CASE COMMENTS

FGN v. ZEBRA ENERGY LIMITED[1]: EMERGENCE OF THE FIRST NIGERIAN CASE ON UNILATERAL CONTRACT OR A MIRAGE?

Although the traditional examples of unilateral contracts are of trivial domestic nature,[2] the concept plays a large and useful part in commercial transactions.[3] Once a promise is classified as an offer of a unilateral contract, a number of rules apply to the acceptance of the offer.[4] However, since the classical case of *Carlill v. Carbolic Smoke Ball Co.,*[5] *(Carlill's*case) in 1893, there has not been any reported case on unilateral contract in Nigeria. Remarkably, the Supreme Court recently applied the concept in the case *of Federal Government of Nigeria & Ors. Zebra Energy Limited.*[6]The thrust of this paper is to evaluate the case and its contributions, if any, to Nigerian jurisprudence on theLaw of Contract, especially, the concept of unilateral contract.

This paper is divided into five parts. Part One examines the meaning and features of a unilateral contract while Part Two focuses on the facts of the Zebra's case and the decision. Part Three is devoted to the Comments of the writer on the case while Part Four postulates on the correct analysis of the case based on established principles of the Law of Contract. The paper is concluded in Part Five. It is the view of this writer that the case was wrongly decided and therefore merely raises a false signal about the emergence of the first Nigerian case on unilateral contract. Rather, the case raises an issue on revocation of an offer made open till a specific date before the expiration of the date and not that of a unilateral contract.

UNILATERAL CONTRACT DEFINED

A unilateral contract arises when one party (promisor) promises to do an act, or forbear from doing something if the other party will do (or forbear from doing) something without the other party making any promise to that effect.[7] The contract is described as unilateral because the promisee has not made counter promise to perform the required act or forbearance. The distinguishing feature of a unilateral contract therefore, is that "only one party, the offeror or promisor, is under a contractual obligation at any relevant period".[8] Hence, Chitty succinctly defines a unilateral contract as one in which only one

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[1][2002] 18 N.W.L.R. (Pt. 798) 162.

[2] Many contracts professors have delight in illustrating this rule as follows: "The professor offers to pay a student a sum of money if she rides a bicycle across the Brooklyn Bridge or shinnies up a greased flagpole. The student eagerly commences. Just before the student reaches her goal, the professor mysteriously appears and shouts, "I revoke". See P.M. Tiersma, "Reassessing Unilateral Contract - The Role of Offer, Acceptance and Promise", U.C. Davies Law Review, Fall, 1992, p.12.

[3]F.R. Davies, Contract, Sweet & Maxwell, 4th ed., (1981), p.12

[4]For instance, it is of great importance to decide when acceptance takes place inunilateral contract situation. See G.H. Treitel*, The Law of Contract*, Sweet & Maxwell International Student Edition, 7th ed. (1990). p.31

[5][1893] 1 Q.B. 256.

[6]*Supra.*

[7] G.H Treitel*, op. cit*. p30.

[8]I. E. Sagay, Nigerian Law of Contract, (2000), Spectrum, 2nd ed., 7.

party is bound. According to him "the promisee will not be liable if he did nothing.[9] Other features of a unilateral contract are: (i) The offeror is asking the offeree to do a specified act, other than the making of a promise. The offeror contemplates not the creation of mutual promises, but the dependence of his own promise upon the offeree's performance of an act.[10] If the offeree promises to do the act, this does not turn the offer to a bilateral contract. The offeree's promise would be irrelevant. (ii) At the inception, the offeror is running the risk of incurring an obligation, when no obligation is imposed on the other. (iii) It is for the offeror and him alone to prescribe the mode of acceptance.

The commonest example of unilateral contracts is an offer for reward made to the whole world, a covenant by one party in a contract under seal, the making of a promissory note, the acceptance of a bill of exchange, the offer of a reward for the return of lost property, the grant of an option to purchase property.[11] In *Carlill's* case, the Defendant Company who were manufacturers of a product named "Carbolic smoke ball" placed an advertisement in a newspaper that it would pay 100 pounds to any person who used its product - the Carbolic smoke ball in a specified manner and nevertheless succumbed to influenza. The Defendant further stated in the advertisement that it had deposited a sum of 1,000 pounds in a particular bank for the purpose of honouring possible claims. The Plaintiff bought one of the products and used it as specified and still caught influenza and instituted this action to compel the Defendant to pay him the 100 pounds. The Defendant contended in its defence that the advertisement was a mere puff, a mere statement of confidence in their product and a promise, which was not intended to create legal relations. The Defendant contended further that the advertisement was not an offer and that in any case, the Plaintiff had not communicated his acceptance to it (the Defendant).

The claim of the Plaintiff succeeded. The court rejected the plea that the statement was a mere puff and held that the statement that the Defendant had deposited some money in the bank for that purpose was cogent evidence that it intended to be bound by the statement. It was held that the advertisement was a unilateral offer to the whole world whereby anyone who performs the terms of the offer brings himself into a contractual relationship with the Defendant. By the terms of the contract, there was no need to notify the Defendant of the fact of acceptance. Performance, in this case, using the smoke ball for two weeks, constituted the consideration.

THE ZEBRA'S CASE

It is appropriate at this stage to consider the Zebra's case.[12] The facts of the case are not in dispute.[13] The Respondent applied to the Nigerian Head of State for an oil prospecting licence (OPL) further to the indigenous exploration programme initiated by the Federal Government of Nigeria in 1991. The

[9]Chitty on Contract, Sweet & Maxwell, 1994, p19 para 1.022.
[10]Cheshire, Fiffoot & Fursmston, Law of Contract, ELBS with Butterworths, 12th.ed., (1992), p.59.
[11]*Chitty, op. cit. p. 12.*
[12]*Supra.*
[13] The action wascommenced by the way of originating summons in the Federal High Court, Federal Capital Territory, Abuja

application was approved in a letter dated 8/3/99 on the conditions that the respondent will pay within 30 days, that is, by 7/4/99:

(i) an application fee of N50,000.00,

(ii) bidding fee of 100, 000 U.S dollars,

(iii) a signature bonus and reserved value of 20 million US dollars.

(iv) statutory fees and confirmation acceptance of the offer (check statute)

The letter further stated that the Appellant may reallocate the concession without further reference to the Respondent if the above conditions were not met. The Respondent purportedly accepted the offer in a letter of 22/3/99 by paying a sum of N50, 000.00 being the application fee and N860,000.00 (instead of 100,000.00 U.S. dollars) being the bidding fee and promised to pay the signature bonus and reserved value of 20million U.S. dollars "in due course". In the same letter of "acceptance", the Respondent sought clarification on how much of the 20million U.S dollars represent the signature bonus and how much represents the reserved value. In a letter dated 15/4/19 (8 days after the time originally stipulated for acceptance of the offer), the Appellant stated that the sum of signature bonus and reserved value could be paid in two instalments within a period of three months from the date of the award, that is, on or before 7/6/99. Subsequently, the Respondent made a part payment of 1 million U.S dollars on 28/5/99, one week before the expiration of the deadline and requested for an extension of time to pay the second instalment within 3months, that is, before 27/8/99. However the Appellant replied three days later on 31/5/99 and granted the Respondent a grace of 45 days within which to pay. That is, the time for the payment of the second instalment was extended from 7/6/99 to 15/7/99 instead of 27/8/99 requested by the Respondent. Meanwhile, there was a transition from military rule to civil rule on May 29 1999. The allocation was cancelled by the new civilian rule on 8/7/99 (before the expiration of the new deadline) based on the recommendation of a Panel headed by Dr. Christopher Kolado, which was set up by the Federal Government to review all contracts, licenses and appointments made between the 1st January and 28th May 1999. The Respondent commenced an action in the Federal High Court, Federal Capital Territory, Abuja for breach of contract seeking an order of specific performance of the contract between it and the Appellant. Judgment was given to the Respondent. The Appellant appealed unsuccessfully to the Court of Appeal and finally to the Supreme Court.

The main issue before the Supreme Court was whether there was an existing contract between the parties on 8/7/99 when the Appellant cancelled the allocation. The Appellant answered the question in the negative and contended that the original offer made by it to the Respondent had lapsed. It was further argued that the offer to extend payment of the second instalment by 45 days was a counter offer and up to the time the Appellant cancelled the allocation, the Respondent had not accepted the counter offer. The Respondent contended that there was a binding contract and that the contract was revoked for no other reason except “in accordance with the recommendation of the 6th Appellant's Commission". The Supreme Court classified the contract as a unilateral one and held that the offer was accepted when the Respondent commenced performance of the conditions laid down by the Appellant, that is, when the Respondent paid the sum of N50, 000.00 as the application fee and N860, 000.00 as

the bidding fee. Hence, a contract came into existence on 22/3/99. The Appellant was therefore obliged to keep the contract open until complete performance. Bello J.S.C. (as he then was), delivering the lead judgment stated thus:

> .... It is settled law that the offer to enter into a unilateral contract is accepted on commencement of performance, even though completion of performance is condition precedent to the offeror's liability to perform his promise. In *Errington v Errignton and Woods* (1952) 1 All E.R.149 the facts support the above statement of law……Coming back to the case in hand, the Respondent had paid N50,000.00 and $10,000.00 U.S Dollars before the expiration of 30 days. It is therefore clear that the Respondent had commenced performance of the conditions laid down by the Appellants. The offer could not therefore be held to have lapsed after the expiration of 30 days.[14]

COMMENTS

It is clear from the above statement that judgment was given to the Respondent because the contract was classified as a unilateral contract. Therefore, our first enquiry must be to probe whether this classification was correct. It will be recalled that the distinguishing feature of a unilateral contract is that "only one party, the offeror or promisor, is under a contractual obligation at any relevant period".[15] But could it be said that only one party was bound in the fact pattern of the Zebra's case? The answer is in the negative. In our view, the case is a good example of a bilateral contract. Chitty gave a hypothetical example of a bilateral contract as "an exchange of promise for a promise, e.g., if you promise to pay me 1,000 pounds, I promise to sell you my car.[16] This is exactly what had happened in the *Zebra's case* - the Appellants and the Respondent both bore obligations under the contract - the Respondent to perform all the stipulated conditions while the Appellants would grant the OPL. It is therefore, submitted with respect, that the learned Justice had wrongly characterized the case as a unilateral contract.

Beyond citing the case of *Errington v. Errignton*[17] and *Luxor Eastbourne) Ltd. v. C*ooper,[18] the logical basis for the classification of the contract, as a unilateral one was not clear in the judgment. The question then is to what extent are these cases relevant or similar to the Zebra's case? In *Errington v Errington*[19] a father bought a house for his son and daughter-in-law on mortgage in his name. He paid 250 pounds, being one third of the purchase price in cash and borrowed the balance of 500 pounds from a building society mortgage. The father told the son and daughter-in law that if they paid the 15 shillings weekly instalments, he would convey the house to them when all the instalments were paid. They duly commenced paying the instalments, and a substantial part of the loan had been repaid before the father died. After his death, his widow, acting as his personal representatives, purported to revoke the father's promise. It was held that so long as they were paying the instalments, the father's promise was

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[14] *Supra* pp. 192-3.
[15] I.E. Sagay, op. cit., p.7.
[16] Chitty on Contract, op. 0/ , pp.12-13
[17] *Supra*
[18] [1941] A.C. 108, [1941J All E.R. 149.
[19] *Supra*

irrevocable. They therefore had a contractual licence to remain and a right to the house on completion of the payments.

Perhaps the only similarity between the cases of *Errington and Zebra* is that the offerees had made substantial payment. However, this similarity is artificial because while payment was required to be by instalments in *Errington*, the payment in the Zebra's case was not originally required to be by installments. Rather, all the terms stipulated in the letter of offer including the payment of the 2 million U.S. dollar were required to be performed within thirty days. Hence, the question of substantial performance was not relevant and therefore ought not to have been decisive in the determination of the question whether or not there was a contract in the Zebra's case. Furthermore, what makes a contract a unilateral, bilateral or multilateral one is not the extents to which the obligations under it have been performed but the number of parties that have assumed obligations under it. A contract is either unilateral at the beginning or not. *Errington* was a unilateral contract *ab initio,* because the son and daughter-in-law had not undertaken any obligation in exchange for the promise of the father. They were therefore at liberty to either take the father's offer or leave it without liability. Whereas in the *Zebra's* case both parties had made mutual promises as the basis of the contract in view.

Assuming without conceding, that the *Zebra's* case presents a unilateral contact; the statements of the Supreme Court on the stage at which a unilateral contract is accepted and the right of the promissor to revoke without liability require a closer examination. According to the learned Justice Bello J.S.C. (as he then was):

> **....it is settled law** that the offer to enter into a unilateral contract is accepted on commencement of performance, even though completion of performance is condition precedent to the offeror's liability to perform his promise."..... I have indicated earlier in this judgement that the Respondent had accepted the offer and had made part-payment of the signature bonus/reserved value of $l million U.S. Dollars. By this token the Appellants have no alternative but to keep the offer open since the offeror (sic!) has commenced performance ...[20](Emphasis are mine).

The above statement is irreconcilable with the position of Sagay's and other writers that the revocation of unilateral contracts raises peculiar problems - those of conflict between logic or doctrine on the one side, and convenience, hardship and justice on the other side.[21] There have been various school of thought proposing different solutions to the problem.[22] Treitel also acknowledges that ".. there is much dispute as to the exact stage at which the offer is "accepted" so as to deprive the offeror of the power of withdrawal".[23] While it is conceded that the modem rule holds that once an offeree begins to perform a unilateral contract, the offeror can no longer revoke. Nonetheless, the modern rule maintains the

[20]See pp. 193-4
[21] I.E. *Sagay, op cit.,* pp53-4.
[22]Basically, there are four views. For a treatment of the schools of thought see generally, *ibid.* pp53-4
[23] G.H. Treitel*, op. cit.,* 31

traditional notion that a contract is not formed until the offeree has accepted by finishing the requested performance.[24]

An examination of the case of *Luxor (Eastbourne) Ltd. v Cooper,*[25] which was cited by the Supreme Court in support of the decision will reveal that the court ought to have reached the opposite conclusion if the principle had been correctly applied. In that case, an owner of land promised to pay an estate agent a commission of 10,000 pounds if he effected a sale of a land at a price of 175 pounds. The House of Lords held that in the circumstances of the case, it would not be proper to imply an undertaken by the owner not to revoke his promise once performance had begun. Hence, the owner could revoke his promise at any time before completion of the sale. This case clearly shows that there is no hard and fact rule on whether a unilateral contract can be revoked. Much depend on the nature of the offer. According to the learned authors Chesire. Fiffot and Furmston:

> In some cases the parties may well understand that the offeror reserves a right to revoke at any time until performance is complete, while in others, it may be proper to hold that he cannot revoke once the promisee has started performance. There may well be intermediate cases where the promissor can revoke after performance has started but is obliged to compensate the offeree for his trouble.[26]

The Supreme Court had only presented only one possible viewpoint as a prevailing one out of minimum of four without stating reason(s) for its preference! It would have been better if the Court had stated all the possible viewpoints and explain the reason(s) why a particular view is to be preferred. As pointed out earlier, there is no reported case in Nigeria where the principle of unilateral contract has been considered or applied. Therefore, even if the law had become settled elsewhere, this cannot be said to be the position in Nigeria. Against this background, it is submitted with respect that the assertion of Bello JSC that the law on unilateral contract is settled is too sweeping and has no basis in law in Nigeria and elsewhere.

THE CORRECT ANALYSIS OF THE CASE

Attempt will be made in this section to analyse the facts of *Zebra's* case in accordance with the time-honoured principles of the Law of Contract on concepts of invitation to treat, offer, counter offer and acceptance.

The Respondent's application of 24/11/98 was still probing whether the Respondent may get an OPL from the Appellant on terms, which the Appellants may consider appropriate. The letter was therefore clearly an invitation to treat. The Appellant's letter of 8/3/99 was precise and contained terms and conditions on which the Appellants were willing to grant the OPL to the Appellant. It will be recalled that the letter clearly indicated that the Appellant may reallocate the concession without further reference to the Respondent if the conditions stipulated in the letter were not met. The entire terms of the letter

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[24] p.m. Tiersma, op. cit. 3

[25] *Supra*

[26] Chcshir« & Fifoot and Furrnston, OF" (if" p" 6()

were indicative of an intention to be bound if the Respondents accepted those terms. The Appellants' letter of 8/3/99 therefore constituted an offer. The question to be asked is whether the Respondent accepted the terms of offer unequivocally. The answer is in the negative. Rather, the Respondent satisfied only parts of the terms of the offer. In this regard, it is noteworthy that: (i) the requisite $10,000 U.S. Dollars was paid in Naira and (ii) the signature bonus and reserved value of $20million U.S. Dollar was not paid within 30 days as required. It is not difficult to see that the Respondent "was either probing he opportunity for instalmental payment or simply "playing" for more time when it is sought clarification on how much of the signature bonus and reserved value of $20m represented signature bonus and how much represented reserved value.[27]

This is because the payment of $20m was required to be made on or before a stipulated date. It should not matter in this circumstance whether the payment was made instalmentally, provided it was made within the time stipulated. An indication that this clarification was not material can be gleaned from the fact that the Appellants later informed the Respondents that the $20million U.S. Dollar could be paid in two instalments without categorically stating which portion of the amount represents the signature bonus and how much represents the reserved value. Therefore, the purported acceptance by the Respondents through the letter of 22/3/99 operated as a counter offer, which had destroyed or cancelled the original offer. At this stage, the Appellant could reallocate the licence as indicated in the letter of offer without any liability.

The Appellants, however, made a fresh offer to the Respondents through a letter of 16/6/9 and promised to keep the offer open until 16/6/99. It is submitted that this letter cannot be it modification of a contract since the original offer was never accepted. Rather, than accepting the new terms unequivocally, the Respondents made a payment of $ 1million Dollars and requested for an extension of 3 months to pay the second instalment which technically amounts to a rejection of the Appellant's offer. Be that as it may, the Appellant made another offer (being the third) to the Respondent to pay within 45 days (with effect from 1/6/99) till 15/7 / 99 instead of 27/9/99 requested by the Respondent. However, the Appellant did not wait for the expiration of time granted before revoking the offer.

The main question, therefore, is whether the Appellant can lawfully revoke a contract which it has promised to keep open until a specified date before the expiration of that date without liability. The settled applicable principle is that the offeror is free to revoke the offer at any time before the stipulated date unless the offeree has offered a consideration for that collateral promise. In *Routledge v Grant*,[28] the Defendant offered on 18 March to buy the Plaintiff's house for a certain sum, 'a definite answer to be given within 6 weeks from date'. The Defendant withdrew the offer 3 weeks later while the Plaintiff purported to accept it at the end of 6 weeks. Best C.J. held that the Defendant could withdraw at any moment before acceptance, even though the time limit had not expired and that the subsequent purported acceptance was invalid.

The position would have been different if the promise to keep the offer open had been met by some consideration moving from the offeree. For example, if the offeree had paid some money to the offeror

[27]This writer feels strongly that a request for instalment must have been madeverbally to the appellant
[28](1825) 4 Bing 653

for keeping the offer open for a specific period of time, the offeror would have been bound to do so. In *Mountford v Scott*,[29] Scott granted Mountford an option to purchase his (Scott's) house for 10,000 pounds, exercisable within six months, in return for a payment of 1 pound to him by Mountford, Within the six months period, and before the option was exercised, Scott purported to withdraw the option, Mountford then exercised the option, It was held that Scott purported withdrawn was void and that Mountford had validly exercised his option, Even though the consideration (1 pound) was small, the offer was irrevocable, In short, there was a separate binding contract to keep the contract open for six months.

The *Zebra'*scase does not reveal that the Respondents had furnished any consideration for the promise to keep the offer open till 15/7/99. In other words, the Respondents did not assume any additional obligation or make any promise, howbeit so little, for the fresh promise offer of the Appellant to keep the offer open. The Appellants can therefore lawfully revoke the offer at any time before the date before acceptance.

CONCLUSION

The principles of offer and acceptance are the bedrock of the Law of Contract. The principles may be simple theoretically but often pose difficulties in some complex situations. The correct approach in such complex situations is to analyse the facts of the case stage by stage in terms of offer, invitation to treat, counter offer, acceptance etc. This has been the approach of the Supreme Court in several decided cases. If the same approach had been adopted in the Zebra's case as we have done in this paper, the Supreme Court would have avoided the error it has fallen into. There was clearly no basis for the court's reasoning that the case was a unilateral contract and that the offer was accepted because the Respondents had made substantial payment. The reasoning totally disregards the Respondents' tardiness by shifting at least twice on the contract when they failed to meet the exact terms of the offer.

Against this background, it was not unfair or wicked for the Appellants to take advantage of a supervening circumstance to reconsider their offer and revoke it. Equity, it is said, aids the vigilant and not the indolent.

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[29](1975)] All E.R. 198, CA.