**CASE REVIEW**

# THE *PILLARS (NIG) LTD V. DESBORDES* CASE –SO MUCH ADO ABOUT AN *OBITER DICTUM* IN A CONCURRING OPINION*

## 1. Introduction

On February 5, 2021, the Supreme Court of Nigeria delivered its decision in an appeal comprised in the case of *Pillars (Nig.) Ltd. v. Desbordes.*[1] The notice of appeal contained five grounds of appeal. The appellant's brief raised four issues for determination, while the respondents' brief raised two issues for determination. The Supreme Court, in a lead judgment delivered by Justice EA Agim, determined the appeal on the basis of the issues raised for determination in the appellant's brief. The Supreme Court determined issues number 1 and 4 against the appellant, held that no useful purpose would be served in determining issues numbers 2 and 3, and held that the appeal failed for lacking merit and consequently, dismissed it.

## 2. Facts of the Case

The appellant was the defendant at the trial court. The cause of action arose from the breach of a contract for a building lease. A certain Mr. Grant Desbordes held title to certain land. He and the appellant entered into a Development Lease Agreement for a duration of 26 years effective from October 24, 1977. Under the Lease, appellant agreed at its own expense to erect buildings in accordance with agreed specifications on a designated portion of the land. Completion of these constructions was agreed for on or before December 21, 1979. It was a further term of the Building Lease for appellant to make annual payments to Mr. Grant Desbordes in the sum of N2, 250.00. This payment was due on December 21 of each year for the entire lease period term of 26 years. Up till December 21, 1979, the stipulated period for completion of the construction, appellant failed to commence and conclude the construction. Mr. Grant Desbordes raised issue with the appellant regarding its non-compliance with the terms of the lease. On his instruction, his solicitor issued a Notice of Breach of Covenant to the appellant. Mr. Grant Desbordes afterward became deceased. Following his decease, Counsel, on the instructions of his estate issued statutory notices to the appellant for termination of the lease, and subsequently filed a case at the High Court. Both the High Court and Court of Appeal held the appellant in breach of the lease. The appellant then appealed to the Supreme Court.

## 3. The Decision and the *Ratio Decidendi*

The first ground of appellant's appeal to the Supreme Court was that: The learned Justices of the Court of Appeal erred in law in holding as follows: *'I am of the firm view that the trial judge came to the right conclusion that the evidence in support of service of notice and the fact that defence after denying in their pleading later admitted service of notice of intention are strong basis for the Court to accept PW1's evidence as credible against DW1 testimony*." The Particulars of Error were that

1. "Service of statutory notices is a condition precedent to the institution of the action (for forfeiture of lease and therefore fundamental, as it goes to the root of the action) as to vitiate the entire proceedings for failure to establish same.
2. Issues were joined by the parties on the services of the statutory notice to quit. The burden of proof of the said notice (Exhibit G) is on the plaintiff/respondent. The Rules of pleadings that he who asserts must prove is applicable.

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[1] Hereinafter referred to as Pillars' case. The decision is reported in [2021] 12 NWLR Part 1789, 122

3. The plaintiffs/respondents did not lead evidence of mode of service neither did they lead evidence of the person that effect the service of the statutory notice.
4. It is not the duty of the defendant/appellant to aid the plaintiff/respondent to prove service of the statutory notice.
5. The admission of the DW1 that service of Exhibit H (the notice of the lessor's intention to recover the possession) was effected on the defendant/appellant is not sufficient proof of Exhibit E (Notice of Breach of Covenant) and G (Notice of Quit).
6. Service of Exhibit E and G being fundamental cannot be inferred. Strict proof of same is very important.

The Supreme Court held that issue number 1 for determination which purported to arise from ground of appeal number 1 differed from the subject matter of the complaint in ground of appeal number 1. The Court held that usually an issue is derived from a ground. In the present case, if the subject matter of the issue differs from the subject matter of the complaint in the ground, it would be wrong to say that the issue for determination number 1 is related or derived from the ground of appeal number 1. In this regard, the Court held that that to the extent that issue number 1 for determination questions the decision of the Court of Appeal concerning the issuance and service of a valid Notice to Quit, it had no relationship with any of the grounds of the appeal. The court then held that as it is, no issue is distilled from ground 1 of this appeal, and that by not raising any issue for determination from it, the appellant abandoned the ground of appeal number 1. It was hereby struck out. In essence, the Court found that there was no ground of appeal complaining against the decision of the Court of Appeal confirming the decision of the trial Court that the respondents pleaded and proved service of notice to quit. The Court then held that the part of issue number 1 for determination that questioned the decision of the Court of Appeal concerning pleading and proof of service of notice to quit, not being derived from or related to any ground of the appeal was incompetent; it thereby struck it out.[2] It is important to reiterate and re-emphasise that the part of the notice of appeal that challenged service of a notice to quit on the appellant by the respondent was held by the Supreme Court as not properly before it. It was struck out and was not determined by the Supreme Court. This factor is of singular importance with reference to the subsequent *dicta* of the concurring opinion on the issue of a notice to quit.

## 4. Critical Analysis

A judgment is an official and authentic decision of a court upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to the determination of the court. It is the decision of a court resolving the dispute between the parties[3]. The term is also used to denote the reasons which the court gives for its decision, so that where the court consists of several judges, such as under the Nigerian appellate system, it may happen and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the court in the technical sense of the word[4]. The word judgment in its technical sense which is the sense, in which it is used in judicial proceedings, connotes a binding determination of a court or tribunal in a dispute between two persons. The determination is enforceable by the exercise of the coercive jurisdiction of the courts at the instance of the party in whose favour the judgment has been given[5]. A judgment is the law's last word in a judicial controversy; it is the final consideration and

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[2] The Court relied on *Modupe v. State* (1988) 9 SCNJ 1; *Apostolic Faith v. Umo Bassey James* (1987) 7 SCNJ 167, and a long line of cases established over time, that any issue raised for determination in an appeal that is not based on or covered by any ground of the appeal is not valid for consideration and must be struck out.

[3] *Oredoyin v. Arowolo* [1989] 4 NWLR Part 114, 172

[4] *Ogboru v. Ibori*, [No.1] [2005] 13 NWLR Part 942, 319

[5] *Osafile v. Odi (No.1)* [1990] 3 NWLR Part 137, 130; *Usman v. KSHA*, [2008] All FWLR Part 397, 78

determination of a court of competent jurisdiction upon matters submitted to it in an action or proceeding[6]. Judgment is a decision or determination in relation to a court just as '*ruling*'. However, in contradistinction to a ruling, a judgment is a final decision of the court resolving the dispute and determining the rights and obligations of the parties[7]. These definitions are however subject to qualification because decisions of the court declining to entertain the claim for procedural defects, or refusing to determine the ultimate issues for procedural or inherent vice still qualify as judgments.

### 4.1 Identifying What Constitutes the Judgment of a Court

An action is instituted for the enforcement of a right or the redress of an injury. Thus, a judgment, as the culmination of an action, declares the existence of the right recognizes the commission of the injury or negatives the allegation of one or the other. However, as no right can exist without a correlative duty, or any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms or else denies that such a duty or such a liability rests upon the person against whom the aid of the law is invoked. In other words, a judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding; or on one of the questions, if there are several[8]. Where a single Judge presides, the judgment of that court is what may be discerned as the *ratio decidendi* or *rationes decidendi* of the case in contrast to the passing remarks otherwise referred to as *obiter dictum* or *obiter dicta* made by the court in the course of preparing the judgment. The problem arises when three or five justices preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the lead judgment, and others, under the mandatory provisions of the constitution, are obliged to render either their concurring or dissenting judgment. In such a situation, it is the lead judgment that is in legal circles, regarded as the judgment of the court[9]. The decision of a court consisting of more than one Judge is determined by the opinion of majority of its members.[10] For the purpose of exercising any jurisdiction conferred on it by the Constitution or any other law, section 294(2) of CFRN 1999 provides that each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion. A judgment or ruling of an appellate court presided over by plural judges in contra-distinction to a single judge is encapsulated in the leading judgment or ruling of the court. Where the judgment of a court with plurality of judges sitting is announced or reported to be unanimous, the other judges would deliver concurring judgments. These may comprise brief or lengthy judgments[11]. Where a court consists of more than one Judge, the decision of the court is determined by the opinion of the majority of the members[12]. This majority opinion is the judgment of the court. The minority judgment or dissenting judgment is not the judgment of the court[13].

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[6] *Travellers Insurance Co. v. US*, 51 FPD 673

[7] *Ushae v. COP* [2006] All FWLR Part 313, 86

[8] *Ogboru v. Ibori*, (n 4)

[9] *Abacha v. Fawehinmi*, [2000] 6 NWLR Part 660, 228; *Daramola v. Aribisala*, [2009] All FWLR Part 496, 1964

[10] s. 294 (4) & (5) of CFRN 1999; in *Pharmatek Industrial Projects Ltd. v. Trade Bank Plc*, [2009] All FWLR Part 495, 1678, it was held that in proceedings where the judgment of the court is split into plurality or majority and minority positions, what constitutes the judgment of the court is the majority position.

[11] *Akpoku v. Ilombu* [1998] 8 NWLR Part 561, 283

[12] s. 294(3) of CFRN, 1999; in *Saidu v. Abubakar*, [2008] 12 NWLR Part 1100, 201, Bulkachuwa, JCA stated at 244 D-E: *'The appeal emanates from the decision of an election tribunal where five justices presided, the decision was signed by 3 members including the chairman. Two other justices did not sign, even assuming they did not agree with the judgment there is nothing on the record to show that they were dissenting from the majority judgment. We are bound by what is in the record, there is a majority judgment, and even if the minority i.e. the two justices had dissented, the majority decision would still have been the decision of the lower tribunal.'*

[13] *Ekpan v. Uyo* [1986] 3 NWLR Part 26, 63

Appeals lie only in respect of the majority judgment, and not the minority judgment[14]. The jurisprudence of the Nigerian legal system is quite clear that it is the *ratio* or *rationes* contained in the lead judgment that constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the lead judgment are *obiter dictum* or *dicta*[15]. Consequently, in the *Pillars*' case, the judgment of the Supreme court is comprised in the lead judgment of the Court delivered by Justice EA Agim.

## 4.2 The Effect of a Concurring Opinion

A concurring judgment might be either a concurrence with the majority or lead judgment or a concurrence with a minority or dissenting judgment. In the jurisprudence and practice of law in Nigeria, it is the *ratio decidendi* contained in the leading judgment that constitutes the authority for which the case stands. All other opinions or expressions contained in the supporting or concurring judgments, particularly those not addressed in the leading judgment are *obiter dicta* and may be of persuasive effect in other occasions[16]. A concurring judgment is not expected to differ from the leading judgment. A concurring judgment as the name implies must agree with the leading judgment.[17] A concurring judgment which differs from or contradicts the lead judgment becomes a dissenting judgment[18], or at best amounts to *obiter dicta*[19]. In any event, A concurring judgment represents only the personal view of the concurring judge, and does not have any binding effect as precedent[20]. Appeals lie only in respect of the majority judgment and not the minority or concurring opinion. An *obiter dictum* in a concurring judgment cannot form the basis or reason to set aside the judgment because it is not the *ratio decidendi*[21]. The value of concurring judgments to our jurisprudence lies in the fact that often, the Judge who pens the concurring judgment is able to take a closer look at an aspect of the appeal before the court in respect of which the lead judgment may have overlooked, or treated superficially[22].

## 4.3 What Constitutes *Obiter dicta* and its Effect

General expressions in every opinion are to be taken in connection with the case in which those expressions are used; if they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision[23]. Statements going beyond the narrow question stated and decided by the court must be regarded as *dicta*[24]. A judicial opinion expressed on a point not necessarily raised and not involved in the case, or on a point in which the judicial mind was not directed to the precise question necessary to be determined to fix the rights of the parties constitutes *dictum*. Expressions in opinions not called for by the facts or circumstances of the case, are no more than *dicta*, entitled to weight only insofar as the reasons therefore may justify the language[25]. *Dicta* are not of binding authority unless they can be shown to express a legal proposition which is a necessary step to the judgment pronounced by the court in

[14] *Umanah v. Attah* [2006] 17 NWLR Part 1009, 503
[15] *Abacha v. Fawehinmi*, (n 9); *Daramola v. Aribisala*, (n 9)
[16] *Okeke v. Chidoka*, [2011] 5 NWLR Part 1241, 483
[17] *Olufeagba v. Abdul-Raheem*, [2009] 18 NWLR Part 1173, 384
[18] *Mohammed v. Abdulkadir*, [2008] 4 NWLR Part 1076, 111
[19] *Ibrahim v. Fulani*, [2010] All FWLR Part 508, 261
[20] *Lendsay v. Cotton*, 20 Am Jur 2d, 435
[21] *Umanah v. Attah*, (n 14)
[22] *Rebold Industries Ltd. v. Ladipo*, [2007] All FWLR Part 395, 522
[23] *Wright v. US*, 302 US 583, 58 S Ct 395
[24] *Technograph Printed Circuits Ltd. v. Packard Bell Electronics Corp*., 17 FPD 2d, 257
[25] 20 Am Jur 2d, 526

the case wherein the *dicta* are found[26]. *Obiter dicta* cannot found a ground of appeal except in the rare cases where it occasioned a miscarriage of justice, to wit, a misdirection which must have affected the judgment in a way that is crucial to the decision[27]. It is perfectly familiar doctrine that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context mean what the words literally signify-namely, *'statements by the way'*. If a judge thinks it desirable to give his opinion on one point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision[28]. *Dicta* by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these *dicta* really form integral parts of the train of reasoning directed to the real question decided. They may, if they merely occur at large, be valuable for edification, but they are not binding[29]. Statement of an abstract legal principle even when made by the Supreme Court is binding precedent only insofar as it is applied to the facts of the case in which the pronouncement was made[30]. *Dicta* are of different kinds and of varying degrees of weight. Sometimes they may be casual expressions of opinion upon a point which has not been raised in the case and is not present to the judge's mind. Such *dicta*, though entitled to respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration.[31]

## 4.4 Distinguishing Between *Rationes Decidendi* and *Obiter dicta*

The *ratio decidendi* of a case is the reason for the decision. It is the principle or ground upon which the case is decided. The expression of a judge in a judgment must be taken with reference to the facts of the case which he is deciding, the issues calling for decision, and the answers to those issues.[32] The *ratio decidendi* constitutes the general reasons for the decision, which is different from the decision itself or the general grounds upon which the decision is based or abstracted from the specific peculiarities of that particular case[33]. Principles are distilled from the fact of the case in which they are promulgated. They draw their inspiration and strength from the very fact which framed the issues for decision. When therefore the facts are not similar, the principle need not apply or be applied to the new case. Principles therefore do not provide any patterns for definite situations. They merely constitute the starting point of legal reasoning[34]. Where the principles enunciated in the decisions of the Supreme Court are not relevant or applicable to the issue or issues arising for determination before the Court of Appeal or any other lower courts, it is not necessary that the Court of Appeal or any other lower court should apply the aforesaid principle[35]. *Obiter dicta* reflect inter alia, the opinions of the judge which do not embody the resolution of the court[36]. It is an ancillary statement made in the course of legal decision-making which does not constitute the integral part

[26] *Michigan Trust Co. v. Canadian Puget Sound Lumber Co., Temple v. Canadian Puget Sound Lumber Co*., 30 E & E D 216
[27] *Bamgboye v. University of Ilorin* [1991] 8 NWLR Part 207, 1
[28] *Flower v. Ebbw Vale Steel, Iron & Coal Co*., [1934] 2 KB 132
[29] *Cornelius v. Philips*, [1918] AC 199
[30] *Pape Television Co. v. Associated Artists Production Corp*., 17 FPD 2d, 256
[31] *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] AC 851, some *dicta*, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. It is open no doubt to other judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class.
[32] *UTC (Nigeria) Ltd. v. Pamotei* [1989] 2 NWLR Part 103, 244
[33] *Adesokan v. Adetunji* [1994] 2 NWLR Part 346, 540; *Ajibola v. Ajadi*, [2004] 14 NWLR Part 892, 14
[34] *Clement v. Iwuanyanwu*, [1983] 3 NWLR Part 107, 39;
[35] *7Up Bottling Co. Ltd. v. Abiola & Sons Ltd* [1995] 3 NWLR Part 383, 257
[36] *UTC Nigeria Ltd v. Pamotei* (n 32)

of the decision for which the case stands[37]. It is what the Judge says by the way, that is, it is a statement the Judge makes in the course of the decision or judgment. It is in most cases a casual and passing expression of the Judge. It is mostly a statement of an illustrative nature based on hypothetical facts. It could be an observation made by the Judge on issues which do not fall for determination, considering the live issues before the court, either of first instance or of appeal[38]. They arise when a Judge thinks it is desirable to express opinion on some points, though not in issue or necessary to the case before him[39]. *Obiter dicta* are mere passing remarks which have no binding authority as a *ratio decidendi*, though they may have some persuasive efficacy. So, *dicta* by a Judge, no matter how eminent they may be, ought not to be cited as founding authoritative propositions of law, unless these *dicta* really form integral parts of the train of reasoning directed to the real questions decided. Otherwise, they may be valuable merely for edification, but are not binding[40].

### 4.4 Jurisdictional Incompetence of the *Obiter* in Pillars' Case

As stated earlier, the lead judgment of the Supreme Court was delivered by Justice EA Agim, JSC. In the lead judgment, the Court held the aspect of appellant's appeal that challenged service of a notice to quit on the appellant by the respondent was not properly before the Court. The Court thus lacked competence to determine it, and struck it out. The role of a court is to pronounce on and decide issues in dispute submitted to it. In such proceedings, it is the parties who play the primary role in the process. The parties perform this role at the trial stage by issues raised on their pleadings, where the case is tried on pleadings, and, at the appellate stage, by the issues arising from the grounds of appeal raised by the appellant. When an issue is not placed before the court, it should not determine it.[41] It is clear that in the lead judgment, the Supreme Court struck out issue for determination number 1 distilled from ground of appeal number 1. It does not appear that any doubt exists about the fact that the consequence of striking out an issue for determination is that, it puts an end to the ground of appeal from which it was distilled.[42]

In this *Pillars*' case, it is clear that for all the benevolence it is capable of mustering, the Supreme Court lacked competence to decide the issue of the validity of service of the statutory notice to quit by the respondent on the appellant as a condition precedent to the institution of the action for forfeiture of the lease. The issue was not before the Court. The ambit of questions envisioned for courts to deal with in exercise of their judicial powers under s. 6(1) & (2) of CFRN 1999, does not extend to hypothetical or academic questions.[43] Courts deal with cases on the basis of facts disclosed, and not with non-existent and assumed circumstances[44]. A court is not bound to answer every issue raised by a litigant unless the point so raised is necessary and material for resolution of the case before it. This is because courts, including the Supreme Court do not indulge in academic exercise or issue opinions about likely cases[45]. Courts are created to decide cases based on real and actual facts, and not to hold forth on imagined or hypothetical facts. Thus, courts do not

[37] *Orthopaedic Hospitals Management Board v. BB Apugo & Sons Ltd*. [1995] 8 NWLR Part 416, 750
[38] *Onagoruwa v. State* [1993] 7 NWLR Part 303, 49
[39] *Buhari v. Obasanjo* [2004] FWLR Part 191, 1487; *FI Onwadike & Co. Ltd. v. Brawal Shipping (Nig) Ltd*. [1996] 1 NWLR Part 422, 65
[40] *Adesokan v. Adetunji* (n 33)
[41] *Comptoir Commercial & Industrial SPR Ltd. v. Ogun State Water Corporation*, [2002] 9 NWLR Part 773, 629
[42] *Odugbemi v Shanusi* [2018] LPER – 44868 [CA]; *Ikpeazu v. Otti* (2016) LPELR – 40055 (SC)
[43] *Mudiaga-Erhueh v. INEC*, [2003] 5 NWLR Part 812, 70; in *Okotie-Eboh v. Manager*, [2004] 18 NWLR Part. 905, 242, it was held that courts are not created to deal with hypothetical and academic issues; rather, they are established to deal with matters in dispute between parties. Courts deal with disputes which are present as between persons, and can declare their rights and equally enforce a judgment given.
[44] *Associated Press v. NLRB*, 301 US 103, 57 S Ct 650
[45] *Umanah v. Attah*, (n 14)

decide questions that have no relevance to the facts. In the absence of facts to which the law can be applied, the court will not embark on any exercise.[46]

An academic issue is one which does not necessitate answer or adjudication by a court of law because it is not necessary. Courts deal with live issues, which will have bearing in one way or the other on any of the parties or all the parties.[47] An academic matter in a suit is one which is raised for the purpose of intellectual or scholarly reasoning, which cannot in any way affect determination of the live issues in the matter. It is merely to satisfy intellectual curiosity[48]. A suit is academic if it is merely theoretical, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour.[49] Courts do not expend judicial time and energy on academic issues.[50] A hypothesis is an assumption made, especially in order to test its logical or empirical results[51]. The duty of the court is to determine the merit of the case or dispute before it. The merit of the case is the real ground of an action or defence in contrast to some technical or collateral matter raised in the cause of the case.[52] A court's jurisdiction cannot be invoked for purposes of deciding a question not arising out of the facts of a case brought before it, but existing only in the light of hypothetical facts[53]. Hypothetical and academic issues or questions do not help in determination of the live issues in a matter. As a matter of law, they add nothing to the truth-searching process in the administration of justice. This is because they do not relate to any relief[54]. Where resolution of an issue raised by the parties before the court is not relevant to determination of the actual issue in dispute, the court will refuse to countenance such issue for being academic or hypothetical[55]. Thus, if a question presented to the court for resolution is unrelated to the controversy before the court for determination, the court will decline jurisdiction to entertain it[56]. Clearly, the concurring opinion in the *Pillars*' case,

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[46] *Igwe v. Alvan Ikoku College of Education, Owerri*, [1994] 8 NWLR Part 363, 459

[47] *Ijaodola v. Unilorin Governing Council*, [2018] 14 NWLR Part 1638, 32, the term for which appellant contested for the office of Vice-Chancellor for the University of Ilorin commenced in 2012 and came to an end in 2017. Hearing an appeal in 2018 to determine whether appellant was qualified, to have been the Vice-Chancellor for the term 2012 to 2017 had become an academic exercise. All the reliefs even if resolved in appellant's favour would not confer any right or benefit on him because the term for which he wanted to be Vice-Chancellor expired in 2017. Since no purpose would be served by the appeal it was a mere academic exercise.

[48] *Abubakar v. Yar'adua*, [2008] All FWLR Part 404, 1409; in *Chedi v. A.-G., Fed.*, [2008] 1 NWLR Part 1067, 166, it was held that courts have no jurisdiction to give advisory opinions but they being courts of law can only adjudicate upon live or living issues. Issues that are not live are hypothetical or academic: the courts do not form the habit of engaging themselves in such an inconsequential exercise.

[49] *Plateau State v. A-G, Fed.*, [2009] All FWLR Part 449, 531; in *Dickson v. Sylva, [2017] 10 NWLR Part 1573, 299*, it was held that courts assume jurisdiction only on live issues; academic issues which are, almost always, hypothetical, do not engage the attention of courts.

[50] *KRK Holdings (Nig.) Ltd. v. FBN (Nig.) Ltd*, [2017] 3 NWLR Part 1552, 326; in *Marine & Gen. Ass. Co. Plc. v. OU Ins. Ltd.*, [2006] 4 NWLR Part 971, 622, it was held that courts of law are not established to deal with hypothetical and academic questions. Courts are established to deal with live issues that relate to matters in difference between parties. In *Min. for Works & Housing v. Tomas (Nig.) Ltd.,* [2002] 2 NWLR Part 752, 740, it was held that courts should not indulge in academic exercise. Courts deal only with live issues and steer clear of those that are academic. It would be improper for the Court to exercise jurisdiction in deciding academic questions, the answer to which cannot affect the parties in any way.

[51] *Abubakar v. Yar'adua*, (n 48)

[52] *Zabusky v. Debayo-Doherty*, [2013] 2 NWLR Part 1338, 320

[53] *Collins v. Porter*, 328 US 46, 66 S Ct 893; in *FCDA v. Koripamo-Agary*, [2010] 14 NWLR Part 1213, 364, it was held that a theoretical, hypothetical point is not for the courts to consider, as courts do not make moot decisions or decide hypothetical cases which have no bearing with what the court is required to decide. In *Geidam v. NEPA* [2001] 2 NWLR Part 696, 45, it was held that courts are loathe to make pronouncements on academic or hypothetical issues as it serves no useful purpose

[54] *Adeogun v. Fashogbon*, [2009] All FWLR Part 449, 531

[55] *ADH Ltd. v. Amalgamated Trustees Ltd*., [2007] All FWLR Part 392, 1781

[56] *Magraw v. Donovan*, 20 Am Jur 2d, 443

to the extent that it forms the subject matter of this review, is the aspect that deals with the issue of service of a notice to quit. As stated in the lead judgment, validity of the service of a notice to quit was not properly presented to the court. The Court struck out that issue and determined the appeal on the basis that the validity of the notice to quit was not an issue in the appeal. Flowing from this, the entire postulation of the concurring opinion regarding service of a notice to quit was in respect of an issue that was not before the court. Undoubtedly, a judge is not permitted to indulge in the discussion of theories or principles however attractive, if they have no bearing with the case the court is called to decide[57]. The judge does not have the power to render advisory opinions or to decide academic issues. The court is only competent to decide matters touching live issues in controversy between the parties[58]. The court, therefore, is not expected and does not indulge in answering academic questions or questions which never arose from the issues in the case before the court. Where therefore, the resolution of an issue one way or the other will be no more than engaging in academic exercise, the court will not and should not entertain such matter[59]. The court will not pronounce upon the legal validity of what one of the parties has done or refrained from doing unless such pronouncement is necessary for the resolution of the issues in controversy between the parties to a suit[60]. The courts do not discuss questions that have no relevance to the facts. In the absence of facts to which the law can be applied, the court will not embark on any exercise. Courts are established to decide cases based on real and actual facts not to pontificate on imagined and hypothetical facts[61]. The reasons why the courts are incompetent to indulge in academic exercises is because, the outcome, if decided one way or the other, will neither confer benefit on, nor injure any of the parties, but merely expound the law[62]. The ambit or compass of questions intended to be dealt with in exercise of judicial powers vested in the courts of this country under section 6(1) and (2) of CFRN 1999 do not extend to hypothetical questions[63].

### 4.4 Whether *Obiter dicta* in a Concurring Opinion Creates Law

Upon the Supreme Court delivering its decision in the *Pillars*' case, members of the legal profession, particularly property lawyers declared their conclusion that the decision created a seismic event in the landlord and tenant relationship. The conclusion was that deducible from the decision, an irregularity in the issuance or service of a notice to quit in an eviction proceeding is no longer fatal to the competence of the action. In other words, a defective notice to quit is not fatal merely because the deficiency in the requisite period the notice is required to run. According to this theory, subsequent issuance of the writ of summons or other originating eviction process serves *ex post facto* to cure the defect in the notice to quit. Reliance for this new-fangled position was placed on the *obiter dicta* of Justice Ogunwumiju, JSC's concurring judgment where her Lordship stated[64]:

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[57] *Dike v. Nzeka* [1986] 4 NWLR Part 34, 144

[58] *Martin Schroeder & Co v. Major & Co. (Nig.) Ltd* [1989] 2 NWLR Part 101, 1; *Fawehinmi v. NBA (No.1)* [1989] 2 NWLR Part 105, 494

[59] *NIDB v. Fembo (Nig.) Ltd*. [1997] 2 NWLR Part 489, 543

[60] *Biishi v. Judicial Service Committee*, [1991] 6 NWLR Part 197, 331; in *Kudu v. Aliyu* [1992] 3 NWLR Part 231, 615 the Court of Appeal held that if the decision of the lower court rested substantially on facts not pleaded or issues not raised by the parties or within their contemplation or if the findings which formed the basis of the judgment on appeal, are not borne out by the pleadings of the parties, and the issues thrown up by the judgment of the court do not arise from the leadings and were indeed not canvassed, such judgment will not be allowed to stand as to hold otherwise would amount to a fundamental breach of the legal principle that requires that cases should be decided not on hypothesis, but on the hard facts on which issue have been joined.

[61] *Igwe v. Alvan Ikoku College of Education, Owerri* (n 46)

[62] *Dabo v. Abdullahi* [2005] All FWLR Part 255, 1039

[63] *Mudiaga-Erhueh v. INEC* (n 43)

[64] *Pillars (Nig.) Ltd. v. Desbordes* (n 2) at page 144, paras.C-H

> *"The justice of this case is very clear. The Appellant has held on to property regarding which it had breached the lease agreement from day one. It had continued to pursue spurious appeals through all hierarchy of courts to frustrate the judgment of the trial court delivered on 8/2/2000, about twenty years ago. After all, even if the initial notice to quit was irregular, the minute the writ of summons dated 13/5/1993 for repossession was served on the appellant, it served as adequate notice. The ruse of faulty notice used by tenants to perpetuate possession in a house or property which the landlord had slaved to build and relies on for means of sustenance cannot be sustained in any just society under the guise of adherence to any technical rule. Equity demands that wherever and whenever there is controversy on when or how notice of forfeiture or notice to quit is disputed by the parties, or even where there is irregularity in giving notice to quit, the filing of an action by the landlord to regain possession of the property has to be sufficient notice on the tenant that he is required to yield up possession. I am not saying here that statutory and proper notice to quit should not be given. Whatever form the periodic tenancy is, whether weekly, monthly, quarterly, yearly etc., immediately a writ is filed to regain possession, the irregularity of the notice, if any, is cured. Time to give notice should start to run from the date the writ is served. If for example, a yearly tenant, six months after the writ is served and so on. All the dance drama around the issue of the irregularity of the notice ends. The Court would only be required to settle other issues, if any, between the parties. This appeal has absolutely no merit and it is hereby dismissed."*

The interpretation given to this opinion raises the question whether *obiter dicta* in a concurring opinion constitutes a precedent capable of application in subsequent cases and capable of binding other courts. The Supreme Court is at the top of the judicial hierarchy in Nigeria. court. The decision of the Supreme Court is final and settles the position of the law in respect of a particular issue and becomes a binding precedent for all other courts of record in Nigeria.[65] The Supreme Court and other courts are bound by previous decisions of the Supreme Court where the law and facts in contention are the same or similar.[66] An expression in an opinion which is not essential to support the decision reached by the court is *dictum* or *obiter dictum*[67]. Under the doctrine of *stare decisis*, lower courts are bound by the principle of precedent. A lower court in the judicial hierarchy is bound by the *ratio decidendi* of a higher court, but not by the *obiter dictum*.[68] An *obiter dictum* of the Supreme Court neither binds the court itself nor subordinate courts. Only the Supreme Court's *ratio decidendi* in a case has binding authority on the court as well as lower courts. Tthough the apex court's *obiter dictum* may have considerable weight in determining the subsequent cases in courts, it remains persuasive. It is long settled, therefore, that an *orbiter dictum* is not a conclusive

[65] *CIL Risk & Asset Mgt. Ltd. v. Ekiti State Govt*., [2020] 12 NWLR Part 1738, 203; in *Osakue v. Federal College of Education, Asaba,* [2010] 10 NWLR Part 1201, 1, it was held that all courts established by the Constitution derive their powers and authority from the Constitution. The hierarchy of courts shows the limit and powers of each court, and to defy the authority and powers of a higher court is improper. In *UBN Ltd. v. Oki*, [1999] 8 NWLR Part 614, 244, it was held that in the hierarchy of courts in Nigeria, the Supreme Court is the highest. Thus, under the doctrine of *stare decisis* all courts below the Supreme Court must apply the law as laid down by the Supreme Court to cases before them.

[66] *Ogboru v. Okowa*, [2016] 11 NWLR Part 1522, 84; in *Uba v. Etiaba*, [2008] 6 NWLR Part 1082, 154, it was however emphasised that what the lower court is required to follow is the principle of law or order upon which a particular case is binding, such a principle is called the *ratio decidendi*. A statement made in passing by a Judge which is not necessary to the determination of the case is not a *ratio decidendi* of the case but an *obiter dictum*. It is vital to be able to draw a distinction between them for the purpose of judicial precedent.

[67] *Humphrey v. US*, 295 US 602, 55 S Ct 869

[68] *Clement v. Iwuanyanwu* (n 34); *FBN Plc v. May Medical Clinics Ltd* [2005] All FWLR Part 271, 171; *Awoniyi v Yaba College of Technology* [2006] All FWLR Part 300, 1645

authority.[69] A case is authority only for what it in fact decided. In other words, it is only the *ratio decidendi* of a judgment that binds the court and lower courts and not the *obiter dicta* in concurring judgments.[70]

## 5. Conclusion

As a matter of fact, the general decision of the Supreme Court in the *Pillars*' case dismissing the appeal and the particular decision striking out the first issue for determination stand on good law and are unimpeachable. The basis of this case review is the suggestion in the concurring judgment that an irregular notice to quit is validated by the filing of a writ to regain possession. In this regard, the suggestion in the opinion that *[t]ime to give notice should start to run from the date the writ is served,* if taken to its logical conclusion allows an eviction proceeding to be commenced without service of statutory or contractual notices, and for the landlord to rely on service of the originating processes as equivalent to service of the statutory or contractual notices. This suggestion, degrades to extinction, the law that proper service of statutory or contractual notices is a conditions precedent to the competence of an eviction proceeding. The umbrage of the learned Justice of the Supreme Court who penned the concurring opinion was clear. The Appellant breached the lease agreement, held on to property and continued to pursue '*spurious*' appeals through all hierarchy of courts for about two decades. The appellant's exercise of its constitutional right of appeal, however distasteful it might be, and whatever motives may lie at the back of it, may not provide a basis for excoriation of his exercise of that right. Furthermore, it is not clear that the appellant had any control over the speedy [or lack of it] determination of the appeal. As a result, however unrighteous the conduct of the appellant might be, and however righteous the anger of the court might be, it presents inadequate cause to formulate a general principle prescribing and sanctifying a violation of statutory and contractual provisions for service of requisite notices which comprise conditions precedent to maintenance of competent eviction proceedings. As the learned Justice stated, *[t]he justice of this case is very clear.* Truly the justice of the case was quite clear. It lay the lead judgment of the Supreme Court, and not in the concurring opinion. As set out in the case of *Leeds Industrial Co-operative Society, Ltd. v. Slack, dicta* sometimes may be casual expressions of opinion upon a point which has not been raised in the case and is not really present to the judge's mind. Such *dicta*, though entitled to respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. As stated earlier, a concurring judgment represents only the personal view of the concurring judge, and does not have any binding effect as precedent. Where then as in the *Pillars*' case, the legal position propounded by the *judex* is mere dicta, comprised in a concurrent opinion, on an issue which is not placed before the court for adjudication, clearly, it is incapable of creating law.

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[69] *Oteri Holdings Ltd. v. Oluwa*, [2021] 4 NWLR Part 1766, 334; in *Emerah & Sons Ltd. v. A-G, Plateau State, [1990] 4 NWLR Part 147, 788*, it was held that though *obiter dictum* in a judgment has no binding effect on lower courts, this does not however affect the principle that a lower court cannot refuse to be bound by decisions of higher courts even if those decisions were reached *per incuriam.*

[70] *Obasanjo v. Yusuf*, [2004] 9 NWLR Part 877, 144; in *Saif Ali v. Sydney Mitchell & Co., [1978] 3 All ER 1033*, Lord Wilberforce stated that in the House of Lords, since the Practice Direction of 1966, all propositions of law laid down in the speeches in previous appeals are persuasive only, whether they constituted an essential logical step in the author's reasons for disposing of the appeal in the way that he proposed, and so formed part of his *ratio decidendi* or, though not regarded by him as necessary for that purpose, were included as a helpful guide to judges in the disposition of future cases and so were *obiter dicta.*