

SUPREMECOURTOFNIGERIA
12THDECEMBER 1995. SC. 171/1993
S.M.A.BELGORE,A.B. WALI,I.L. KUTIGI,
U.MOHAMMED,S.U. ONU,JJSC.

UNIONBANKOFNIGERIALIMITED DEFENDANT/APPELLANT
AND
ODUSOTEBKSTORELIMITED PLAINTIFF/RESPONDENT

APPEALS - Competence of briefs - Respondent's brief to the cross appeal - Where filed out of time - Whether the brief is competent.

APPEALS - Grounds of appeal - Struck out by the Court of Appeal for failure to relate any issue to them - Where all the issues raised were eventually considered - No miscarriage of justice is occasioned

DAMAGES - General damages - Where an outrageous award of twenty million naira is made - whether the Supreme Court would reduce the amount.

FOREIGN EXCHANGE - Transactions involving foreign currency - Whether the debtor is bound to provide equivalent local currency - At time of settling debt.

NEGLIGENCE - Findings of fact - as to the issue of negligence - Whether substantiated by the evidence.

PRACTICE & PROCEDURE - Illegality - Where neither pleaded nor raised by leave of court as new point - All arguments thereto are discountenanced.

RULES OF COURT - Filing of document - In contravention of Court of Appeal Rules - Whether that court is bound to draw the attention of the erring party.

FACTS

The plaintiff/respondent sued the appellant for being negligent in handling payments to the plaintiffs' overseas suppliers as a result of which the plaintiff suffered some loss. Since the plaintiff could no more transfer the money through the Central Bank of Nigeria, it claimed the total cost of making the transfer through "private arrangement" at any time the defendant is making payment of the bills in question. The plaintiff claimed the total sum of N33,

2032 UNION BANK LTD V. ODUSOTE BOOK STORES LTD

972.00 as special and general damages (N20, 000,000.00 thereof being general damages)

The trial court found for the plaintiff and awarded the sum of N32, 040,691.76 including the N20, 000,000.00 general damages. The defendant's appeal to the Court of Appeal was dismissed as that court upheld the trial court's judgment. The defendant being dissatisfied has further appealed to the Supreme Court raising 6 issues. Defendant is also kicking against the lower court's order that it, shall pay the bill at the prevailing foreign exchange rate at time of payment.

ISSUES FOR DETERMINATION

(1) Whether the Court below was not in error when it held that it would not, and in fact did not, countenance the Appellant's Reply Brief and Respondent's Brief in respect of the Cross-Appeal filed by the Respondent.

(2) Whether the Court below was not in error when it struck out ground 4 of the original Grounds of Appeal and ground 3 of the Additional Grounds of appeal filed by the Appellant.

(3) Whether the Court below was not in error when it held that the learned trial Judge was right when he entertained and gave judgment in favour of the Respondent in respect of those parts of the claim as finally made through amendment of the proceeding but which were not in existence as at August 14, 1987 when the suit was filed. Etc see p. 2038

HELD (Unanimously allowing the appeal in part per **WALI JSC, ONU JSC** dissenting as to quantum of general damages)

Competence of briefs

1. I am satisfied from a perusal of the original reply of respondent's brief and the brief to his cross appeal that they were served on the appellant on 17th February, 1993. There was no application either written or oral by the appellant for extension of time within which to file his (respondent) brief to the cross appeal as well as the reply to the main appeal. The document was supposed to have been filed on 19th February, 1993 and its purported filing on 24th February, 1993 was done out of time: It is incompetent and the Court of Appeal is in my view right in discountenancing it. (p. 2042 D)

Rules of court - Filing of document

2. Where a party has filed documents in contravention of the Court Rules and which are incompetent, the Court is not duty bound to draw the attention of the erring party particularly when it is at the stage of preparing judgment. The Court of Appeal will only use its discretion under rule 3 of order 7 of its Rules when a party demonstrates by offering urgent and convincing reasons that the non-

compliance was not wilful. The Court has the bounden duty to see and ensure that in filing briefs of argument parties comply with its Rules. That was not done in this case. No good explanatory reason was proffered why the Court of Appeal should not discountenance or strike out such briefs on grounds of incompetence. (p. 2043 A)

Grounds of appeal - Struck out by the Court of Appeal

3. Although the learned Justice of the Court of Appeal said he would strike ground 4 of the original Grounds of appeal and ground 2 of the additional grounds on the ground of abandonment for failure to relate any issues or issue to them he nonetheless proceeded and considered all the issues raised in the appellant's brief of arguments. No miscarriage of justice was caused to the appellant in the way the two grounds of appeal complained of were treated by the Court of Appeal. (p. 2045 D)

Negligence - Findings of fact

4. The evidence accepted and relied upon as a whole disclosed a substantial case of negligence against the appellant. The findings of fact on this issue are fully substantiated and are unimpeachable. (p. 2053 A)

Illegality where not pleaded

5. I entirely agree with the submission of learned Senior Advocate for the respondent that the issue of illegality of the mode of payment was not pleaded. There was no evidence on the issue led at the trial. The appellant did not seek of the Court to raise it as a new point. It is incompetent and all arguments relating to it are discountenanced. Private arrangement to pay a foreign debt in foreign currency at the time the judgment was given cannot be ascribed the meaning of illegality in the circumstance. (p. 2053 C)

Transactions involving foreign currency

6. In transactions involving foreign currency, where the unit of the account is foreign currency, the debtor must provide enough local currency equivalent to the currency of account whenever the debt is being settled. (p.2053D)

General damages - Outrageous award

7. I am of the view that the award of N20,000,000 general damages is outrageous. The respondent is only to be awarded such sum as will fairly compensate it for the loss that it's has actually sustained. The highest amount recorded as the total income made by the respondent is for the year 1982, which is N22,008.00. Taking into consideration all other matters, it is my view that a sum of N500,000

general damages will compensate the respondent for the losses its sustained from the time the suit was instituted to the date the trial court delivered its judgment. I reduce the award of N20,000,000 general damages to N500,000. The Appeal therefore succeeds in part and to that extent, it is hereby allowed. (p. 2055 D) B

B

NOTABLE POINTS OF INTEREST

WALI JSC

1. Need to indicate which of the grounds are covered by an issue

C While it is true that the Rules as regards filing of briefs of argument do not specifically state that counsel must indicate in his brief which of the ground or grounds of appeal are covered by an issue, it is highly desirable that it should be done. This will tremendously assist the appellate Court in relating arguments to the issue to the ground of appeal they are related, thus saving the time of the Court and enhancing the quick disposal of the appeal. (p. 2045 B)

D

2. When appeal court will interfere with award of general damages

The general principle of law is that an award of general damages is a matter for the trial Judge and that normally an appeal court will not interfere with such award, unless:

- E (i) Where the trial Judge has acted under a mistake of law.
(ii) Where he has acted in disregard of principles.
(iii) Where he has acted under a misapprehension of facts.
(iv) Where he has taken into account irrelevant matters or failed to take account of relevant matters, or
F (v) Where injustice would result if the appeal Court does not interfere. (p. 2054 H)

ONU JSC

3. Illegality - Burden of proof lies on party making the allegation

G It is my firm view that the burden of showing that illegality abound in the act of the Respondent remitting money out of the country illegally or through unlawful channels lay on the Appellant. Thus, as in my judgment, illegality neither having been pleaded nor evidence thereof given, this appeal ought to stand dismissed as the issue of what to pay to the Respondent's overseas
H suppliers and how to pay had been resolved by consent. In this wise, it ought to be borne in mind that an allegation that one intends to engage in illegality or commit a crime being a very serious allegation, the burden is on the party alleging illegality or the commission of the crime in the transaction to prove the fact. (p. 2055 G)

4. General damages need not be proved nor pleaded

General damages are losses which flow naturally from the defendant (in this case the Appellant) and its quantum need not be pleaded or proved as it is generally presumed by law. Secondly, where a trial Judge in assessing general damages, proceeds upon a wrong principle or on no principle of law and makes an award which is manifestly unwarranted, excessive, extravagant, unreasonable and unconscionable in comparison with the greatest loss that would possibly flow from the said breach of contract without stating whether the amount awarded is for loss of business or loss of profits and the measure of the basis of its assessment, the appeal court will interfere therewith but not otherwise. (p. 2070D)

REPRESENTATION

Kehinde Sotola, SAN with Miss Akin-Toya for the Appellant
Chief Afe Babalola, SAN with L.O. Fagbemi for the Respondent

D

CASES REFERRED TO

Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352

Onifade v. The State (1990) 7 NWLR (Pt 161) 150

Adejumo v. Yusuf Ayantegbe (1989) 3 NWLR (Pt. 110) 417 at 430

E

Aja v. Okoro (1991) 7 NWLR (Pt. 203) 266 at 277

Asakwe v. Governor of Imo State (1991) 5 NWLR (Pt. 191) 318

Momodu v. A.G. Momoh (1991) 1 NWLR (Pt. 169) 608 at 621

Oguma v. IBWA (1988) 1 NWLR (Pt. 73) 658

Sowole v. Nigersile Construction Co. Ltd. (1970) NCLR 435

F

Okulaja v. Haddad (1973) 11 SC. 357 at 362

Fatoyinbo v. Williams (1956) 1 FSC 87

Kerewi v. Odegbesan (1967) NMLR 89

Ratman v. Curmarasary (1965) 1 W.L.R. 8)

Reichel v. Magrath 14 App. Cas. 665

G

Huntly v. Gaskell No. 1 (11905) 2 Ch. 655

Sodipo v. Lemminkainen Oy (1986) 1 NWLR (Part 15) 220

Ekwunife v. Wayne (W.A.) Ltd. (1989) 5 NWLR (Part 122) 422 at 450

Bello v. A.G. of Oyo State (1986) 5 NWLR (Part 45) 828

Hadley v. Baxendale (1854) 9 Exch. 314

H

Victoria laundry Ltd. v. Newman Industries Ltd. (1949) 2 K.B. 528

Roland Webster v. Rosanque (1912) A. C. 394

STATUTES & RULES REFERRED TO

Court of Appeal Rules 1981 0.6 rr. 9(a) & 10: 0.7 r. 3

Evidence Act ss. 134, 135, 136(1)

B LEAD JUDGMENT BY WALI JSC

The Plaintiff's claim as contained in paragraph 48 of his settled amended statement of claim is as follows:-

"(i) Declaration that the Defendants were negligent in handling, operating and management of Plaintiff's business affairs and accounts with the Defendant.

(ii) An order directing the Defendant to refund to the Plaintiff forthwith the sum of N804, 988.59 being the amount paid in respect of outstanding bills in Schedules 2B, 2C, 2D 3 and 5.

(iii) An order directing and compelling the Defendant to pay the Plaintiff the sum of N12, 302, 555. 24 being the difference between the applicable Pre SFEM rate in respect of all the outstanding bills in Schedules 2B, 2C, 2D, 3 and 5 and the rate of which the said outstanding bills will now be remitted by private arrangement or by any process as may be directed by the Federal Government of Nigeria as at the time of judgment/payments.

(iv) An order compelling the Defendant to credit the plaintiff's account with values of bills IBC 3752 and 3732.

(v) An order directing Defendant to release the plaintiff's title documents forthwith to the plaintiff.

(vi) An order directing the Defendant to pay to the Plaintiff the sum of N33, 410,972.58 (Thirty three million, four hundred and ten thousand nine hundred and seventy two naira, fifty eight kobo only) being special and general damages suffered by the Plaintiff as a result of negligent handling of Plaintiff's foreign business and bank account by the Defendant.

PARTICULARS OF DAMAGES

G SPECIAL DAMAGES

(1) 50 Excess deduction made and withheld by the Defendant on Plaintiff's account as per Schedule 4. N113.730.22 (2)

15% interest charged on wrongful debit Entry posted to Plaintiff's account by Defendant in January 1987 11. 731. 75

H (3) Value of IBC 3752, IBC 83732 withheld by the Defendant. 6.865.76

(4) Refund of Deposit made in respect of outstanding bills in schedules 2B, 2C 2D 3 and 5. 804,988.59

(5) Cost of remitting the outstanding bills through

private arrangements loss applicable Pre-SFEM values.

12.302.555.24

SUB-TOTAL: N13, 239, 871.56,

GENERAL DAMAGES

(6) *Loss of profit on the Plaintiff's withheld capital.* B
N171,101.02

(7) *Loss of business, Contract and Goodwill with foreign business partners and benefactors together with loss sustained as a result of Plaintiff's Managing Director's title documents: 20,000.000.00*
OR ALTERNATNELY damages for breach of contract by the Defendant. C
20,000.000.00

TOTAL: N33.410. 972. 00."

These claims were denied by the defendant in their totality and prayed in paragraph 41 of his settled amended statement that the plaintiffs claims be dismissed, it being frivolous, speculative and an abuse of court process. D

At the trial the plaintiff called five witnesses and through them put in evidence a large number of documents while the defendant called two witnesses and put in evidence a number of documents,

At the completion of the trial, the learned trial Judge Sijuwade J. delivered a considered judgment in favour of the plaintiff and made the following order:- E

"..... The plaintiff's action therefore, succeeds in its entirety. In addition to all the declarations sought for in its amended pleadings which I have already granted in this judgment, the plaintiff is in (Ill entitled to the sum total of #32,040.641. 76 (Thirty-two million, forty thousand, six hundred and forty-one naira seventy-six kobo) made up as follows:

BY way of Special Damages:

1. *50 Excess deduction made and withheld by the defendant on plaintiff's account* NI13,730.22
2. *15 interest charged on wrongful debit entry posted to plaintiff's account by defendant in January 1987* 11,731.75 G
3. *Value of IBC3752, IBC3732 withheld by the defendant...* 6,865.76
4. *Refund of deposit made in respect of outstanding bills....* 804,988.59
5. *Cost of remitting the outstanding bills through private arrangements.* 11. 103.375.44 H

Sub-Total: 12,040,691.76

Item 1-5 above-Immediate Payment ordered

2038 Union Bank v Odusote Bookstores Ltd. (1995) 12 KLR Wali JSC
By Way of General Damages

6. *Loss of profit on plaintiff's withheld Capital, loss of business contracts, and goodwill with foreign business partners and benefactors together with loss sustained as a result of plaintiff's Managing Director's title documents* 20.000.000.00

Total: N32,040, 691. 76

B *Thirty-two million forty thousand six hundred and ninety one naira seventy six kobo) with costs I assess at N5, 000.00 against the defendant in favour of the plaintiff."*

Dissatisfied with the trial court's judgment the defendant appealed against it to the Court of Appeal, Ibadan Division. The plaintiff also cross-appealed. In the judgment of that Court delivered by Kolawale J.C.A. with which Aloma and Ayo Salami JJCA agreed, the appeal by the defendant was dismissed in its totality while the cross-appeal by the plaintiff was allowed in part to the effect of which the following orders were made:-

D *"It is hereby ordered that the relief claimed in paragraph 48 (iii) .of the final statement of claim shall be amended to read that:-*

1. *An order directing and compelling the Defendant to pay to the plaintiff the sum of N 11,103,375.44 being the difference between the applicable bills pre - SFEM rate in respect of all the outstanding bills in schedule 2B, 2C, 2D, 3 and 5 and the rate at which the said outstanding bills will by the Federal Government of Nigeria shall be the prevailing rate as at the time of payment.*

F *2. It is further directed that the Defendant shall pay the cost of remitting the said outstanding bills at the rate of exchange prevailing as at the time of payment or remittance or by any process as may be directed by the Federal Government as at the time of payment."*

The defendant has now further appealed to this Court. Parties filed and exchanged briefs of argument as required by the Rules of this Court. Henceforth the plaintiff and the defendant will be referred to as the respondent and the appellant. In the appellant's brief the following six (6) issues are raised for determination:-

G *"(i) Whether the Court below was not in error when it held that it would not, and in fact did not, countenance the Appellant's Reply Brief and Respondent's Brief in respect of the Cross-Appeal filed by the Respondent.*

H *(2) Whether the Court below was not in error when it struck out ground of the original Grounds of Appeal and ground 3 of the Additional Grounds of appeal filed by the Appellant.*

(3) Whether the Court below was not in error when it held that the learned trial Judge was right when he entertained and gave judgment in favour of the Respondent in respect of those parts of the claim as finally made

through amendment of the proceeding but which were not in existence as at August 14, 1987 when the suit was filed.

(4) Whether the Court below was not in error when it held that the trial Judge was right when he held in effect that it would be proper for the Respondent to remit money to overseas countries through what the Respondent described as Private arrangement” not being through the channels laid down by the law and in using the rates of exchange alleged to be applicable through that means in the calculation of the special damages awarded under this head.

(5) Whether the Court below was right when in giving judgment in this appeal before it, the court ordered that the relief claimed in paragraph C 48(iii) of the final Statement of Claim be amended.

(6) Whether the Court below was not in error the facts and in law when it upheld the award of general damages in the sum of N20 million made by the trial Court in favour of the Respondent.”

These issues have been adopted by the respondent in his brief of argument. Before I go into the arguments of learned Senior Advocates on the issues canvassed it is pertinent to reproduce the brief facts of the case of the contending parties, and in doing that, I shall adopt the facts nearly summarized in the appellant's brief of argument which are as follows:-

(i) The Appellant was at all times a Banker whilst the Respondent was a Bookseller and customer of the Appellant. The Respondent made use of the Appellant's Ibadan Branch to make payments for books ordered from foreign book sellers. Between 1981 and 1984, the Respondent entered into 174 such transactions and also a Bill LC 205/81 involving the payment of sums of money to various overseas suppliers. The allegation of the Respondent was that the Appellant was negligent in handling the payments to the overseas suppliers as a result of which the Respondent suffered some loss. Such loss, the Respondent contended was due to the failure or negligence of the Appellant to take the appropriate steps within the times stipulated by law in order to effect the payments Overseas of the said sums of money which were debited against the accounts of the Respondent. It was alleged by the Respondent that if it had to transfer overseas the various sums of money still remaining unpaid, it would cost much more to do so as it could no longer transfer the said sum of money through the Central Bank of Nigeria, and would have to make such transfer through ‘private arrangements’. The Respondent claimed the total cost of such transfer through ‘private arrangement’. It was also alleged that the appellant unlawfully withheld documents relating to a landed property belonging to the Respondent's Managing Director even though the Respondent was in no way indebted to the Appellant.

A claim was also made in respect of the said alleged unlawful detention of the document. Finally, it was the case of the Respondent that as a result of all the above, and the loss of goodwill, it was entitled to the award of general damages.

(2) *The Appellant admitted having a banker-customer relationship with the Respondent. As to the allegation of its failure to make payments to Respondent's Overseas customers promptly, it was the case of the Appellant that to the extent that it was law in its power, it made remittances to those customers promptly. It was furthermore its case that as it was obliged to make such remittances through the Central Bank of Nigeria under the laws of the country, some delay was inevitably incurred in that process, but that some remittances continued to go through the normal lawful channel even after the Respondent had instituted this suit. The Appellant further contended that the Central Bank of Nigeria rejected some of the documents presented by the Respondent for payment overseas and that it (i.e., the Appellant Bank) handled all the Respondent's transactions with diligence. It also denied that it relating withheld the Respondent's Managing Director's documents relating to his property."*

The first issue deals with the refusal of the Court of Appeal to consider the appellant's reply-brief to the main appeal and his respondent's brief to the cross appeal. It was the submission of learned Senior Advocate that the Court of Appeal erred in law in relying on Order 6 Rule 10 of the Court of Appeal Rules 1981 (as amended) in discountenancing the issues raised and canvassed in the Reply Brief and the Respondent's brief to the cross appeal on grounds that the time for filing the two briefs had since expired. It was his submission that the courts, both in this country and in England have passed the age of deciding the rights of the parties on legal technicalities. It was his contention that since learned Senior Advocates appearing in the case for the contending parties had argued that appeal on the briefs, the Court of Appeal should have drawn his attention to the non-compliance with the rules to enable him put his house in order, rather than to consider the issue suo motu, resulting in the rejection of the briefs. He submitted that the consequence of the Court of Appeal decision that the Reply Brief and the Respondent's brief to the cross appeal were not properly filed and therefore discountenanced was a misdirection which resulted in miscarriage of justice. Learned Senior Advocate cited and relied on several authorities in support of his submissions.

In reply to the appellant's submissions (supra) Learned Senior Advocate for the respondent submitted that there was no time the appellant filed a reply brief or a respondent's brief to the respondent's brief for the cross appeal filed on 17th February, 1993. He said the reply brief and the respond

ent's brief to the cross appeal were made in respect of the respondent's brief to the main appeal filed on 6th July, 1990 and the respondent's brief to the cross appeal filed on 21st November, 1990 which had been abandoned.

Looking at the orders made by the court of Appeal as a result of applications made by the appellant and the respondents respectively I cannot but agree more with the submissions contained in the respondent's brief. B

As a result of the application on notice dated 30th day of January, 1993 and filed on 3rd February, 1993, praying the Court of Appeal to deem properly filed and served:-

1. The appellant's brief of argument;
2. The appellants/respondent's brief of argument to the respondent's C cross appeal, and
3. The appellant's reply brief to the main appeal, or in the alternative for:

Leave to file a new appellant's brief of argument and to deem as properly tiled and served, the said appellant's brief and the respondent's brief and the appellant's reply brief; and the application on notice by the respondent for order that: D

Leave be granted to the appellant to file and argue additional ground of to his cross appeal;

The Court of Appeal made the following orders respectively:- E

"I. *That by consent of both counsel leave is hereby granted to the appellant to file a new appellant's brief of argument the appellant's brief be and is hereby deemed to be properly filed and served today.*

xx F

1. *That leave be and is hereby granted to the respondent to file and argue one additional ground of appeal in the cross appeal as set out in the schedule attached to the motion papers.*

2. *That leave be and is hereby granted to the respondent to amend the Notice of cross appeal to include the following relief. "An order directing the defendant/respondent to pay the cost of remitting the outstanding bills at the rate of foreign exchange prevailing at the time of payment or remittance or, by any process as may be directed by the Federal Government of Nigeria as at the time of judgment/payment;"* G

3. *That Chief Afe Babalola shall file all the processes within two days from today; and* H

4. *That two days be and is hereby granted to file reply brief and respondent's brief in the cross appeal. No order as to costs.*

These orders were made on the 15th day of February, 1993 and on

that date, the time within which to file the appellants reply briefs to the respondent's brief and his brief to the cross appeal as respondent was abridged. Also abridged was the time within which the respondent as cross appellant would file his amended brief as cross appellant and other processes relevant to the appeal. Learned Senior Advocate at his own request was granted two B days within which to do that. Learned Senior Advocate for the appellant was also granted two days after service on him of the cross appellant/respondent wended brief to file his brief (as respondent to the cross appeal) as well as ill's reply brief to the Respondent's brief to the main appeal.

The record shows clearly that the Respondent's brief to the main C appeal, as well as its cross appellant's brief dated 20th November, 1990 were abandoned and substituted by the respondent's brief to the main appeal and its brief to the cross appeal dated 15th January, 1993.

If it is true as the Learned Senior Advocate wants us to believe, that he was not served with respondent's brief to the main appeal and his brief to D the cross appeal on 17th February, 1993, he could not have been in a position to prep e his respondent's brief to the cross appeal and the reply brief to his main appeal which bore the date of 19th February, 1993. And as admitted, by learned counsel for the appellants these briefs were filed on 24th February, 1993. I am satisfied from a perusal of the original reply of respondent's brief E and the brief to his cross appeal that they were served on the appellant on 17th February, 1993. There was no application either written or oral by the appellant for extension of time within which to file his (respondent) brief to the cross appeal as well as the reply to the main appeal. The document was supposed to have been filed on 19th February, 1993 and its purported filing m 24th F February, 1993 was done out of time: it is incompetent and the Court of Appeal is in my view right in discountenancing it.

There is nothing on record to show that Learned Senior Advocate for the appellant made may move to put his house in order by making use of the provision of rule 10 of order 6 of the Court of appeal Rules, 1981 (as G amended which provides thus:-

"10. Where an appellant fails to file his brief within the time provided for in rule 2 above, or within the time as extended by the Court. The respondent may apply to the Court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in H oral argument except by leave of the Court. Where an appellant fails to file a reply brief within the time specified in rule 5, he shall be denied to have conceded all 'he new points or issues arising from tile Respondent's brief. " Learned counsel failed to file his reply brief and (his) respondent's brief to the cross appeal. He did not make any effort to seek the Court of appeal's indul

gence for leave to proffer oral submissions in lieu of the incompetent briefs as provided for in rule 9 (a) of Order 6 of the Court of Appeal Rules, 1981.

Where a party has filed documents in contravention of the Court Rules and which are incompetent, the Court is not duty bound to draw the attention of the erring party particularly when it is at the stage of preparing B judgment. The Court of Appeal will only use its discretion under rule 3 of order 7 of its Rules when a party demonstrates by offering urgent and convincing reasons that the non-compliance was not wilful.

The Court has the bounden duty to see and ensure that in filing C briefs of argument parties comply with its Rules. That was not done in this case. No good explanatory reason was proffered why the Court of Appeal should not discountenance or strike out such briefs on grounds of incompetence. See Huraimon v. Bamgbose (1989) 3 NWLR (Pt 109) 352; Onifade v. The State (1990) 7 NWLR (pt 161) 150, particularly at pp. 166 - 167. And on this point I agree and adopt the finding and conclusion of the learned Justice of D the Court of Appeal in the lead judgment that-

“The brief which was filed on 24 February, 1993 was therefore filed out of time. The appeal was adjourned by consent of both counsel to 25 February, 1993 for hearing, the day on which the appeal was heard. The 19 February the day the Reply Brief was settled was a Friday. The brief could therefore be filed on that working day. In my judgment, when a process has been filed out of time, the consequence is that such process must be deemed not to have been properly filed. It follows that there was no reply brief nor a Respondent’s brief to the Cross Appeal. Every submission made based on the Reply brief and the Respondent’s brief to the Cross Appeal must be discount- F tenanced. It means that all the new points contained in the in the Respondent’s brief remain unanswered and all the material points of substance contained in the Cross-Appellant’s brief remain unanswered.”

The 2nd issue raised by the appellant for determination in this appeal is the striking out of ground 4 of the original ground of appeal as well as G ground 3 of the additional grounds.

Learned Senior Advocate complained about the learned Justice of the Court of Appeal statement that counsel owes the Court a duty to relate issues raised in the brief to particular ground or grounds as this would help the court and makes it work easier. Learned Senior Advocate submitted that a H counsel has no obligation to specifically mention in his brief which of the grounds of appeal are covered by an issue, but what he must ensure is that all the issues raised in the brief have their basis in one or more of the grounds of appeal. He cited and relied in support, the decisions of this Court in Akin

Adejumo & Ors. v. Yasuf Ayantegbe (1989) 3 NWLR (Pt. 110) 417 at 430 and Mazi Aia & Anor v. John OkOfo & Ors. (1991) 7 NWLR (Pt. 203) 266 at 277. He said the cases of Asakwe v. Governor of Imo State & Ors. (1991) 5 NWLR (Pt. 191) 318 and Abu Momodu & Ors. v. A.G. Momoh (1991) 1 NWLR (pt. 169) 608 at 621 relied upon by the learned Justice of the Court of Appeal did' not state B or lay the principle that a Brief must set down in a written form the grounds of appeal to which issues relate. He submitted that the learned justice of the Court of Appeal by the pronouncement above, had adversely prejudiced his mind against the case of the appellant whereby he struck out ground 4 of the original grounds of appeal as well as ground 3 of the Additional Ground of C Appeal.

In reply learned Senior Advocate for the respondent submits that the learned Justice of the Court of Appeal was right in striking out ground 4 of the original grounds and ground 3 of the additional ground for the following reasons:-

D (a) Ground 4 of the original grounds was not supported by any brief; showing which evidence was at variance with the pleadings.

(b) Additional ground 3 was also not supported by the appellant's brief and the appellant failed to demonstrate "in what manner the decision of the Court of Appeal would have been affected if the alleged "variance" be E tween evidence and the pleadings and the alleged "weight of evidence" particulars of which are still unknown have not been struck out."

Learned Senior Advocate contended that in spite of the Court of Appeal striking out of the 2 grounds of appeal it proceeded to consider them and determine the case on the merit.

F Ground 4 of the original grounds of appeal filed in the Court of Appeal reads thus:-

"4. The learned trial Judge erred in law and came to a wrong decision when he gave judgment to the plaintiff on its claim for general damages when evidence given in respect thereof was at variance with the pleadings."

G PARTICULARS OF ERROR

(1) *When in support of its claim for general damages of N20, 000, 000 all the plaintiff pleaded was general loss of profit, custom and goodwill in paragraph 46 of its Further, Further, Further, Further and better state- ment of claim;*

H (ii) *When the evidence of the 4th P. W. in support of the plaintiff's claim for general damages was the specific loses in respect of specific customers;*

(iii) *When such evidence amount to proving items of special dam- ages and the facts and particulars thereof must h(' pleaded but were not pleaded by the plaintiff;*

(iv) *When where facts of general Issues were pleaded; evidence of particular from particular persons or complaints cannot be properly received;*

(v) *When the evidence of the 4th P. W. on the 9th June, 1989 have no tactual basis in plaintiff's statement of claim and therefore go to no issue;"* while ground 2 of the additional grounds of appeal reads as follows:- B

"The judgment is against the weight of evidence."

While it is true that the Rules as regards filing of briefs of argument do not specifically state that counsel must indicate in his brief which of the around or grounds of appeal are covered by an issue, it is highly desirable that it should be done. This will tremendously assist the appellate Court in relating arguments to the issue to the ground of appeal they are related, thus saving the time of the Court and enhancing the quick disposal of the appeal. As Nnaemeka-Agu put it in his book - Manual of Brief Writing at p.7, that: C

"The sole purpose of an appellant's brief, is therefore to present a party's case on appeal in a summary form but with such accuracy and lucidity as not only to give in advance, a deep insight into the party's case, but also to convince it on the justice of his case."

Although the learned Justice of the Court of Appeal said he would strike around 4 of the original Grounds of appeal and ground 2 of the additional grounds on the ground of abandonment for failure to relate any issues or issue to them he nonetheless proceeded and considered all the issues raised in the appellant's brief of arguments. The complaints in the 4th ground of the original grounds of appeal is directed against the award of general damages while additional ground 2 is attacking the weight attached by the trial Court and the Court of Appeal, to the evidence adduced by the respondent in support of his claims. In the submissions of learned Senior Advocate for the appellant, he did not show which part of the evidence adduced by the respondent, was contrary to the pleadings. No miscarriage of justice was caused to the appellant in the way the two grounds of appeal complained of were treated by the Court of Appeal see the case of Momodu & Ors. v. His Highness Alhaji Momoh & Ors. (1991) 1 NWLR (pt. 169) at 621 wherein Uwais JSC expounded the law as follows: E

"The issues formulated for determination take the place of ground of appeal and when the issues have been considered by the appellate court that equivalent to considering the grounds of appeal. " F

The complaint raised in this issue therefore fails since all the issues raised in the appellant's brief inclusive of the ones distilled from the two grounds alleged to have been abandoned were adequately considered. G

In the third issue raised by the appellant in his brief he complained H

that the Court of Appeal was in error when it upheld the decision of the lower court wherein it entertained and gave judgment for the respondent in respect of those parts of the claim as finally made through Amendment of its pleadings but which were not in existence as at August 14th, 1987, when the suit B was filed. The gist of the complaint in summary is as follows:-

- (i) That when the writ of summons was issued on 14th August, 1987. The total amount claimed by the respondent was N1,328,837 .55 which included the sum of N487. 397 .23k as “purported revision of rate in 1986 for the goods bought and (not?) paid for since 1983.
- C (ii) In and his “Further, Further and Better amended statement of claim”. The respondent abandoned the claim of N487 ,397 .23, and instead, made a claim of N12,303,555.24k as the cost of remitting the total of the yet unremitted money overseas.

Learned Senior Advocate agreed that the respondent had the right to amend D his statement of claim as he had done but contended that that would not preclude him from subsequently leading evidence or proffering argument against all or any of the new claims brought in by the Amendment. He submitted that since the cost of remitting the outstanding bills would have been N487,362.23, but escalated to N12,302,552.24; the judgment should have been limited to the E lower figure, but not in the sum of N11,103 ,375.44 as given by the trial Court and subsequently affirmed by the Court of Appeal. He submitted that those additional claims ought not to have been granted as no evidence was led in their support. Learned Senior Advocate further submitted that the Court of Appeal completely misunderstood the argument of the appellant on the point F and proceeded on the basis, albeit wrongly, that his quarrel was with the fact of the amendment of the Writ of Summons and the statement of claim which he described as “a total misconception and misunderstanding of the case that was argued before the court below in the appellant’s brief.”

In’ answer to the submissions above, learned Senior Advocate for G the respondent made the following submissions:

1. That all the affected bills were in existence at the time the Writ was issued;
 2. That the appellant had in his possession all remittance as at the time when goods were ordered in 1982/83; and
- H that the appellant is therefore grossly in error in submitting that what the respondent was entitled to was the actual costs of the goods at the time when the writ was issued. Learned counsel contended that in 1984 the Federal Government realized that there were too many outstanding bills and it ordered the Manhattan Bank of New York to evaluate the genuine and faked one. This

exercise was completed on 21st May, 1987 and all bills that were not included in the final Debit Summary Status Report (DSSR) as at May 21, 1987 could not be: remitted by Central Bank, and that was the time the cause III action arose.

The appellant's quarrel as it is apparent from its submissions, is not with the Amendment of the respondent's pleadings, but with the escalation of B the amount claimed as a result thereof. The appellant's contention is that the claims brought in through the subsequent amendments of the respondent's pleading were not in existence as at August 1987 when the suit was filed. In short, as at that date those causes of action did not arise.

The expression "cause of action" is define in Strand's Law Diction- C ary Vol. 1 p. 424 thus:-

"is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if the plaintiff must prove in order to obtain appellant."

The respondent's claim is based on a breach of contract arising from the D appellant's negligence in the handling of the remittance documents. So the respondent's cause of action arose on 21st May, 1987 when the exercise carried out by the Manhattan Bank of New York on behalf of the Central Bank of Nigeria and some of the respondent's bills were not, through the appellant's negligence, reflected in the final Debit Summary Status Report. (Exh.1). The E claims were in existence and validly reflected in the respondent's paragraphs 46 and 47 of the Further, Further and Better Amended Statement of Claim. The learned trial Judge after considering the evidence and the arguments proffered by learned counsel on the issue concluded:-

F

"As to the significance of the time of the releases of the bills for foreign currency by the CBN which I explained earlier above I will refer to the evidence of the 1st D. W. which goes to confirm it. The witness admitted inter alia:-

"I agree that once a bill is successful with the C.B.N the latter could G release the payment of foreign exchange any time thereafter."

I refer to exhibits '3' and '9' in this case to show that there is time limit for the importers with outstanding bills to submit their claims forms within a specific time if they had to be considered for refinancing. Exhibit '9' was the defendant's letter dated 1/2/84 to the plaintiff. Exhibit '9' was based on Exhibit H '3' issued by the C.B.N. to the Authorized Dealers. Exhibit '1' the DSSR dated 21/5/87 is the outcome of the compliance required of the importers through their bankers as contained in Exhibits '3 and '9'. Exhibit '1' specifically refers to the C.B.N. circular No. ECD/AD/10/84 of 1911/84 - Exhibit '3' on the point. I

refer also to Exhibits 101 (1) which is a telex message from Chase Manhattan Bank London which is the bank employed by the Federal Government to conduct the reconciliation exercise of the Claims of the importers and exporters on their outstanding bills for settlement which letter reads in part as follows:-

B *“The Central Bank has now informed Chase Manhattan that the refinanc*

ing of short term trades arrears has been finalized and no further Notes will be issued. Chase Manhattan’s role as Reconciliation Bank will cease as of 2nd December, 1988 “(Note: Underlining mine for emphasis)

C From the foregoing I hold that the plaintiff’s claim or cause of action is not premature and that as at 21st May, 1987 the cause of action arose.”

The learned Justice of the Court of Appeal, after considering the issue also concluded as follows:-

“The respondent’s case is based on negligence as averred in paragraph 47 of the Amended Statement of claim with respect to the 174 bills handed to the Appellant for processing through the Central Bank of Nigeria to enable the Appellant to pay the Overseas Exporters who had shipped books to the Respondent. Some of the bills were rejected by the CBN as a result of negligent handling, some were not forwarded to the CBN, some were unmatched in CBN returns, some were misplaced. So, in my judgment, the Respondent’s case is based on the 174 bills variously handled negligently by the Appellant.”

I fully accept and endorse the conclusions. See Oguma v. IBWA (1988)1 NWLR (Pt. 73) 658 and Sowole v. Nigersile Construction Co. Ltd. (1970) NCLR 435. The other related point to issue 3 is whether the respondent’s claim as contained in paragraph 46 of the Further, Further and Better Amendment statement of claim was proved.

Both the appellant and the Respondent called witnesses and put in several documents in evidence in support of the averments contained in their respective pleadings. I have already dealt with paragraph 46 of the amended statement of claim and agreed that both the trial court and the Court below were right in their conclusions Oil the issue.

It was the contention of the appellant that the evidence produced by the respondent did not prove the amended claim and therefore both the trial Court and the Court of Appeal were wrong in awarding the sum of N11,103,37.24k. He submitted that the learned trial Judge failed to advert his mind to the rates of exchange prevailing as at August 14, 1987 but went on to use the higher rate of N20 to 1.00 pound and other rates regards the other currencies, Learned Counsel particularly referred to the evidence of P.W.2,

P.W.3 and P.W.4 on the rates of exchange of the foreign currencies involved, to Naira. lie submitted that the learned trial judge was in error and the Court of Appeal was wrong to affirm the award of N11,103,375.44 as special damages to the respondent instead of N487 ,397 .23 which was based on the applicable rates in foreign currencies at the time of the issuance of the Writ of summons, Learned Senior Advocate cited and relied on sections 134, 135 and 136(1) of the Evidence Act, and Oshinjinrin v. Elias (1970) 1 All NLR 153 and Okulaja v. Haddad (1973) 11 SC 357 at 362, in support of the submissions.

It was the case of learned counsel for the respondent that there were as many as 174 bills outstanding for both placed orders by respondent from overseas suppliers, between 1982 and 1983. At the material time all payments for goods ordered must be approved by the Central Bank of Nigeria on application through an approved commercial bank and the appellant was one of such approved banks. The respondent submitted all the remittance documents through the appellant, but due to the latter's negligence the bills were not submitted to the Central Bank of Nigeria within the stipulated time for approval. He submitted that even though the outstanding bills were not approval by the Central Bank of Nigeria payment of them after 1987 must be made to the respondent's customers overseas in foreign currencies at the relevant rate of exchange to Naira.

I have carefully considered the submissions of learned counsel on the related issue; and I have no hesitation in agreeing with the decisions of both the trial Court and the Court of Appeal. The way and the manner the learned trial Judge painstakingly and diligently treated the bulk of evidence is remarkable and commendable. The learned trial Judge concluded on question of negligence as follows:-

"Having summarized the submissions of the two learned counsel on the various acts of negligence complained all of which I have myself elaborately dealt with in my findings on them above in this judgment, the conclusions of which I here now reiterate except one, which is the wrongful detention of plaintiff's rate title deeds and which I shall presently deal with, I will like to, restate the statement of law earlier mentioned in this judgment, more so wit, the lengthy and powerful submissions of Chief Afe Babalola, SAN, that the issue of negligence is a question of fact, and not of law, and each case of negligence must be decided in the light of its own facts. I have earlier also discussed the question of when the cause of action arose, the validity or rather admissibility of the schedules prepared by the 4th P. W. irrespective of whether he is to be regarded as an interested party which will make n difference to their admission in the circumstance of this case, as I do no intend to rely on them, nor have I allowed them to govern my sense of justice, in this

matter having regard to other numerous and vital documents tendered as exhibits most of which speak for themselves. All these contentions inclusive of whether there is a variance between the evidence of the plaintiff and its amended pleadings as submitted by Mr. Ajayi, are all matters upon which I have taken a stand earlier in this judgment, and as, I do not intend to repeat myself, this stand of mine still holds.

On the question of wrongful detention of the title deeds of the plaintiff by the defendants, the law is, in cases of detainee as restated in SOD/MU v. N.P.A (1975) S.C. 15 at 26 - 27, cited by Mr. Ajayi, the plaintiff must prove that he has the ownership of the thing being detained. The title deeds in this case are those of the Managing Director of the plaintiff but which were deposited by the plaintiff with the defendant who took same as security in support of any obligation that it (sic) to the plaintiff. When the defendant who took possession of those title deeds they were not held as security to protect its interest against the liabilities of the Managing Director of the plaintiff but rather against that of the plaintiff who had a substantial contractual relationship of banks and customer with the defendant. Would the defendant refuse to embark on levying execution on those deeds should the plaintiff fail in its obligation to the defendant on the ground that its legal owner is the Managing Director of the plaintiff? Certainly not. The Managing Director though has the legal ownership of those deeds but having surrendered them to the plaintiff who then deposited same with the defendant for its own use, it is the plaintiff who, legally, is entitled to ask for the return of them and not the Managing Director who is not a party to the contract. The plaintiff is de facto the owner of those deeds in as far as the defendant and the purpose for which they were deposited are concerned. I therefore hold that the plaintiff is the appropriate person to demand for the return of the plaintiff's Managing Director's title deeds from the defendant. If, therefore, the plaintiff demands for the return of the title deeds as it did in Exhibit 136 (i) of 16/3/87 and the defendant refused to return same as shown in (Original not legible)

Exhibit 135 (i) then such refusal except justified is actionable in law of detainee. The law is that a bank has right to hold unto the title deeds of its customer if the latter is not owing the bank. The onus of proof, therefore, to justify the retention of those title deeds is upon the defendant whom I am afraid has failed to lead any credible evidence (if any at all) to justify the retention of those title deeds, more so, it is common knowledge between the parties that the plaintiff's accounts, at all material time, was in credit. In the absence of such proof by the defendant, I hold the latter liable in damages for the wrongful detention of the plaintiff's Managing Director's title deeds.

negligent handling;

(3) For failure and/or omission to forward plaintiffs bills to Central Bank of Nigeria and consequent none reflection of plaintiff's 16 bills in Central Bank of Nigeria Debtors Summary Report;

(4) For causing some of the plaintiff's bills to be unmatched in Central Bank of Nigeria returns;

(5) For misplacing some of the plaintiff's bills and delay in forwarding some of the plaintiff's bills to Central Bank of Nigeria in spite of full payment and proper documentation by the plaintiff;

(6) For irregular and careless debiting and crediting of plaintiff's C : account at in whims and caprices;

(7) For failure and/or omission to exercise appropriate skill and care;

(8) For unlawfully withholding plaintiff's capital on fully paid bills;

and (9) For unlawfully withholding plaintiff's Managing Director's title

D documents pledged as security for plaintiff's obligation to the defendant. The plaintiff's claims, therefore, succeed on all the issues of negligence and accordingly it is entitled to the declaration sought for in paragraph 48 (1) of their amended pleadings."

The Court of Appeal, in affirming the findings of the learned Judge quote E (supra) opined thus:-

"On the state of pleadings, I have no doubt that the appellant did not make serious effort to challenge the Respondent's claim. The Respondent further tendered evidence in support of the pleadings OR damages as deposed to by P. W.4 Kolade Mosuro, General Manager of the Respondent at F page 167 line 3 to 174 lines 1-13.

The evidence of D.W.1 at page 207-221 did not controvert Respondent's evidence, rather under cross-examination the witness admitted the effect of failure to pay the overseas suppliers as narrated by P. W.4, D. W.2 Mrs. Ayodeji who represented the Appellant also did not controvert the evidence G of the Respondent on damages. The learned trial Judge in my judgment properly evaluated the evidence on damages from pages 374-399 of the record. The findings of fact based on the evidence tendered before him. In N.E.P.A. v. Alli (1992) 8 NWLR (Part 2,59) 279 the Supreme Court held that –

The power of an appellate court to disturb the finding as to damages H is very much limited, particularly in a case like this which turns on credibility of a particular witness. This court will not interfere merely because it would be inclined to award a different figure."

The findings of fact in this case was upon the uncontradicted evidence of P. W. 4 before the court. It can therefore not be said to be against the weight of

evidence.”

The evidence accepted and relied upon as a whole disclosed a substantial case of negligence against the appellant. The findings of fact on this issue are fully substantiated and are unimpeachable see Lucy Onowan & Anor v. Iserhie in Re – ‘Lucy Onowan Appellant (1976) 9-10 se 95; Balogun & Ors. v Agboola (1974) 1 All NLR (pt.2) 66 and Fatoyinbo & Ors. v. Abike Williams & Ors. (1956) 1 FSC 87.

I shall briefly touch on the issue of illegality of the mode of payment of the outstanding bills by the respondent to his customers and raised by the appellant in issue 4 of his brief.

I entirely agree with the submission of learned Senior Advocate for the respondent that the issue of illegality of the mode of payment was not pleaded. There was no evidence on the issue led at the trial. The appellant did not seek leave of the Court to raise it as a new point. It is incompetent and all arguments relating to it are discountenanced. See Abaye v. Ikem Uche Offili & Anor. (1986) 1 NWLR (Pt. 15) 134. Private arrangement to pay a foreign debt in foreign currency at the time the judgment was given cannot be ascribed the meaning of illegality in the circumstance.

Issue 5 has been sufficiently covered while considering issue 3. I may only need to emphasize that in transactions involving foreign currency, where the unit of the account is foreign currency, the debtor must provide enough local currency equivalent to the currency of account whenever the debt is being settled. See Woodhouse v. Nigeria Produce (1971) 1 AER 665.

Issue No. 6 deals with the award of N20,000,000 as general damages. Where I agree with the statement by learned Justice of Court of Appeal that, in considering the proper amount to be awarded as general damages, the Judge should take judicial notice of the serious devaluation of Naira against other currencies but it must relate to the whole evidence adduced in proof of the losses.

The claims under the heads are couched as follows:-

“GENERAL DAMAGES

(6) *Loss of profit on the Plaintiff's withheld capital.* NI 71, 101.02

(7) *Loss of business, Contract and Goodwill with foreign business partners and benefactors together with loss sustained as a result of Plaintiff's Managing Director's title documents: N20,000,000.00*

OR ALTERNATIVELY damages for breach of contract by the Defendant. 20,000,000.00.

At the trial,, Tax Clearance Certificates of the respondent for the years 1980-

1986 were tendered and admitted in evidence as Exhibits 216 - 221. Each certificate showed the total income made by the respondent each year and the amount of tax paid. These are as follows:-

	YEAR	TOTAL INCOME	TAX PAID
B	J 1979/80	N54,127.00	N24,357.15
	1980	19,330.93	8,698.92
	1981	6,444.92	2,900.21
	1982	22,008.00	9,495.90
	1983	21,012.00	9,495.90
C	: 1984	28,612.00	12,875.40
	1985	62,837.00	28,276.65
	1986	122,631.00	55,183.95

The respondent's gross income for years 1979 -1986 is N208,480.85. So the average total income for these years is N29,945.83. The net loss of the respondent should be limited to the time he instituted the action to the time the judgment of the trial court was handed down, that is August, 1947 to October, 1989.

It was the submission of learned Senior Advocate for the appellant that had the Court of Appeal properly considered and evaluated the evidence adduced, some of the items listed by the learned Senior Advocate for the respondent in his respondent's brief, would not be taken into consideration in the award of this outrageous sum of N20, 000, 000 as general damages. He referred to items - (a) Damages and losses sustained as a result of the appellants detention of the Respondent's Managing Directors title deeds; (c) Damages as a result of reduction of Respondent's discount by some of its foreign suppliers (d) Damages as a result of the Appellant's withholding Respondent's capital and (e) Damages for fiddling and mismanagement of Respondent's capital. Learned counsel submitted that losses in the items listed (Supra) could be quantified and be claimed as special damages. While I agree that losses in items (c), (d) and (e) can be quantified. I do not accept the learned Senior Advocate's Submission as regards item (a). If the complaint of the respondent is accepted on (a) it will only amount to detainue that may attract nominal damages. And as rightly pointed out, the retention of these documents by the appellant was for tile purpose of receiving overdraft from the appellant. So the detainue can only be limited to the period the respondent applied for their release after the judgment of the trial Court.

The general principle of law is that an award of general damages is a matter for the trial Judge and that normally an appeal court will not interfere with such award, unless:

- (i) Where the trial Judge has acted under a mistake of law.
- (ii) Where he has acted in disregard of principles.
- (iii) Where he has acted under a misapprehension of facts
- (iv) Where he has taken into account irrelevant matters or failed to take account of relevant matters, or

(v) Where injustice would result if the appeal Court does not interfere. B
See Yesufu Adewuyi v. Abibade & Ors. 4 W ACA 169; Solanke v. Ajibola (1969) 1 NMLR 45; His Highness Oyoj v. Felix Egware (1974) 1 All NLR (Pt.1) 295 and Ziks Press Ltd. v. AlvanIkoku 13 WACA 188. The appeal court is entitled to interfere with an award of damages made by a Judge where the circumstances calling for such an interference are shown to the appellate C court. See Flint v. Lavell (1935) 1 KB 354; Agaba v. Oiobusin (1961) 1 All N.R.R. 299 and Obere v. The Board of Management Eku Baptist Hospital (1978) 6 and 7 SC 15.

The award of general damages is improper where the quantum of loss is ascertainable. See Kerewi v. Odegbesan (1967) NMLR 89. D

With these principles in mind and the evidence adduced in support of this head of claim, I am of the view that the award of N20,000,000 general damages is outrageous. The respondent is only to be awarded such sum as will fairly compensate it for the loss that its has actually sustained.

The highest amount recorded as the total income made by the respondent is for the year 1982, which is N22,008.00. Taking into consideration all other matters, it is my view that a sum of N500,000 general damages will compensate the respondent for the losses its sustained from the time the suit was instituted to the date the trial court delivered its judgment. I reduce the award of N20,000,000 general damages to N500,000. See Dredger v. S.S. Edison F (1933) A.C. 449; Kerwin v. Odegbesan (supra) and Lagos City Council Care-taker Committee & Anor. v. Benjamin O. Unachukwu & Anor. (1978) 3 SC 202. The Appeal therefore succeeds in part and to that extent, it is hereby allowed. In other respects the judgment and orders of the Court below is affirmed and the appeal is dismissed. G

The respondent is awarded NI,000.00 cost in this appeal against the appellant.

BELGORE JSC

Trial Judge, to my mind, acted on wrong assumption in deciding quantum of damages in this matter. It is normally within the province of trial judge's discretion to determine damages but in this case the principles to be

H

followed are ignored as the decision of that Court upheld by Court of Appeal is wrong. It will result in injustice if allowed to stand. (Sholanke v. Ajobola (1969) 1 NMLR 45,) and this Court will interfere with the awards Obere v. The Board of Management. Eku Baptist Hospital (1978) 6 & 7 SC. 15.) (See also Kerewi v. Odegbesan (1967) NMLR 89.

B I therefore agree with the Judgment of Wali J.S.C. and I for the reasonably adumbrated therein also allow in part this appeal and make the same consequential orders.

C

KUTIGIJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Wali JSC and agree with the conclusions therein. I endorse the consequential orders contained in the judgment.

D

MOHAMMED JSC

E I have had the privilege of reading the judgment of my learned brother, Wali, J.S.C. in draft and I agree that this appeal succeeds in part. My learned brother has considered all the issues raised for the determination of this appeal and I have nothing more to add. I accordingly agree to reduce the damages awarded by the trial court and which had been affirmed by the Court of Appeal. My learned brother has made a considerable finding on this award and I agree with him that general damages be reduced to N500,000.00 only. I abide by all the consequential-orders made in the lead judgment.

F

ONU JSC

G I have had the benefit of reading in advance the judgment of my learned brother, Wali, J.S.C. just delivered and I agree with his reasoning. I do not consider it necessary for me to restate the facts that have given rise to this case since my learned brother has adequately set them out in his comprehensive judgment. Suffice it to say, that all the six issues which in the Appellant's view (and by and large an: adopted by the Respondent with modifications) which arise for the determination of this Court, are:

H

1. Whether the court below was not in error when it held that it would not, and in fact did not countenance the: Appellant's Reply Briefan4Respondent's Brief in respect of the Cross-Appeal by the Respondent.

2. Whether the Court below was in error when it struck out ground of the original Grounds of Appeal ground 3 of the Additional Grounds of appeal

filed by the Appellant.

3. Whether the Court below was not in error when it held that the learner trial Judge was right when he entertained and gave judgment in favour of the respondent in respect of those parts of the claim as finally made through amendment of the proceeding but which were not in existence as at August 14, 1987 when the suit was filed. B

4. Whether the Court below was not in error when it held that the trial Judge was right when he held in effect that it would be proper for the Respondent to remit money to overseas countries through what the Respondent described as “private arrangement” not being through the channels laid down by the law and in using the rates of exchange alleged to be applicable through that means in the calculation of the special damages awarded under this head. C

5. Whether the Court below was right when in giving judgment in this appeal before it, the court ordered that the relief claimed in paragraph 48 (iii) of the final Statement of Claim be amended.

6. Whether the Court below was not in error on the facts and in law when it upheld the award of general damages in the sum of N20 million made by the trial Court in favour of the Respondent. D

I wish to expatiate on each of the issues in the order they were argued by the Appellant as follows:-

ISSUE 1:

The Appellant’s grouse in this issue is whether the Court of Appeal (hereinafter referred to as the court below) was not in error when it held that I would not, and in fact did not, countenance the Appellant’s Reply Brief and Respondent’s Brief in respect of the Cross-Appeal filed by the Respondent. It is pertinent to point out that the gravamen of Appellant’s complaint is that F court below acting suo motu ought not to have discountenanced its Reply Brief and Respondent’s Brief to the Cross-Appeal. Giving its reasons, which in my view cannot be faulted, for discountenancing these processes the court below had this to say:

“There are two further fundamental defects in the Reply brief and Respondent’s brief in respect of the Cross-Appeal filed on 24 February, 1993. The first defect is that the Reply Brief and the Respondent’s brief in respect of the Cross-Appeal was filed out of time. The Appellant was granted two days to file the Reply brief and the Respondent’s brief to the Cross-Appeal. The Respondent filed the Respondent’s brief and the Cross-Appellant’s brief on H 17 February, 1993. If the Appellant was served on 17 February, 1993, the Appellant’s time within which to file all his process would expire on 19 February, 1993.

The Appellant's Reply brief and the Respondent's brief to the Cross-Appellant's brief filed on 24 February, 1993 was dated 19 February, 1993. This means that the Appellant was served either before or on 19 February, 1993.

The brief which was filed on 24 February, 1993 was therefore filed out of time. The appeal was adjourned by consent of both counsel to 25 February, 1993 for hearing; the day on which the appeal was heard. The 19 February the day the Reply brief was settled was a Friday. The brief could therefore be settled on that working day. In my judgment, when a process has been filed out of time, the consequence is that such process must be deemed not to have been properly filed. It follows that there was no Reply Brief nor a Respondent's brief to the Cross-Appeal. Every submission made based on the Reply brief and the Respondent's brief to the Cross Appeal must be discountenanced. It means that all the new points contained in the Respondent's brief remain unanswered and all the material points of substance contained in the Cross-Appeal's Brief remain unanswered....."
(Underlining is by me for emphasis).

Since the processes were filed out of time, the contention that the court below should have called the attention of the Appellant to its (Appellant's) mistake and extended time, more so that the parties had made use of those briefs in their Address, would in my view, be of no consequence. This is because there was no time that the Appellant filed a Reply Brief or Respondent's Brief to the Cross-Appeal on 17 February, 1993; what the Appellant filed being Appellant's brief on 6th July, 1990 and the Respondent's brief filed on 21st November, 1990 respectively - both of which were abandoned and so not before the court. Indeed; the court below put the matter beyond peradventure when it further held as follows:-

"The second effect is that assuming the reply brief was filed within time, learned counsel, for the appellant dealt in the Reply Brief with the Appellant's Brief filed on 6 July, 1990 and the Respondent's brief on 21 November, 1990 both of which have been abandoned and superseded by the Appellant's amended brief filed on 3 February, 1993 for which leave was granted on 1st February, 1993 and which was deemed to be properly filed and served on that day. The relevant find current Respondent's brief in this appeal is the one filed on 17th February, 1993 for which leave was granted on 15 February, 1993."

The Reply Brief and the Respondent's Brief to the Cross-Appeal amounting, as they did, to a nullity, the court below was perfectly justified, regardless of the fact that the parties erroneously dealt with them as if they existed, to declare them suo motu a nullity. In this wise, I agree with the

Respondent's submission that a court has no jurisdiction to entertain a brief which was filed in reply to a non-existent brief. For instance, if there is no statement of claim any defence purportedly filed is a nullity. See Buraimoh v. Bamgbose (1989) 3 NWLR (Part 109) 352 where Nnaemeka-Agu, J.S.C. at page 360 of the Report said:

*In this court the learned counsel for the appellant, Mr. Sofunde, filed, a brief. B
By reason of a procedural error, it turned out that the brief which the learned
Counsel for the respondent, Mr. Fashanu, was to have relied upon was filed
before the appellant had leave to appeal and so is a nullity.*

See also Amaefule v. The State (1988) 2 NWLR (Part 75) 156 which is authority for saying that it is a queer and awkward procedure to file a reply C brief before receiving the appellant's brief and that "A Respondent's Brief" being an answer to the appellant's brief, it follows that if there is no brief, there can be no answer, And as this court had occasion to stress in Ladejo Onifade v. Alhaji Alimi Olayiwola & ors. (1990) 7 NWLR (Pt. 161) 130 at 166-167.

D

*"Needless to say that rules of court must prima facie be obeyed.
(See Ratman v. curmarsary (1965) 1 W.L.R. 8). It is the court which can extend
an Indulgence to a party in a case before it to depart from the rules. See
Finding v. Finding (1939) 2 E.R. 173 at 177. The courts have an inherent
jurisdiction to ensure compliance by litigants with the rules of court and to E
strike out any process not filed in compliance with the relevant rules. See
Reichel v. Magrath 14 App. Ch. 665; Huntly v. Gaskell No. 1 (1905) 2 Ch.
655; Nixon v. Loundes (1909) 2 Ir. R. I. So, in my judgment, the document
labelled the brief of the appellant could have been properly struck out in the
lower court by reason of the fact that it was not a brief within the contempla- F
tion of the relevant rules of court. The lower court had extended to the
plaintiff the indulgence of treating the document as a brief, notwithstanding
its serious defects. In the circumstances, in my judgment, the plaintiff cannot
now be heard to say that the lower court had taken no cognizance of this
document before arriving at its decision in the instant case."*

G

In the instant case, it is clear that there was no application for extension of time before the court below albeit that Appellant was aware that it was out of time and the attention of its counsel was drawn thereto by Respondent's counsel at the hearing of the appeal. A cursory examination at the purported H discountenanced show clearly that they were a reply to the, 1990 brie which had been abandoned, one repetitive of facts which Appellant had over-which had been in its main (Appellant's) Brief and Appellant's counsel's view on cases cited by the Respondent in its Brief. In as much as the Respondent's

Cross-Appeal as set out in/its first relief was for the increment of the N20 million to N30 million but was dismissed by the court below in the face of its (Appellant's) Brief having been discountenances; that as Respondent's .second relief in the cross-appeal was that Appellant should pay in Naira the equivalent of the money due on the outstanding bills whenever it chose to pay it and Appellant rightly, did not write a word in opposition to the Respondent's Brief on the point, the argument thereon cannot be pushed too far. The Appellant's complaint therefore that a Brief which did not in fact exist was discountenanced, is to say that least, inconceivable. In conclusion, I am of the firm view that on the alleged non-consideration of the Reply Brief, that the Appellant was neither prejudiced nor was a miscarriage of justice occasioned thereby, particularly so when the Reply Brief is (a) a reply to 1990 briefs which had been abandoned three year earlier , (b) a repetition of what Appellant had already presented in its main (Appellant's) Brief which therefore assumed the magnitude of a licence to repeat issues or evidence or an attempt to improve on its (Appellant's) Brief with a view to arguing the case all over again. Assuming without conceding that the court below in the case in hand was wrong to have jettisoned the defective Reply Brief and Respondent's Brief to the Cross Appeal, such as error cannot and would not warrant a reversal of the judgment of the court below as it did not engender a miscarriage of justice. See Onifade v. Olayiwola (supra) at pages 171, 168E and 138 (per Olatawura and Agbaje, n. SC). See also Far East Merchantile Co. Ltd. v. Jackie Philips Photos Ltd. (1974) 11 S.C: 225, 231-232; Eme v. The State (1964) 1 All NLR. 416. All the Cases cited by the Appellant are, in my respectful view, of no avail.

This issue is accordingly resolved against the Appellant.

The second issue is whether the court below was not in error when it struck out ground 4 of the original Grounds of Appeal and ground 3 of the Additional Grounds of Appeal filed by the Appellant.

Ground 4 of the original grounds of Appeal contained on the Appellant's Notice of Appeal which is the subject-matter of the complaint herein can be seen at page 955 of the record of appeal and it reads:

"4. The learned trial judge erred in law and came to a wrong decision when he gave judgment to the plaintiff on its claim for general damages when evidence given in respect thereof WAS AT VARIANCE WITH PLEADINGS."

The Appellant's grouse is against the striking out of that ground as well as ground 3 of the additional grounds of appeal referable to the award of damages only. A cursory glance at pages 815 to 825 of the record of Appeal embodying Appellant's Brief clearly indicates how it (Appellant) devoted those pages to the treatment of general damages but no where is any mention made

about evidence being at variance with pleadings.

Similarly, there is nothing in the brief of the Appellant in support of the ground of the additional grounds of appeal alleging that the judgment is against the weight of evidence in respect of the finding of liability on which the trial court based its judgment that the Appellant is duty bound to pay the money due to the overseas suppliers at the prevailing rate when he chooses to pay. Moreover, even in respect of general damages, the few complaint about the evidence of P.W.4 and P.W. 5 do not qualify in law as it may, the court below having thoroughly considered the issue raised on weight of evidence. Despite the serious error committed by the Appellant, the court below nevertheless considered all three issues raised in all the grounds of appeal when it said:

“Having pointed out all these lapses in the appellant’s brief of argument, I am constrained to consider the three issues formulated by reference to the seven grounds of appeal and will discountenance any ground of appeal which is not referable to any of the three issues raised in the appellant’s briefand so I hold the view that because of the complexity of the appeal, the merit therein should be properly considered.”

It ought to be noted before I conclude my consideration of this issue that it is trite that issues and not grounds are what are argued in this court and the Court of Appeal. See Macaulay v. N.A.L. Merchant Bank Ltd. (1990) 4 NI I{ 83 at 321.

Thus, once in the instant case, the three issues formulated based on the grounds filed have been considered and resolved, the ground covered by those issued must be treated as having been considered. See Onifade v. Olayiwola (supra) Busari v. Osem (1992) 4 NWLR(Part,237) 557 at 580; Osinupei v.Saibu (1982) 7 S.C. 104 and Ugo v. Obiekwe(1981) 1 NWLR (Part 102) 108. As this court had occasion to point out in Alhaji Momodu and ors. v. His Highness Alhaji Momoh & ors. (1991)1 NWLR (part 169) 621 (per Uwais, JSC):

“..... The issues FORMULATED FOR DETERMINATION take the place of grounds of appeal and when the issues have been-considered by the Appellant court that is equivalent to considering the grounds of appeal. This is the essence of the practice of Brief writing” See also Aja & anor. v. Okoro & ors. (1991)7 NWLR (Part203)260at277. My answer to issue 2 H is therefore rendered in the negative.

Issue 3 asks whether the court below was not in error when it held that the learned trial Judge was right when he entertained and gave judgment in favour of the Respondent in respect of those parts of the claim as finally

made through amendment of the proceeding but which were not in existence as at August 14, 1987 when the suit was filed.

Strictly viewed, this issue is unrelated to any of the grounds of appeal; it can at best be said to be remotely related to ground 4 as contained in Appellant's Notice of appeal. The complaint being substantially different from B the issue raised on the ground of appeal before the court below, ordinarily ought to be dismissed as going to no issue. See Western Steel Works v. Iron & Steel Workers (1987)1 NWLR (Part 49) 284 at 295. Albeit, I deem it necessary to consider it for what it is worth.

The gravamen of Appellant's complaint against the judgment of the C Court below is that what the Respondent was entitled to was the actual cost of remittance as at 1987 and that the Respondent ought to have remitted the money on its own. Learned Senior Advocate for the Appellant concedes that the, court has unfettered power to grant amendment but maintains that all that the Respondent was entitled to was no more than the ACTUAL COST OF D THE REMITTANCE at the time the writ was issued in August, 1987, to wit: N487,397.23 This argument, followed by Appellant's own admissions are better brought out graphically from the following extracts at pages 18, 19, 20 and 21 respectively of the Appellant's Brief as follows:-

".....*The Appellant also concede that the effect of the E amendment of the writ and of the Statement of Claim was that both took effect as from the date when the original writ and the Original Statement of Claim were filed.*"

".....*We would like to say again that the submission of the Appellant was that the Respondent was entitled to no more than the sum of F N487,397.23.*"

".....*According to the Respondent, the cost of re-mitting the outstanding bills would have been N487, 397. 23. By the amendment, that cost was alleged to be N12, 302,555.24. The judgment in this respect was in the sum of N103,375.44. The sum of N12,302, 555. 24 was G arrived at by the Respondent making claims in respect of additional sums occasioned by the change in the value of the Naira vis-a-vis the foreign currency. The case of the Appellant is that those additional claims should not have been granted.*"

".....*It is our submission that he was in error H in thus arriving at the figure of NJ2,302, 555.24 instead of the figure of N487,397.23 which was based on the rates applicable when the writ was issued.*"

Now that Appellant failed to remit the money one may ask, who pays difference in the cost of remittance the time the writ was issued and when actual

remittance took place?

The Respondent's case, be it noted, is based on a breach of contract arising from negligence as averred in paragraph 47 of the amended Statement of Claim with respect to the 174 bills handed over to the appellant for processing through the Central Bank of Nigeria to enable the Appellant pay the Overseas Exporters who had shipped books to the Respondent. Further, it is apparent 1 that the cause of action in this case arose on the Federal Government discovering that there were many outstanding bills out of the 174 embodied in the Debit Summary Status Report (DSSR) as confirmed by P.W.,3, a Central Bank Official, whose evidence of the fluctuating rates in the currencies mentioned in his evidence is uncontroverted. Thus, the argument by the Appellant that the sum of ₦12,302,555.24 was arrived at after making claims in respect of additional sums occasioned by the change in value of the Naira and this, after an amendment was effected vide paragraph 48 (iii) of Respondent's pleading to take care of the exchange rate, overlooks the nature of the international transaction and the difference between the "money of account" and the "money of payment." Significantly enough, there is no appeal against liability by the Appellant who was found negligent by the trial Judge which held that it (Appellant) should pay immediately at a time when the Naira was 12 to one dollar. Yet, payment was and is not effected despite seven motions brought by Appellant for stay of execution leading to the trial court's ruling at page 844D E (2) of the Record which granted –

"An order directing the defendant/respondent to pay the cost of remitting the outstanding bills at the rate of exchange providing as at the time of payment of remittance or by any process as may be directed by the Federal Government of Nigeria as at the time of judgment or....." F

As to the dichotomy between "the money of account" and "the money of payment" which implies that the Debtor must use as much "currency of payment" that would be enough to pay the debt in the currency of account whenever chooses to pay, this can best be illustrated in the decision in Woodhouse v. Nigeria Produce (1971) 1 A.E.R. 665 at 667 where Lord G Denning said:

"..... At the heart of the case, lies the difference between money of account and money of payment. It is this, the money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay.. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay. Take for example, suppose an English merchant buys 20 tons of cocoa bean from a Nigeria supplier for delivery in three months time at the price of 5.00 pounds Nigerian, payable in pounds sterling in London. Then the money of

account is Nigerian Pounds. But the money of payment is Sterling. Assume that, at the making of the contract, the exchange rate is 1.00 pounds Nigerian for 1.00 Sterling - "Pound for Pound." Then so long as the exchange rate remains steady, no one worries. The buyer pays 100.00 Sterling in London. It is transferred to Lagos, where the seller receives 1.00.00 Nigerian.

B But suppose that, before the time for payment, Sterling is devaluated by 14 percent, whilst the Nigerian Pound stands firm. The Nigerian seller is entitled to have currency worth 100.00 Nigerian, because the Nigerian pound is the money of account But the money of payment is Sterling. So the buyer must provide enough sterling to make up 100.00 Nigerian. To this, after

C devaluation, he will have to provide 116.50s in Pounds Sterling. So the buyer in England, looking at it as he will in Sterling, has to pay much more for his 20 Tons of cocoabeans than he had anticipated. He will have to pass the increase on to his customers. But the seller in Nigeria, looking at it as he will in Nigerian Pounds, will receive the same amount as he had anticipated. He will receive 100.00 Nigerian just the same; and he will be able to pay his growers accordingly. But now suppose that in the contract for purchase, price had been not 5.00 Nigerian but 5. 00 Sterling a Ton. So that the money of account was Sterling. After devaluation, the buyer in England would be able to discharge his obligation by paying 100.00 Sterling; but

E the Nigerian seller would suffer when he transfers 100.00 Sterling to Nigeria, it would only be worth 86.00 Nigerian, so instead of getting 100.00 Nigerian as he had anticipated, he would only get 86.00 Nigerian; and he would not have enough to pay his growers. So you see how vital it is to decide in any contract what is the money of account and what is me money of

F payment."

As the money on the outstanding unremitted bills could no longer be sent to the Respondent's book suppliers through the Central Bank of Nigeria but the Respondent must of necessity pay for the books or be guilty of immoral or criminal conduct, it must act in a legitimate way to send their

G money to them. See Olaogun Entemrises Ltd. v. S.J.&M. (1992) 4 NWLR (Part 235) 361 at 385. Such a transaction, this court has held, would not qualify for remittance if it is not submitted to the Central Bank of Nigeria. See A.C.B. Ltd. v. Obmiami Brick Stone (Nig), Ltd. (1990) 5 ~R (Part 149) 230 at 242.

Myanswer to this issue is rendered in the negative.

H The question posed in issue 4 is whether the court below was not in error when it held that the trial Judge was right when he held in effect that it would be proper for the Respondent to remit money to overseas countries through what the Respondent described as "arrangement" not being through

the channels laid down by the law and in using the rates of exchange allege, 10 be applicable through that means in the calculation of the special damage awarded under this head.

Like in most of the issues argued above, this issue is not strictly relate, 10 any ground of appeal but its grouse seems to be targeted at ground 5 when the Appellant assails the decision of the court below as erring in law B and so lame to a wrong decision by holding that:-

“The short answer to this question, in my view, is that nowhere in the judgment did the learned trial Judge hold that money should be remitted by the Respondent to overseas countries through illegal channels.....No evidence of illegality was led either in chief or by C cross examination. The plea of illegality cannot now be raised or entertained at the appeal stage as no such defence was ever pleaded.”

In my consideration of this issue I deem it necessary to point out the following inherent defects:-

Firstly, the complaint of the appellant in the lower court which ap- D pears to form the basis of ground 5 from which the issue herein, was tacitly formulated, was not canvassed in the record of proceedings in the court below. Thus, the ground is incompetent. A fortiori, the issue distilled therefrom.

Secondly, the word ‘black market’ used profusely in the Appellant’s E brief with care and caution by it, appears to me to be its own invention since the court below never used such words or said anything of the like.

Thirdly, the Appellant in its brief in the court below had submitted that or applied order would have been “A claim that appellant do pay the lawful equivalent of the various sums as at the date of judgment to the re- F spondent.” As Respondent’s claim at page 46 of the Record under claim (iii) of paragraph 48 which by amendment was not opposed was made in Respondent’s favour on 15/2/93, the Appellant’s appeal on this issue would appear to me to be purely academic.

Should I be wrong in the above conclusion I have arrived at, it is my G firm view that the burden of showing that illegality abound in the act of the Respondent remitting money out of the country illegally or through unlawful channels on the Appellant. Thus, as in my judgment, illegality neither having been pleaded nor evidence thereof given, this appeal ought to stand dismissed as the issue of what to pay to the Respondent’s overseas suppliers H and how In pay had been resolved by consent. In this wise, it ought to be borne in mind that an allegation that one intends to engage in illegality or commit a crime being a very serious allegation, the burden is on the party alleging illegality or the commission-of the crime in the transaction to prove

the fact. See Hire Purchase v. Richens (1887) 2 QBD 387 at 389. In which case, none of the parties to such a transaction is entitled to any remedy or relief from a court of law; indeed once a court or a Judge becomes aware of the illegality, it is the duty of that court or Judge to stop the case and dismiss the claim for being void and unenforceable. See Sodipo v. Lemminkainen Oy (1986) 1 NWLR (Part 15) 220 and Ekwunife v. Wayne CW.A.) Ltd. (1989) 5 NWLR (Part 122) 422 at 450. In the instant-case no such illegality had been pleaded and proved.

Despite the foregoing, the Appellant's submission was and still is that under the law, no "private arrangement" is permissible otherwise than by the purchase of foreign currency through the Bureaux de Change and that in any case, both at the time the suit herein was instituted and at the date the final statement of Claim was filed, no Bureaux de Change had been established. "Private arrangement", it strongly contended could only have meant "black market" and no other arrangement, adding that if by "private arrangement" the Respondent meant some legally approved method, then there must be stated rates set down in some document either in the Central Bank of Nigeria or in any of the approved Bureaux de Change or in the books of any other bodies lawfully carrying on transactions in foreign currency exchange.

Appellant, in my opinion, is confused as to the establishment of Bureaux de Change in that while in its brief it concluded that as at 14/8/87 up to the present time, transfer of money could be done through Bureaux de Change, yet on the same page it asserted that no Bureaux de Change had been established at the time the Statement of Claim was filed. In fact, the 'Respondent's as well as the defence witnesses on the point were not cross-examined and their evidence was thus largely uncontroverted. It is for this reason that the further submission by the Appellant

- (i) that no witness told the trial court what Respondent meant by private arrangement;
- (ii) that no definite evidence as to the rate of exchange under that sort of arrangement in respect of all or any of the currencies concerned to wit: pound sterling, D.S. dollar, Canadian dollar and the Indian Rupee was given;
- (iii) that not one of the two Bank officials called, namely P. W. 2 and P.W.3, tendered evidence of the rates;
- (iv) that P.W.4 who gave evidence on the matter was a banker and did not testify how he came by the rates he gave or at any rate he was unsure of those rates;
- (v) that D.W.1, a banker from the Appellant, told court that he did not know the rates and
- (vi) that the onus to prove the rates and of actual amount claimed as

special damages on this head certainly lay on the Respondent, are of no avail.

The further submission of the Appellant therefore that “private arrangement means lack market is clearly misconceived. It smacks, as I earlier pointed out, of an invention by the Appellant since it was in realization of the need to widen the scope of the foreign exchange market so as to ease the hardship of the citizenry in procuring foreign currency, that the Federal Government established the Bureaux de Exchange to operate as an informal foreign exchange market. B

Particulars of Error (e) to ground 5 of the grounds of appeal from which this issue supposedly emanates and which asserts that there was no pleading or evidence led by the Respondent to show the rate of exchange that would have been applicable in law on which any valid judgment could be given, cannot therefore be true. It is accordingly struck out. In the alternative, the issue in the result, is accordingly answered in the negative. C

The complaint in issue 5 is whether the court below was right when in giving judgement in this appeal before it, the court ordered that the relief claimed paragraph 48(iii) of the final statement of claim be amended. Characteristically as with other issues, this issue is not related to any of the grounds of appeal contained in the Notice of Appeal although ground 8 and some of its particulars, namely particulars (e) and (f), seem relevant in this regard. D

The ground (ground 8) without its particulars (e) and (t) states:- E

“.....The Court below erred in law by holding that:
“With regard to the second issue, I think that having regard to the rate of exchange in the country and having regard to the fact that either party to this contest has a right of appeal, an order by the learned trial judge that the defendant should pay the sum of N11,103,375.44k immediately has the effect of frustrating the judgment. In order that the judgment might not be N11,103,375.44k the immediate payment of the sum of N11,103,375.44k should have been made elastic as it claimed in paragraph 48 (iii) of the amended statement of claim, making it possible to explore the possibility of arranging remittance of the sum by any process as may be directed by the Federal Government of Nigeria at the time of payment. The appeal on the second issue succeeds.” F

and thereby came to an erroneous decision in the appeal. G

PARTICULARS OF ERROR

(a) The respondent’s motion dated 15th May, 1992 for leave to vary the appellant of the court below in respect of the exchange rates used in calculating the amount needed to remit the outstanding bills to the suppliers was opposed by the appellant. H

(b) The court below is not a trial court, its duty is to see whether the trial court has used correct procedure to arrive at the right decision.

(c) The case and the submission of the respondent before the court below were that the trial court was to assess the rate of exchange at the time of assessment.

B (d) The evidence led at the trial was on 'private arrangement,' which the learned trial judge accepted on the following figures

(a) U.K. $\{452,578.76 \times 20 = \text{N}9,031,575.20\text{K}$

(b) U.S. $\{ \$283,831.18 \times 12 = \text{N}3,405,974.16\text{K}$

(c) Canadian $\{ \$75,836.15 \times 9 = 763,361.50\text{K}$

C (d) Indian Rs $\{ 1-3,196.72 \times 0.89 = 136,345.08\text{K}$

Particular (a), in my judgment, does not support the complaint and is completely irrelevant while particular (b) constitutes an argument and is unrelated to the ground of appeal; particular (c) does not support the complaint and is irrelevant while particular (d) does not support the complaint as framed.

D Particulars (a), (b), (c) and (d) in the result be and are hereby struck out.

In respect of particulars (e) and (t) it needs to be borne in mind that the Respondent, in anticipation of the problems that the Appellant might create by not complying with the court order, coupled with the danger that the E Naira might continue to depreciate fast, rightly in my view, pleaded in paragraph 48 (iii) (supra) that the court should order an alternative remedy that the Appellant should pay to the Respondent the Naira value of the outstanding bills by any process as may be directed by the Federal Government of Nigeria as at the time of the judgment or payment.

F It is incontestable that the Respondent amended its statement of claim with Appellant's consent for an order that the Appellant do pay the cost of remittance at the date of payment. There were therefore materials before the court below for holding the view that the Appellant indeed frustrated the orders of the trial court to the extent that the amount that was ordered to be G paid immediately after judgment on 30/10/89, had become grossly inadequate by 24/5/93 when the court below delivered its judgment. Besides, as the application to amend the notice of cross-appeal in line with the pleadings was not opposed by the Appellant, that it filed this appeal at all is tantamount, in my view, to an abuse of court process. See Ogbuanyinya v. Okudo (No.2) 14 H NWLR (Part 146) 551 at 572 and Alade v. Alemuloke (1988) 1 NWLR (Part. 69) 207 at 213. All illustration of such abuse of court process is to be seen in the Appellant's brief in the court below where it argued, among other that-

".....The claim should have been either to recover the monies plus

damages if the appellant was in any way at fault, OR for an order that the appellant do pay to the beneficiaries the sum the respondent was owing them in currencies of their different countries. The alternative to the last mentioned order would have been a claim for an order that the appellant do pay the lawful equivalent of the various sums as at the date of judgment to the respondent.”

It ought to be pointed out that as this court cannot be used to frustrate legitimate transactions, the transaction giving rise to the case on appeal on being merely legitimate and capable of being financed by the Central Bank: rd Nigeria in 1982/83, the Respondent's applications for the lawful remittance of foreign exchange were mortally delayed by the Appellant. What the Appellant wants is to pay the cost as at 1982/83 leaving one with the query of who then pays the difference between the rate as at 1982/83 and at the time of payment. The Appellant's contention that there is no evidence on which the court could base its order nor any evidence that it (Appellant) would j till the judgment, cannot be correct, more so that the court's record is replete with Appellant's D acts of defiance and frustration of court's judgment. Besides, there is abundant evidence to show the rate of exchange when the transactions took place. It is also common ground between the parties and indeed it is common knowledge that the Naira has continuously devalued since 1984 it is still nose diving. By its order which is crystal clear, the court below never ordered the E Federal Government to order the Appellant to do anything; what it means is the lawful process of sending money out of the country as may be in operation and being guided by Federal Government laws, orders or regulations at the time of payment. The Appellant's contention that the Respondent was to mitigate damages is preposterous in that issue in the first place neither arose F from the grounds of appeal nor from the particulars thereof. Secondly, the Appellant neither raised the issue of mitigation of damages in its pleadings nor argued same in the court below. Thus, it is too late to raise it in this court vide Kosile v. Folarin (1989)3 NWLR (Part 107) 1 and Union Bank of Nigeria v. Nnoli (1990)4 NWLR (Part 145) 530 C.A. The question of mitigation of dam- G ages therefore did not arise in so far as the Appellant overlooked the fact that up to 1987 when the final DSSR was published, it did not accept that the Central Bank of Nigeria would not accept the remittance of the outstanding bills at the prevailing rate in 1982/83. This issue is accordingly resolved against the Appellant.

The sixth and final issue reads:

“..... Whether the court below was not in error on the facts and in law when it upheld the award of general damages in the sum of N20 million made by the trial court in favour of the respondent.”

As I had occasion to point out before, the Appellant here too, did not relate this issue to any of its grounds of appeal. Albeit, a cursory look at the grounds of appeal reveals that grounds 6 and 7 are relevant while ground 10 is only partially relevant. Grounds 6 and 7 from which this issue is partly an offshoot, bereft of their particulars, provide respectively as follows:-

B ground 6 *“The court below erred in law in holding that the award of damages of N20 million should be based on the rate of inflation and fluctuations of the value of the Naira in the World market and thereby came to a wrong decision in the appeal. “*

GROUND 7: *“The court below erred in law by holding that the award of N20 C million as general damages was valid without properly considering the submission made thereon and thereby came to a wrong decision in the appeal.”*

In my treatment of the above two grounds coupled with ground 10 on weight of evidence and from which the issue under consideration partly D flows, it is pertinent to observe firstly, that general damages are losses which flow naturally from the defendant (in this case the Appellant) and its quantum need not be pleaded or proved as it is generally presumed by law. See Bello v. A. G. of Oyo State (186)5 NWLR (Part 45)828 and Ijebu Local Government v. Adedeji Balogun Limited & Co. (1991) 1 NWLR (Part166) 136.

E Secondly, where a trial Judge in assessing general damages, proceeds upon a. wrong principle or on no principle of law and makes an award which is manifestly unwarranted, excessive, extravagant, unreasonable and unconscionable in comparison with the greatest loss that would possibly flow from the said breach of contract without stating whether the amount awarded is for F loss of business or loss of profits and the measure of the basis of its assessment, the appeal court will interfere therewith but not otherwise. See Hadley v. Baxendale (1854)9 Exch: 314; Victoria Laundry Ltd. v. Newmau Industries Ltd. (1949) 2 K.B. 528; Roland Webster v. Williams Rosangue(1912) A.C. 394; Okoro v. Ezuma (1961) All N.L.R. 183; Idahosa v. Oronsave (1959)4 F.S.C. 166; Ziks Press Ltd. v. Alvanlkoku 13W.A.C.A. 188 at 189; P.Z. & Co. Ltd. v. Ogedengbe (1972)1 All NLR (Part 1) 202 at 205-206; Uwa Printers (Nig.) Ltd. v. Investment Trust Ltd. (1988)5 N.W.L.R. 110 at 111-112; OkongWlfv. N.N.P.C. (1989)4N.W.L.R. (P 115) 296 and Osuji v. Isiocha (1989)3 N.W.L.R. (part 111) 623 at 627.

H Indeed, the courts have stated times without number that apart from damages naturally flowing from the breach no other form of general damages can be contemplated. See Nigeria Produce Marketing Board v. Adewumini (1972 All N.L.R. (Part 2) 433 at 438 and P.Z. & Co. Ltd. v. Ogedeugbe(supra) For as Devlin, C.J. crisply put it in Biggin v. Permanite (1951) 1 K.B. 4 22 at 438 on the award of

damages:

“Where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can.”

See also Odumosu v. African Continental Bank Limited (1976) 11 S.C. 55 at 68-69 wherein it was held by this Court (per Idigbe, J.S.C.) that:

“General damages..... are such as the jury may give when the Judge cannot point out any measure by which they are to be assessed, except the opinion, and judgment of reasonable men....from the point of view of proof (evidence) general damages are classified into two categories:

(1) that in which they (damages) may be inferred; and

(2) that in which they will not be inferred but must be proved (for instance, damages arising by way of general loss of business following injury). Even in regard to this latter category evidence will not be allowed to be given by a plaintiff of loss of a particular transaction or custom (following the injury) with a view to showing specific loss for that is a matter which falls in the realm of special damages.....”

See also Halsbury’s Laws of England Volume 12, 4th Edition, paragraph 1113 and Charlesworth on Negligence, 5th Edition paragraph 127, page 82 wherein it is stated that:

“General damages are those which the law presumes to flow from the negligence complained of.”

In the instant case, although on the pleadings as amended and the unchallenged uncontroverted evidence led through P.W.4 and P.W.5, the learned trial Judge made unimpeachable findings of fact and fully evaluated the defence through D.W.1, this court pointed out in West African Shipping Agency (Nigeria) Limited & anor. v. Musa Kalla (1978) 3 S.C. 21 that:

“It is wrong for the learned trial judge to take into consideration for the general damages, matters which he should have considered in his award of special damages.”

In the instant case, it would, in my judgment amount to double compensation against which the law frowns to award the Respondent heavy general damages to the tune of N20,000.00 more so after the award of special damages.

See N.P.A. v. Ephraim Banire (1972) 3 S.C. 168 and Imana v. Robinson (1979) 3-4 S.C. 24.

The respect of ground 6, the complaint is that it was wrong to base the award of N20 million damages on inflation and fluctuation in the value of the Naira. Much as this complaint does not follow from the grouse in the ground, it is genuine, in that it is correct to say that to say that “The claim is highly exaggerated.” I shall come to this point shortly. I however, do share the

Respondent's view that particular (b) which quarrels with the Black Market rate in 1989 as being N20.00 to {I has nothing to do with inflation and fluctuation; that particular (e) is totally irrelevant to the complaint of inflation or fluctuation, while Particular (t) is no more than an argument.

In respect of ground 7, the Appellant's grouse is that the sum of N20 B million was awarded without proper consideration of the submissions made thereon. In my view, all but particulars (k), (l) and (m) to which I will also advert shortly, do not support the complaint in this ground. Particulars (a) to (j) are accordingly struck out.

Now, of the N33 million claimed as general damages to the Respond- C ent, N20,000,000.00 out of which the trial court awarded and was affirmed by the court 'below, NI million constituted general damages representing the Managing Director of Respondent's, title documents withheld from him by the Appellant. The award therein is palpably wrong since the reason given by the trial court that the deposit of these title deeds was for a purpose that never D existed is incorrect; It is an argument that cannot be readily sustained, more so that there was an agreement between the parties and it was a sort of guarantee for performance. Such that, if the Respondent felt no purpose would be served by its depositing them with the Appellant, it would never have asked for its Managing Director to deposit them with the appellant. While therefore, the E appellant had no business keeping or withholding these title deeds once the Managing Director of the Respondent who was not owing it a kobo demanded for the, they ought to have been returned to him. The evidence of P. W. 4 to the effect that -

"Had the Plaintiffs been in possession of these title deeds we would F have gained a million naira annually"

Could not have availed the Respondent. A fortiori, the court below was patently wrong to have affirmed this item of damage which is accordingly set aside.

On the argument that the award of N20,000,000.00 general damages by the G High Court and confirmed by the court below should not be disturbed, I have considered all the authorities proffered by the learned S.A.N. for the Respondent including the latest in the series which was indeed forwarded to us while writing out judgments, viz Ijebu Ode Local Government v. Adedeji .Balogun and Sons Limited & Co. (supra). While I am of the view that the trial court and H the court below acted largely on the uncontroverted and unchallenged evidence of P. W.4 and P. W. 5 to award the entire amount of N20 million, which as pointed out hereinbefore is outrageous or arbitrary, this court will interfere with the quantum of award. The principles governing such an interference have been laid down in such cases as Balogun v. Labiran (1988) 1 NSCC. 1056;

Dumez v. Ogboli (1972) All NLR. 244 at 253; Uwa Printers (Nig.) Ltd. v. Board of Management Eku Baptist Hospital (1978) 6 7 S.C. 15. In the latter case, this court, following the English decision in Hadley v. Baxendale (supra) at page 354 (per Anderson B) laid down the rule on damages which has been followed faithfully ever since by the courts, to wit: that damages in respect of a breach of contract are such as may fairly an, reasonably considered as either arising naturally in the usual cause of thing from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contact, as the probable result of breach, as follows:-

“The principles upon which an appellate court will act in reviewing an award of damages are now Well settled and can be summarized as follows:

An appellate court is not justified in substituting a figure of its own for that awarded by the lower court simply because it would have awarded a different figure if it had tried the case at first instance. Before the appellant court can run properly interfere, it must be satisfied either that the judge in assessing the damages applied a wrong principle of law such as taking into account some irrelevant factor or leaving out of account some relevant factor or that the amount awarded is either so ridiculously low or so ridiculously high that it must have been a wholly erroneous estimate of the damage.”

While strictly speaking, I cannot see the wood for the trees in the Appellant’s assertion that the trial Court modulated the general damages from N500,000.00 to N20 million in that the Respondent led evidence which it (Appellant) failed to challenge or controvert at the trial as I had hereinbefore observed, it being palpable that to award N20 million as general damages to the Respondent is clearly unjustified and unwarranted since it is exaggerated and is ridiculous high as well as an erroneous estimate of the damage, I award in Respondent’s favour the sum of N400,000.00 as general damages – the latter being, in my estimation, the amount flowing from the Appellant’s breach complained of.

It is for the above reasons and those more elaborately set out in the judgment of my learned brother Wali, J.S.C. that I agree with his reasoning but not his conclusion as regards the quantum of award. I, however, will make the same order for costs as contained in the lead judgment.