulatory Commission dated 12/7/12.

8. Exhibit H is the CTC of Thisday Newspaper Publication (at page 24) of 7th June 2012.

He was cross examined.

Under cross examination, PW1 testified further with regards to the questions put to him by defence Counsel which can all be gleaned from the record of proceedings of this case. And would be reproduced hereunder where found necessary.

The Defendant in her defence on the 2nd of July, 2015 called 1 Witness Chinelo Mbanefo (DW1) who adopted her witness Statement on Oath filed on the 14/12/12, 27/11/13 and 17/03/15 and tendered the following Exhibits:

Exhibit J is Terms and Conditions of the Promotional Competition .

Exhibits K1 and K2 are the Promo Flyer and the two accompanying Special recharge cards.

Exhibits L1,L2,L3, L4, L5, L6, L7, L8, L9, L10, L11 and L12 are documents titled subscribers profile in the names of Dr. Dickson Osuala, Bayo Telebi, Agha Clement Nnamdi, Williams S. Omoruikoba, Olayinka O. Babatunde, Ayoola M.Akanade, Prince .F. Nwokoro, Clifford Ezekwobi, Lanre Ogunyinka, Chukwuemeka Ojukwu, Temitope O. Lolade and Apostle A.M. Awolar.

Exhibit M is the three paged documents with list of names, contact address, location etc.

Exhibit N is the letter from Alexander Forbes to the Manager Serguits Marketing Strategy dated 8/02/12.

Exhibit O is the letter to C.E.O, contact Solutions Ltd from National Lottery Commission dated 22/2/12.

Exhibit P is the document "Permit to operate National Lottery Business dated 30/11/2011.

Exhibit Q is the letter from Consumer's Protection Council dated 8/2/12.

Exhibit R1 to R9 are the letters from Nigerian Communications to the CEO of Etisalat.

She was cross examined.

Under cross examination, DW1 testified further as reflected in the record of proceedings before the court. Her testimony under cross examination would be referred to and recounted where found necessary in the course of this judgement.

Both counsel to the plaintiff and defendant at the close of evidence filed, served and adopted their respective written addresses.

The defendant in her final written address filed on the 24th of November, 2015 and adopted on the 28th of February, 2017 raised the following issues for determination.

1. Was there a contract between the plaintiff and the defendant in respect of the FC Barca Promo.
2. Whether based on all the facts and evidence before this Honourable court, it can be said that the plaintiff was not aware that the winner of the Range Rover Sport under the FC Barca Prom would emerge via a draw.
3. Whether considering the entire facts of this case and evidence before this Honourable court, the plaintiff was neglectful in his performance of the Rc Barca Promo by focusing solely on the prices to be won without cognisance of the associated risks and terms and conditions thereof.

4. Whether considering the entire facts/context of this case and the totality of the messages sent to the plaintiff in the course of the FC Barca Promo, the message 'well done you win 25,000 points' can be interpreted to mean that the plaintiff won a Range Rover Sport.

5. Whether considering the evidence before the Honourable court, the plaintiff has proved the allegation of scam or case against the defendant.

The written submission is before the court and would be referred to when found necessary.

In conclusion of his address, he urged the court to dismiss the case in its entirety with substantial cost.

The plaintiff in his final written address filed on the 31st of March, 2016 and adopted on the 28th of February, 2017 formulated five issues for determination:

1. Whether Plaintiff being a subscriber to the defendant has established a contractual relationship with the defendant.

2. Whether having regard to the pleadings before this Honourable court, the admission of the defendant in its statement of defence and the evidence adduced thereon, the plaintiff has proved his case upon balance of probabilities and is entitled to all the reliefs sought in the claim

3. Whether the plaintiff having accepted the offer of the defendant to participate in the promotional Game and having established consideration (N100 per ams correctly answered) and attained the required 25,000 extra points is entitled to the SUV Range Rover Sport worth N15,000,000.00

4. Whether the documents tendered by the defendant and admitted were rightly admitted

5. Whether the Honourable court can expunge wrongly admitted documents in the course of delivering its judgement.

The entire written address is also before the court and will be referred to where and when found necessary.

In conclusion, Counsel urged the court to grant the reliefs sought by the plaintiff.

The defendant filed on the 24th of February, 2017 a Reply on point of law to the Plaintiff's Final Address.

And on the 3rd of May 2017 as reflected in the records both parties upon directive of the court further addressed court on points of law.

The gravamen of the plaintiff's case is that he participated in the FC Barca Promo for the prizes which were a Range Rover Sport (worth N15 Million) daily N500,000.00 (Five Hundred Thousand Naira) and a trip to Spain to watch Barcelona. He started the promo in February, 2012.

That in the course of the promo game which was by SMS for which he paid N100 per SMS, the defendant on the 18th of March, 2012 which was the proposed day for winning of the grand prize of Range Rover Sport sent him SMS that he could earn 25,000 extra points to be the winner by sending the correct answer to a question. This he did immediately and the defendant responded with another SMS saying he had won the 25,000 points. And that pursuant to his having become the winner he expected the defendant to hand over the Range Rover to him as they promised.

However rather than do so the defendant continued sending him questions to answer and refused to give him the Range Rover, even after the purported Grand Prize was to have been won on said 18th of March, 2012.

Plaintiff contends that the Promo Game was a scam.

The defendant on the other hand based their defence on the Terms and Conditions of the Promo. They contend that the plaintiff played the game without due caution and negligence without taking into cognisance the terms and conditions which had set out the modalities for the game and they also referred to the promo as a game of chance.

That the plaintiff having agreed to be bond by the Terms and Conditions in the website of the FC Barca Promo ought to know that he could not win the promo by earning points. That that was only meant to increase his chance of winning.

That the plaintiff agreed to participate in the Promo after he received an SMS that stated a warning that 'Terms and Conditions apply'.

The defendant posited that the promo game was not a scam as there were several persons who emerged winners in the game and were given prizes.

I have considered the case of the plaintiff, defence of defendant and the final addresses of counsel on behalf of both parties. And I'm of the view that the relevant issues herein are as canvassed by the two parties in their addresses. I would however narrow them down to the two main issues which arise for determination of plaintiffs claim under the circumstance. They are:

1. Whether evidence has been led to establish the existence of a contractual relationship between the plaintiff and the defendant in respect of the FC BARCA PROMO (hereinafter referred to as Promo).

2. Whether the claims of the plaintiff have been sufficiently proved, having regard to the evidence adduced by both parties before this court.

The first issue is on the existence of a contractual relationship between the parties in respect of the Promo game. The defendant in her address proffers that there was no contractual relationship between the plaintiff and defendant and that as such all the claims of the plaintiff should fail.

The plaintiff on the other hand contends that the defendant offered him via text message to his phone number an opportunity to participate in the Promo which he accepted by complying with the request in the text message and with the sum of N100 consideration for each SMS and each correct answer forwarded to the defendant.

This issue is premised simply on what constitutes the creation of a valid contract. When exactly does a binding contract arises between two or more parties.

It is ordinarily well settled that for a contract to exist there must be an offer, an unqualified acceptance and a legal consideration. There must be a mutuality of purpose.

This is quite an elementary principle of law and there are so many authorities on this. See

GOMWALK V. MIL. ADM. PLATEAU STATE (1998) 7 NWLR PT. 558 pg 413 @ 443

OLAOPA V. OBAFEMI AWOLOWO UNIVERSITY ILE IFE (1997) 7 NWLR PT. 512 or LPELR - 2571 (SC) pg 16 PARA A-G

CLEMENTINA M. OGUNNIYI V. HON. MINISTER OF FCT & ANOR (2014) LPELR-23164(CA) pg 26-27 paras E-B

NEKA B.B.B. MFG. CO. LTD V. A.C.B LTD (2004) 2 NWLR PT. 858 pg 521

For better understanding of the parties relationship, I recount submissions of defence counsel in paragraphs 1.3 & 1.4 of her defendant's reply on points of law here under:

"1.3. There is a consensus between the parties that the Plaintiff is a subscriber to the Defendant's telecommunication network. There is also consensus that the Defendant organized the FC Barca Promo which was open to all subscribers on its network albeit not automatic. It is important to reiterate the crucial point that a subscriber had to participate in the promo, a subscriber had to activate it and indicate interest by sending an SMS to "777" at a cost of N100 (One Hundred Naira). Therefore, while the promo was open to all subscribers on the Defendant's network, only subscribers who indicated interest by sending the relevant SMS participated. It is therefore obvious, that the Promo was a distinct and separate arrangement from mere subscriber status.

1.4 It is forcefully submitted that the case of Louisa Carlill v Carbolic Smoke Ball Co (1982) EWCA Civ 1 (1893) 1 QB 484 heavily relied upon by the plaintiff is entirely inapplicable in this case. It is not in contention that the plaintiff participated in the FC Barca promo. The bone of contention is the plaintiff's contention that he was not aware of the terms and conditions of the promo, and this is the basis of the knowledge of the terms and conditions of the Promo, then a valid and enforceable contract was never created between the parties in respect of the promo as no consensus ad idem was reached between the parties in the absence of a clear and unequivocal agreement on its terms and conditions. This is a sharp contrast to the Carbolic smoke Ball case where the terms of the agreement were very clear and the plaintiff complied with same."

I also refer particularly to paragraphs 5-12 of statement on oath of defendant's witness and paragraphs 3,4,6 and 7 of plaintiff's witness statement on oath.

Essentially the defendant having testified as indicated above on how the plaintiff became a participant in the Promo, has tacitly admitted the contract between both parties. Their complete Volte face in their final address that there's no contractual

relationship between both parties in respect of the Promo is an afterthought that cannot avail them under the circumstance. See

WEST AFRICAN PORTLAND CEMENT PLC V. MR. DAVID KEHINDE ODUNTAN & ANOR (2007) LPELR - 9046 (CA) pg 25-26 PARA E-A. where the court was of the same view expressed per OKORO, J.C.A as follows:

"This is so because an acceptance of an offer may be demonstrated by the conduct of the parties or by their words or by documents that have passed between them. In R.E.A.N Ltd, v. Aswani Textile Ind. (1991) 2 NWLR (pt.176) p. 639 at 66 B-F Tobi JCA (as he then was) held as follows:-
"A compromise which is founded in the law of contract, does not stand on rhetorics but on the well settled principles of contract with its tap roots on the collateral act of forbearance. A forbearing conduct which subsequently reopens into a compromise could be in writing. It could also be made orally or by parol ... There are however instances when in the interest of justice and fair play, a court of law can infer the existence of a fore-bearing conduct which has developed into a compromise. One of such instances is when the forbearance wants to take advantage of his own forbearing conduct with a view to overreaching his opponent who is already the victim of the forbearing conduct. In such a situation, a court of law as a court of equity is entitled to invoke the well established principles of estoppel by conduct".

Where a man conducts himself in a manner such that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the later was intended to act upon it in a particular way and he with such belief, does act in that way to his detriment, the first is estopped from denying the facts as represented. See Nassar & Sons (Nig) Ltd. v L.E.D.B (1959) 4 FSC 242 and Horicon Ltd. v. Emenike Wasurum (1987) 4 NWLR (pt 66) 646."

More so the submission of the defence counsel in his final address that there's no contractual relationship for want of a consensus ad idem cannot replace the evidence of both parties referred to above which reflects a blow by blow account of how the contract was formed between the parties. It is well settled that address of counsel no matter how coherent cannot take the place of credible evidence before the court. See

UBN PLC & ANOR V. AYODARE & SONS (NIG) LTD & ANOR(2007) 13 NWLR PT. 1052 pg 567 or LPELR - 3391 (SC) pg 50 PARA E

ODUWOLE & ORS V. WEST(2010) 10 NWLR PT. 1203 pg. 598 or LPELR- 2263 (SC) pg 26 PARA E-F

As far as the offer and acceptance with regard to the Promo is concerned, there appears to have been a consensus ad idem at that point when the relationship between both parties for the Promo Game took off. The plaintiff subscribed to participate in the game by responding to the SMS as prompted by the defendant. And both parties thereafter engaged in the Promo Game by exchange of SMS.

I do not agree with the defendant that there was no mutuality of purpose. The conduct of both parties at the time the Contract crystallized is reflective of a consensus ad idem. Apart from a formal express contract, it is trite that the existence of a contract can even be inferred by the conduct of the parties in a given circumstance. See

AKINOLA & ORS V. LAFARGE CEMENT WAPCO NIGERIA PLC (2015) LPELR- 24630(CA) pg 16-17 PARA D-B where the court observed as follows:

"To begin with, we have to determine how a contract is formed or created. This court per Oguntade, J.C.A (as he then was) in

GOMWALK vs. MIL. ADM. PLATEAU STATE (1998) 7 NWLR (Pt.558) 413 at 433 stated as follows:-
I am in grave difficulty to agree with the submission of learned Counsel for the Appellant that there was no contract between the Appellant and the Respondent. A contact could be in writing. It could also be on parol. The Law even allows the Courts to infer the existence of a contract by the conduct of the parties in the circumstances of the case. And what is more, a particular trade practice which the parties have adopted or followed in the past to their mutual advantage could also ripen into a contract. It is clear to me from the totality of the pleadings and the exhibits (e.g Exhibits "A, A1-A2, B, C and S") that there was a contract between the parties, and the contract was to remit money to the Respondents overseas Customers Youngstars Traders Importers and Exporters of Hong Kong: Although there was no specific agreement to that effect, the pleadings, the exhibits and even the evidence in Court show the existence of the contract."

After having enjoyed the benefits of the contract the defendant is estopped from denying the existence of a binding contract between the parties. See

HORICON LTD. V. EMENIKE WASURUM (1987) 4 NWLR PT. 66 pg. 646

WEST AFRICAN PORTLAND CEMENT PLC V. MR. DAVID KEHINDE ODUNTAN & ANOR (Supra) Pg.25-26 Para A-A.

Suffice to say that issue number one is resolved in favour of the plaintiff.

Issue two is whether the claims of the plaintiff have been sufficiently proved, having regard to the evidence adduced by both parties before the court.

The resolution of the first issue also determines plaintiffs reliefs numbers (1) & (3).

The determination of all the other reliefs sought would be subsumed in the resolution of issue two by a holistic consideration of all thereliefs.

The gravamen of the plaintiff's case is that the defendant denied him his legitimate entitlement to the winning prize of the Promo even after he emerged winner.

While the defendant hit the nail on the head when she proffered that the crux of the plaintiff's case is the interpretation he gave to the SMS messages he received from defendant.

Thus the defendant aptly captured the core of this case which is the interpretation to be given to the SMS received by the plaintiff particularly as chronicled in paragraphs 25,26, 27, 28, & 29 of the evidence on oath of the plaintiff who testified as PWI. Having established the foregoing therefore there's no reason to beat around the bush and engage in lengthy discuss that have no bearing to the determination of the lives issues in this case. I would therefore proceed to the relevant point in issue.

The plaintiff's grouse is not just that he was deceived to participate in the Promo game but particularly that he was deceived to send SMS to answer the question of 18th March, 2017 with the promise that he would be the winner if he answered the question correctly. And that after answering the question correctly he was deceived to believe he had won the Range Rover.

The defendant has admitted sending all the text messages quoted in the aforementioned paragraphs to the plaintiff. Particularly under cross examination where the DW1 testified as follows:

"The SMS referred to in paragraph 29 of statement of claim was sent to the plaintiff."

A scrutiny of the said paragraph 29 of statement of claim reveals that it is completely at par with paragraph 28 of the statement on oath of plaintiff.

Going by the statement of defense of the defendant it is not a surprise that the defendant under cross examination admits sending this text message to the plaintiff. Going by the express wordings of the text message though, it is still curious that the defendant in the entire length and breadth of her defense neither denied that the text message was intended for the plaintiff nor that it was sent to the plaintiff. Not even in any of the correspondence before the court as Exhibit did the defendant deny the text message was intended for the plaintiff. Thus the defendant having admitted sending the text messages to plaintiff in above mentioned paragraphs, the court would carefully examine the messages, determine the purport of same and act on it's import accordingly. The court has the duty to act on material facts arising in an issue that has not been denied by the adverse party as same are deemed admitted. See

OGOLO & ORS V. FUBURA & ORS(2003) 11 NWLR PT. 831 pg 231 or LPELR-2310(SC) pg 40 PARA F

UNIBIZ NIG. LTD V. COMMERCIAL BANK(CREDIT LYONNAISE (NIGERIA) LTD) (2005) 14 NWLR PT. 944 pg. 47 or LPELR-3381(SC) PARA C-D.

In line with the evidence of the plaintiff the text messages declaring him the winner are as follows:

Paragraph 28:
"Final Reminder for 8077112502 Range Rover worth 15 million can be yours today! Win 25,000 extra points to be the winner. Send Rover to 777 now"

Paragraph 29:

"well done you win 25,000 points!"

The defendant in the entirety of their evidence didn't inform this court that this text messages were contrived to confuse the plaintiff and not to be taken seriously. They would therefore have to be bound by the words of their SMS.

The previous text messages of 15th March 2012, 16th March 2012 and 17th March 2012 could be presumed to be merely encouraging the plaintiff to continue playing the game as proffered by defendant, as none of them gave any precise condition for plaintiff to fulfil to become the winner. But the SMS of 18th March, 2012 under reference as in paragraph 28 above did.

The text messages of 18th March, 2012 in paragraphs 28& 29, which clearly stipulates that the plaintiff should play to win 25,000 points to be the winner, and then goes ahead to confirm that the plaintiff had won 25,000 points.

The defendant made heavy weather about the applicability of the terms and conditions to the entire Promo game and in fact articulated her defense around this said 'terms and conditions' (in evidence as Exhibit J) which according to the defendant stipulates that a winner was to emerge via a "draw".

It is necessary at this point to digress and consider the argument of plaintiff in his final address that Exhibit J, the purported Terms and Conditions was wrongly admitted in evidence. The plaintiff objected to any reliance on Exhibit J by this court. Exhibit J is the much talked about Terms and Conditions of the Promo. The plaintiff urged the court to expunge same for having been wrongfully admitted. The plaintiff contends that the defendant just lumped her documents together without stating the purpose for which it was tendered.

The plaintiff in his evidence had hitherto testified that he wasn't aware of the terms and conditions of the Promo. That the defendant never referred him to any website nor any other

avenue to access any terms and conditions of the Promo game. The defendant denies this and referred to the several ways the attention of participants in the Promo was drawn to the terms and conditions. The defendant has not been able to convince this court that the plaintiff at any time was ceased of what the terms and conditions of the Promo were. However it is observed that it is the evidence of the defendant in paragraph 4 of further amended statement of defense, statement on oath and oral testimony before the court that at the onset of the game participants were issued a 'warning that Terms and Conditions apply' in the kick off text message. This was not denied by the plaintiff. It is pertinent to reiterate at this point that the law is well settled that facts not denied are deemed admitted. And facts admitted need no further proof. See

UNIBEZ V. C.B.L. (Supra)

EFET V. INEC & ORS (2011) 7 NWLR 423 or LPELR- 8109 (SC) pg 25-26 PARA G-A.

The plaintiff denied knowledge of any existing rules, terms and conditions nor any website containing said terms. But what the plaintiff doesn't deny is that he received the text message from defendant that 'terms and conditions apply'. To my mind this is sufficient notice of the existence of certain terms and conditions which are to apply to the Promo. Suffice to say that the court would not expunge Exhibit J as urged by the plaintiff as Exhibit J forms the bedrock of defendant's defense and was copiously alluded to in her statement of defense and in the course of evidence.

Exhibit J is found to have been properly admitted and would be acted upon by this court. The defendant has tendered the said Terms and Conditions, the court reiterates its admission of same for the aforementioned reasons and would proceed to act on it as the terms and conditions regulating the Promo.

The emergence of a winner by draw is the contention of defendant. This one word 'draw' features prominently in the defense as being the basis for anyone to win the Range Rover worth #15,000,000.

As a result I have carefully scrutinized Exhibit J-the Terms and Conditions whether it defines this word 'draw' referred to by defendant and also reflected in Exhibit J, however I found no definition of the word 'draw' used therein. I also had to resort to the English Dictionary and Black's Law Dictionary for the definition of 'draw' to decipher whether the definition is indicative of what is meant by draw or why it is impossible for a winner who emerges by the so called draw to be so informed by text message. These I didn't find in any of these definitions of 'draw'

The BLACKS LAW DICTIONARY specifically defines draw as:

"draw

vb. (13c)

1. To create and sign (a draft) <draw a check to purchase goods> .

2. To prepare or frame (a legal document) <draw up a will> .

3. To take out (money) from a bank, treasury, or depository <she drew $6,000 from her account> .

4. To select (a jury) <the lawyers began voir dire and had soon drawn a jury> ."

The defendant never defined that word draw in their evidence nor has it been defined in Exhibit J where it was used. Why was the plaintiff expected not to have believed he had emerged the winner when the text messages from the defendant infers so, merely because the winner was to emerge via a draw according to Exhibit J. What is draw under the circumstance? That question remains for the defendant to answer another time and at another place. The exact process comprising the 'draw' wasn't described in Exhibit J.

The defendant further still employing inter play of words submitted that points earned in the game merely increased the chances of winning and could not lead to winning the game. And that the plaintiff clearly understood this by the averment in paragraph 32 of the statement on oath. This in my view is a misunderstanding of the averment in that paragraph because to my mind the plaintiff was quite clear and unequivocal in that paragraph on his belief that points could make a player win at a stage.

I seem to share the impression of plaintiff that paragraph 28 and 29 indicated he could win the game by the points earned.

Clearly the defendant didn't state in the said text message that:

WIN 25,000 EXTRA POINTS TO QUALIFY TO BE THE WINNER nor WELL DONE YOU WIN 25,000 POINTS YOU QUALIFY FOR THE DRAW.

Rather the defendant stated in the text messages thus " WIN 25,000 EXTRA POINTS TO BE THE WINNER" and then WELL DONE YOU WIN 25,000 POINTS.

The defendant opined that these messages were merely to encourage the plaintiff to keep playing the game. In my view, if the above text messages intended differently from what is portrayed in the content, then they went beyond what could be termed mere encouragement but rather progressed into an inducement. This court has to rely on the evidence as led by the parties and cannot indulge in trying to canvass a case for either of the parties outside the evidence placed before her. Doing so under the circumstance would only lead to mere speculation and or conjecture, which all courts have been admonished by the apex court to refrain from. See

AGIP (NIGERIA) LTD V. AP INTERNATIONAL & ORS (2010) 5 NWLR or LPELR- 250(SC) pg. 66-67 paras F-A

ECOBANK (NIG) LTD V. ANCHORAGE LEISURES LTD & ORS (2016) LPELR- 40219 (CA) pg 34-35 PARA E-A.

The defendant argued that the plaintiff clearly understood the Promo was a game of chance with no guarantee whatsoever of his winning the Range Rover.

There's no doubt from the evidence before the court that this was a game of chance for which there was no guarantee of winning the Range Rover sport. However this position was qualified on 18th March, 2012 when the defendant in her own words guaranteed the plaintiff he would be the winner if he earned 25,000 points and further assured him he had won the 25,000 points.

The logical conclusion and interpretation of any reasonable man of those words would be that the defendant is informing the plaintiff he had won.

The defendant being fully aware that the Promo game was being played via text messages ought to have taken due care not to induce a subscriber to keep playing by clear misleading or fraudulently crafted messages.

Having entered into a contract with plaintiff, the defendant owed the plaintiff a duty of care. See

BELLO ORS V. A.G OYO STATE(1986) 1 S.C. 1-76 or LPELR-764 Pg 89 PARA C-D. where his lordship KARIBI-WHYTE JSC held that:

"It is well settled that the breach of the duty of care owed by the defendant to the Plaintiff which results in injury to the latter gives rise to an action in negligence for damages."

HAMZA V. KURE (2010) 10 NWLR PT. 1203 pg. 630 or LPELR-1351 pg 15 PARA G-B

The defendant having admitted that these text messages were indeed sent to the plaintiff and having of her own accord restated by evidence and further particulars before the court that the plaintiff could not win the game by winning the 25,000 extra points contrary to her own text message that he could, has fortified further the facts leading to the inexorable inference of prove beyond reasonable doubt that the messages were fraudulently crafted to mislead and induce him to continue playing and spending his money for the benefit of the defendant. It is clear that the defendant has by misrepresentation induced the plaintiff to send further SMS to win 25,000 points in this transaction. See

KUFORIJI & ANOR V. Y.B (NIG) LTD 6-7 S.C or LPELR-1716(SC) pg 17-18 PARA F-A.

And

AFEGBAI V. A.G. EDO STATE (2001) 14 NWLR PT. 733 pg 425 or LPELR pg 24 PARA A-C, and 53 PARA A-D where the court Supreme Court posited that:

"A fraudulent misrepresentation, whereby the representor has induced the representee to alter his position by entering into a contract or transaction with the representor confers the right to the representee to either maintain an action for damages, or repudiate the contract or transaction. In such a case, the representee may institute proceedings for the rescission of the contract or transaction."

See also

IDRIS OLATOKUNBO OLAREWAJU V. UNIVERSITY OF LAGOS & ORS (2014) LPELR-24093 (CA) pg 41 PARA A-C.

"Fraud is a knowing misrepresentation of the truth, or concealment of a material fact to induce another to act to his or her detriment, it is also a misrepresentation made recklessly

without belief in its truth to induce another person to act, See Blacks Law Dictionary Eighth Edition page 685."

I am not persuaded by the defendant's reliance on the maxim volenti non fit injuria as a defense because the plaintiff never consented to be mislead nor deceived.

There's also nothing in Exhibit J vaguely suggesting that the defendant was allowed to induce by falsehood nor misrepresent facts to the Plaintiff in the course of the Promo. This principle would only avail the defendant where the plaintiff voluntarily and with full knowledge agreed to participate in the Promo knowing fully well that the defendant was at liberty to employ misleading tactics and misrepresentations to induce him to keep on playing the game. That is not the case here, more so when the allegation agains defendant is not just negligence perse. See

AKINYEMI DARE & ANOR V. CALEB FAGBAMILA (2009) 14 NWLR PT. 1160 pg. 117or LPELR-8281(CA) Pg. 24-25 Para E-C

where his lordship SANKEY, J.C.A postulated that:

"The principle of volenti non fit injuria has been the subject of a lot of misconceptions. This is a common defence in actions of negligence. It emphasizes the necessity for knowledge and consent. The question primarily is whether the plaintiff agreed to the breach of the duty of care by the defendant towards him or, at least, to waive his right of action arising out of such breach. The defence has both these applications. The first of which negatives the wrongfulness of the defendant's conduct, while the second prevents the plaintiff from recovering without affecting the fact that the defendant has committed a wrong. But whatever the application, voluntas emphasizes the need for knowledge of the risk in the plaintiff. The law is that if a defendant desires to succeed on the ground that the maxim valenti non fit injuria is applicable, he must obtain a finding of fact that the plaintiff voluntarily and freely, with full knowledge of the knowledge of the risk he ran, impliedly agreed to incur it.

Therefore, there must be knowledge before there can be consent."

The defendant cannot be allowed to take cover under the maxim volenti non fit injuria from the repercussions of her misrepresentations, which was not an agreed term in their contract relationship.

As earlier highlighted nowhere in Exhibit J was the defendant given the liberty to induce the plaintiff by deceit. There's a whole world of difference between 'Chance', 'Risk' and 'Outright Deceit'. Being a game of chance the defendant ought to have given the plaintiff the opportunity to freely decide whether to take a chance or not to earn a further 25,000 points. But it assured him that if he earned 25,000 points extra he would be the winner. This is against the very spirit of Exhibit J which the defendant so heavily relied upon. The plaintiff never contended that he was coerced into participating in the Promo but that he was coerced and deceived into playing further to earn 25,000 points in order to emerge winner.

By her actions the defendant has tainted the legitimacy of the entire process with deceit, little wonder then that a protest by the National Association of Nigerian students against the Promo was published in Thisday Newspaper calling upon various Government Agencies to probe the Promo, as evidenced by Exhibit H. The defendant in her evidence testified and tendered documents to the effect that the Regulatory bodies in Nigeria including the Nigerian Communications Commission (NCC), Consumer Protection Council(CPC) and the National Lottery Regulatory Commission all approved their FC Barca Promo. And that the Promo was organized in a highly transparent manner. If the manner of their transaction with the plaintiff is what the defendant considers as highly transparent, then I cannot help but wonder what actually their concept of 'Transparency' is. Also I wish to observe that it would be highly unlikely that the Approval by the aforementioned regulatory

bodies constituted a fiat to mislead or deceive innocent Nigerians, (a large number of whom are not very well educated,) with subtle semantics to continuously expend their meager resources without any fulfillment of promised reciprocal benefits.

Nothing in Exhibit J to my mind absolves the defendant of liability of inducement and deceit, not even Clause 9(3). There's also no evidence to convince the court that the plaintiff ought to be aware that what was referred to as 'draw' was at variance with the relevant SMS under consideration on 18th March, 2012.

Even if the plaintiff was aware the winner was to emerge by draw there's no evidence stating the manner of the draw for which the plaintiff ought to have been guided to know whether or not the draw had taken place on that 18th March, 2012 when he received those SMS.

The defendant has also not led credible evidence to establish that the plaintiff's conduct of believing and placing reliance on the text messages from defendant amounts to negligence. The defendant was clear in her text message as to the resultant effect of earning 25,000 points extra. The plaintiff took the chance to win the stated points and in fact did win the points, going by defendant's text. I have not found any carelessness or recklessness in the actions of the plaintiff as the defendant wants this court to believe. I find support for this view in the interpretation given by the court to the two words Misrepresentation and Negligence in the case of

MRS FELICIA DUROWAIYE V. UNION BANK OF NIGERIA PLC (2014) LPELR-24309(CA) pg 22-23 @ paras D-A per UWA JCA

"Misrepresentation in Black's law Dictionary, 7th Edition has been defined as follows: "The act of making a false or misleading statement about something, with the intent to

deceive. The statement so made; an assertion that does not accord with the fact." While negligence has been defined in the same dictionary as follows: "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm except for conduct that is intentionally, wantonly or willfully disregardful of others' rights. The term denotes culpable carelessness."

I do not see the risk taken by plaintiff to earn 25,000 points as unreasonable under the circumstance when he had the assurance of the defendant that he would be the winner if he earned the points considering he knew the correct answer to the question. The defendant also at that point had taken the chance to give plaintiff the opportunity to earn 25,000 points and be the winner, after all it was a game of chance. The defendant is also bound by the outcome of the chance she took and is estopped from denying the same facts she has so represented. I find support for this view in

R.E.A.N LTD V. ASWANI TEXTILE IND. (1991) 2 NWLR (PT. 176) pg. 639 @ 669 PARA B-F per Tobi JCA (as he then was).

And

AG OF NASSARAWA STATE V. AG PLATEAU STATE (2012) LPELR SC pg 28 PARA C-E. where his lordship FABIYI JSC resonated on the principle of estoppel by contract as follows:

" There is the doctrine of estoppel by contract. This is a bar that prevents a person from denying a term, fact or performance arising from a contract that the person has entered into. BLACKS LAW DICTIONARY/ Nineth Edition page 630. There is what is referred to as equitable estoppel. This a doctrine preventing one party from taking unfair advantage of another when through false language or conduct, the person to be estopped has induced another person to act in a certain

way, with the result that the other person has been injured in some way. It is termed estoppel by conduct or estoppel in pais."

See also

WEST AFRICA PORTLAND CEMENT PLC. V. ODUNTAN (SUPRA) pg 25-26 PARA A-A.

This is so because an acceptance of an offer may be demonstrated by the conduct of the parties or by their words or by documents that have passed between them. In R.E.A.N Ltd, v. Aswani TextileInd. (1991) 2 NWLR (pt.176) p. 639 at 66 B-F TobiJCA (as he then was) held as follows:-

"A compromise which is founded in the law of contract, does not stand on rhetorics but on the well settled principles of contract with its tap roots on the collateral act of forbearance. A forbearing conduct which subsequently reopens into a compromise could be in writing. It could also be made orally or by parol ... There are however instances when in the interest of justice and fair play, a court of law can infer the existence of afore-bearing conduct which has developed into a compromise. One of such instances is when the forbearance wants to take advantage of his own forbearing conduct with a view to overreaching his opponent who is already the victim of the forbearing conduct. In such a situation, a court of law as a court of equity is entitled to invoke the well established principles of estoppel by conduct".

Where a man conducts himself in a manner such that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the later was intended to act upon it in a particular way and he with such belief, does act in that way to his detriment, the first is estopped from denying the facts as represented. See Nassar & Sons (Nig) Ltd.v L.E.D.B (1959) 4 FSC 242 and Horicon Ltd. v.Emenike Wasurum (1987) 4 NWLR (pt 66) 646.

The defendant is therefore estopped from denying the obvious that she promised the subscriber he would be the winner if he earned 25,000 points extra. I therefore so hold.

All the above having been said, it is however observed that by the evidence before the court, particularly Exhibit J the defendant has unequivocally set out the procedure for formal declaration of winners and the handing over of the winning prizes including the Range Rover sports.

THE said Exhibit J has copiously set out how the winner is declared and the winning prize given out to the winners, with further conditions following the declaration and the collection of the winning prize. This procedure has been shown to be a part of the contract, it therefore binds all participants including the plaintiff. Pacta sunt Servenda. On sanctity of contract, see

ARJAY LTD V. A.M.S LTD (2003) 7 NWLR (PT. 820) pg 577 or LPELR-555(SC) pg 67 PARA A-E.

JFS INVESTMENT LTD V. BRAWAL LINE LTD & ORS (2010) 18 NWLR PT. 1225 pg 495 or LPELR- 1610(SC) pg 38 PARA C-G.

The plaintiff is not asking the court to order specific performance in terms of the contract rather he has claimed before this court the handing over of the Range Rover Sports to him. The plaintiff hasn't led evidence before this court to show that the laid down procedure prequel to the handing over of the car has been established as fufilled. Neither has he adduced cogent reasons why the said procedure ought to be circumvented under the circumstance.

Suffice to say that the plaintiff has not placed before this court evidence to substantiate his claim that the Range Rover Sport ought to have been handed over to him by the time this suit was instituted. It is settled law that where a contract stipulates a particular procedure or condition for the fulfillment of an obligation then parties are bound by that condition. See

ARJAY LTD V. A.M.S (Supra)

JFS. INVESTMENT LTD (Supra)

RCC (NIGERIA) LTD V. EDOMWONYI (2003) 4 NWLR (PT. 811) pg 513 or (2002) LPELR- 6067(CA) pg. 26 PARA B-E.

The plaintiff in the light of the foregoing has not adduced cogent and credible evidence establishing the propriety of handing over the Range Rover sports to him without following the laid down procedure evidenced in Exhibit J. Considering also that the plaintiff admitted receiving the warning in the SMS that 'Terms and Conditions apply'

I would therefore say that issue No. two is resolved in part only in favour of the plaintiff.

Having considered the salient issues arising in this case I would proceed to determine all the claims of the plaintiff in line with the findings of the court.

The first claim is for declaration on the existence of a contractual relationship between the plaintiff and defendant. This has been sufficiently proved upon a preponderance of evidence and hereby succeeds.

The third claim for a declaration that the defendant owed the plaintiff a duty of care as a customer has been proved upon a preponderance of evidence and it also hereby succeeds.

The fifth claim for a declaration that the action of the defendant in convincing the plaintiff to earn 25,000 points to be the winner without following through with the promise of the winning prize of a Range Rover is deceitful and unlawful, has been proved by a preponderance of evidence and the balance of probability found to be in favour of the plaintiff, it therefore also succeeds.

The seventh claim for a declaration that the defendant is liable to the outcome of the game is found to have been sufficiently proved and also hereby succeeds.

On the other hand the second claim that the defendant breached her implied contract after plaintiff spent over N120,000.00 and defendant failed to fulfill her obligations of his winning the Range Rover, hasn't been sufficiently proved upon a preponderance of evidence, it therefore hereby fails.

The fourth claim is for a declaration that the defendant failed in its duty of care by not providing the plaintiff with any of the winning prizes. The plaintiff with regard to this claim has not successfully discharged the burden of proof placed on him by way of a preponderance of evidence. This claim would therefore also have to fail.

The sixth claim for a declaration that the plaintiff has lost several opportunities and income from his dedication and investment in defendant's Promo hasn't been sufficiently proved upon a preponderance of evidence and it therefore also hereby fails.

Essentially, I wish to point out here that, the fact this court found that the defendant intentionally mislead, induced or deceived the plaintiff to spend his money further in order to earn 25,000 extra points has not necessarily culminated in a finding that the plaintiff has successfully proved his entitlement to the winning prizes as stipulated in the SMS nor Exhibit J at the time of instituting this action. This is primarily for the reason already highlighted that he was warned that certain "terms and conditions apply".

Accordingly therefore the first, third, fifth and seventh declaratory reliefs succeeds, while the second, fourth and sixth declaratory reliefs fail and are hereby dismissed.

Consequently the ancillary reliefs are hereby adjudged as follows:

The eight claim is for an order releasing the Range Rover Sport to the plaintiff.

The plaintiff has not sufficiently proved his entitlement to the release of the Range Rover Sport to him, the claim fails and is hereby dismissed.

The ninth claim is for a perpetual Injunction against the defendant. The plaintiff has not substantiated this claim by leading any credible evidence whatsoever that the defendant at any time harassed nor intimidated him with respect to matters arising from this suit. It is settled law that where there's been no declaration of plaintiff's right the court would not issue an order of Injunction restraining the defendant. I am fortified in the above position by the view of his Lordship Adekeye JSC on the essence of granting a perpetual Injunction as expressed in:

GOLDMARK NIGERIA LIMITED ORS V. IBAFON COMPANY LIMITED ORS(2012) LPELR-9349(SC) pg 65 PARA B-G

"The grant of the relief of perpetual injunction is a consequential order which should naturally flow from the declaratory order sought and granted by court. The essence of granting a perpetual injunction on a final determination of the rights of the parties is to prevent permanently the infringement of those rights and to obviate the necessity of bringing multiplicity of suits in respect of every repeated infringement. Commissioner of Works, Benue State vs. Devcon Ltd. 1988 3 NWLR pt. 83, pg. 407 LSPDC vs. Banire 1992 5 NWLR pt. 243 at pg. 620. Afrotec vs. MIA (2001) 6 WRN pg. 65 Globe Fishing Industries Ltd. vs. Coker (190) 7 NWLR pt. 162. Pg. 265. Compensation was a relief sought as an alternative claim by the 1st and 2nd respondent. A court will proceed to make order in respect of an alternative claim where the main or previous claim did not succeed, but where a court grants the claim of a successful party to a suit there will be no need to consider any alternative claim. Agidigbi vs. Agidigbi (1996) 6 NWLR pt. 454, pg. 300".

See also

AKINDURO V. ALAYA (2007) 15 NWLR PT . 1057 pg 312 or LPELR -344 (SC) Pg 20 paras C-E

Thus the ninth claim for an injunctive order against the defendant fails and is hereby dismissed.

The tenth claim is for an order of general damages. The court is of the view that the plaintiff having successfully established that the defendant owed him a duty of care which was violated by deceit in the transaction with him is entitled to damages against the defendant for breach of duty of care and the deceit perpetuated against him.

The eleventh claim is for an order of exemplary damages. The defendant has not led credible evidence substantiating his claim for exemplary damages, same therefore fails and is hereby dismissed.

The twelfth claim is for the sum of N150,00 00 (Eight hundred and Twenty Naira) as special damages for purchase of recharge cards and online internet from February 2012 to March 2012.

This is a claim which falls under the genre of special damages that ought to be specially pleaded and strictly proved. See

NGILARI V. MOTHERCAT LIMITED (1999)13 NWLR PT. 636 pg 626 or LPELR-1988(SC) pg. 28 PARA E-F

KOSILE V. FOLARIN (1989) NWLR PT. 107 pg 1 or LPELR-1705 (SC) pg. 19 PARA B-C

AKINKUGBE V. EWULUM HILDINGS NIGERIA LTD & ANOR (2008) 12 NWLR (PT. 1098) 375 or LPELR-346(SC) pg. 11-12 PARA F-A.

The plaintiff appears not to be quite sure of the amount he is claiming. In one breath he claims 'N150,000.00' in numbers and in words he claims'(Eight Hundred and twenty Thousand Naira)'. Be that as it may, suffice to say that the claim for special damages has not been substantiated with specific

particulars nor strictly proved before the court. The exact details and particulars leading to the claims made for N120,000.00 and N30,000.00 respectively have not been set out.

The claim for special damages would therefore have to fail and is hereby dismissed.

Consequently and in the light of the foregoing and for the avoidance of doubt the claim for damages as aforesaid in Relief Number ten having succeeded, the defendant is hereby ordered to pay to the plaintiff the sum of N1,000,000.00 damages.

Further order is also hereby made in line with Order 39(7) of the HIGH COURT OF FEDERAL CAPITAL TERRITORY CIVIL PROCEDURE RULES 2004, that the defendant pays 10% interest per annum on the total judgement sum from the date of judgement until such a time when the entire judgement sum is fully and finally liquidated.

(Signed)

Honourable Judge.

Appearances:
Nwabueze Obasi-Obi Esq for Plaintiff
Ogechi Abu Mrs for Defendant.

COURT OF JUSTICE, ABUJA
FCT—ABUJA
CERTIFIED TRUE COPY
SIGN:
NAME: E JOVI .E.
DATE: 28/8/2017