

**SUPREME COURT OF NIGERIA**  
5TH FEBRUARY, 1999. SC. 165/1992  
**CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,**  
**E. O. OGWUEGBU, S. U. ONU, JJSC.**

ACME BUILDERS LIMITED ..... PLAINTIFF/APPELLANT  
AND  
1. KADUNA STATE WATER BOARD  
2. ATTORNEY-GENERAL & COMMISSIONER ..... DEFENDANTS/  
FOR JUSTICE, KADUNA STATE. RESPONDENTS

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**APPEALS** - Discretion - Exercised by lower court - Where judicious - Appellate court will not disturb it - Merely because it would have exercised that discretion differently

**CONTRACTS** - Breach of contract - Anticipated profit - Must be established by evidence - Burden of proof is on the party who asserts.

**CONTRACTS** - Breach of contract - Where it is established - Evidence must be adduced on which assessment of damages it to be based.

**DAMAGES** - Liquidated damages - Nature of use of subject matter of contract - Is irrelevant in awarding liquidated damages or penalty.

**JUDGMENTS** - Interest on judgment debt - From when calculated - Is after adjudication not from accrual of cause of action.

**JUDGMENTS** - Interest on judgment debt and contractual interest distinguished - Contractual interest accrues from due date until date of judgment.

**WORDS & PHRASES** - "Liquidated damages" and "penalty" - Are interchangeable terms.

### **FACTS**

The respondents awarded a contract for the construction of 320 productive boreholes in the Kachia and Jema'd Local Government Areas of Kaduna State to the Appellant, at a cost of 9,402,241.00. The contract was to be completed within 24 months from the date of commencement of work. Under the contract work was to commence on the direction of the 1st respondent who was to pay the appellant 10% of the total value of the contract price as mobilization fee. The 1st respondent directed the appellant by a letter dated 10/11/81 to commence work as agreed, but this did not happen until March 1982, because the agreed mobilization was not released. The reason was that the appellant produced an Insurance Bond as against a Bank guarantee requested by the respondent. The respondent rejected the Insurance Bond. Again it was agreed that 6 rigs were to be used for the execution of the contract but only 2 were used. Due to these and other factors the respondent terminated the contract.

Consequently, the appellant commenced a suit for breach of contract in the Kaduna State High Court, holden in Kaduna, claiming inter alia, a declaration for breach of contract, value of certified but unpaid works, retention fees, etc. The respondent also counter-claimed. At the end of trial, the trial judge granted both the appellant's and respondent's claims and counter-claims in part. Dissatisfied with part of the decision the appellant appealed to the Court of Appeal, which allowed part of the appeal. Still dissatisfied with part of the decision of the Court of Appeal, the appellant has now appealed against part of that decision to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(1) Whether having found the 1st Respondent liable for breach of contract, learned Justices of the Court of Appeal did not have sufficient evidence/materials before them, to assess and award General Damages/Loss of profit in favour of the Appellant for the breach committed.*

*(2) Whether having regard to the specific findings the learned Justices of the Court of Appeal, that the breaches allegedly committed by the Appellant were waived/condoned to by the Respondents, the learned*

*Justices of the Court of Appeal were still justified to have relied on the Appellant's said condoned/waived breach of the Appellant as the basis for awarding nominal damages in favour of the Appellant. Etc.see p.277*

**HELD** (Unanimously allowing the appeal per lead judgment of **ONU JSC**)  
***Breach of contract - Where it is established***

1. Thus, the appellant's contention here which is that the learned Justices of the Court below based their evaluation on extraneous and irrelevant" facts, cannot, with the utmost due respect, be sustained. That the contention cannot be correct may be gleaned from the evidence adduced through two witnesses called by the appellant as follows:-

*"PW1: We also ask for General Damages of 1,664,000 caused by the wrongful termination. This is 20% of the contract price which the plaintiff would have made as profit and since the 1st Defendant stopped the plaintiff from performing, they should pay this sum to the plaintiff."*

*"PW2: We are claiming 1,664,000. This amount represents 20% of the uncompleted job which is the lowest profit margin in construction and drilling industry. The un-completed job was worth 8,239,137.58. We ask for this sum because 1st Defendant wrongfully terminated the contract."*

The foregoing in effect, enable me to hold as done in the Jammal's case (supra) which is on all fours with the instant case, to the effect inter alia, that:

*"..... perhaps the greatest difficulty in the way of the defendants at any rate is the absence of evidence on the amount it had cost them to get the reinstatement of their structural work or the monetary value of the shortfall in the performance of the diminution in the value of the work done in fact. A breach is established but there is no evidence on which the necessary assessment can be based. In such circumstances, the law allows a court to award only nominal damages." (p. 284 G)*

***Anticipated profit - Must be established by evidence***

2. Consequently, anticipated profit (in the realm of civil cases) must be established by evidence and hence the burden is on the appellant who

asserts since he it is, who must discharge that burden before the respondents can be called upon to show that the anticipated profits were probable. See Kate Enterprises Ltd. v. Deawoo (Nig) Ltd. (1985)2 NWLR (Part 5)116 and section 134 (1) and 136(1) of the Evidence Act, Cap. B 112, Laws of the Federation, 1990. In the case in hand, I agree with the respondent's submission that the appellant failed to adduce additional evidence showing that 1,664,000.00 represents 20% of the contract price which they would have made as profit had the contract not been terminated. I also accept the respondents' submission that the court below was right in taking into consideration the fact that the termination of the contract was occasioned by the inability of the appellant to commence work when ordered to do so. (p. 289 B)

**D *Interest on judgment debt - From when calculated***

3. I am to point out that the court below rightly limited the award of 8% interest to 23rd July, 1985 instead of from 15/11/82 to the former date. In the first place, the appellant having woefully failed to adduced any tangible reasons why the period ought to have been extended to 27/10/89 should limit itself to when the contract was terminated on 23rd July, 1985 but not to continue to operate thereafter. Pertinent in this regard is the case of Reuben N.A. Ekwunife v. Wayne (West Africa) Ltd. (1989)5 NWLR (Part 122) 422 where one of the issues that arose for the resolution of this court was whether a court can order interest to be paid on a judgment debt from the date before the date of the judgment. It was held inter alia at page 446 of the Report that:

*"Interest on a judgment debt is therefore interest after adjudication. It cannot be before that incident. So, to award interest on the judgment debt from the date of accrual of the cause of action, as the learned Judge had done, and as the Court of Appeal impliedly thought, is a contradiction in terms."* (p. 290 G)

H

***Interest on judgment debt and contractual interest distinguished***

4. In the case of N.G.S Co. Ltd. v. Nigeria Ports Authority (1990)1 NWLR (Part 129) 741 where the second of two issues for the resolution of the

Court of Appeal was as to whether, having regard to the judgment of the Court of Appeal on 12th July, 1989, interest ought to have been awarded as claimed. It was held by the Court of Appeal in that case inter alia that the basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it to himself B for which he ought to compensate the plaintiff accordingly. Such an interest which is usually referred to as contractual interest which accrues from due date until date of judgment is, with due respect, not the same as that decided in the two cases above. They accordingly do not support the appellant's claim that the period of the award ought to have C been extended to 27/10/89. The principles these two cases enunciate are principles guiding the award of interest on judgment debts whereas the 8% interest being claimed by the appellant is not one that can be considered as a judgment debt. (p. 291 D) D

### ***Appeals - Discretion***

5. It is trite law that once a superior court as in the instant case, is shown to have exercised its discretion judicially and judiciously in the exercise E of its authentic jurisdiction, that exercise of discretion should and must not be disturbed by a higher tribunal for the reason it would have exercised that discretion differently. See The University of Lagos & Anor. v. Aigoro (1985) 1 NWLR (part 1) 143; Jammal Engineering Co. Ltd. v. F Missr. Nigeria Ltd. (1972) 1 All NLR (part 1) 322. In as much as the trial court did not exercise its discretion in the instant case arbitrarily in refusing to award interest on the judgment debt, the court below was right to have upheld that decision. There has been no miscarriage of justice G occasioned thereby and I so hold. (p. 293 B)

### ***"Liquidated damages" and "penalty"***

6. Furthermore, the evidence of D.W.4 for the respondent's claim for the sum of N416,006.87 was computed on the basis of 1% of unexecuted H works as set out in Exhibit 2 which was neither challenged nor countered by the appellant, particularly under the cross-examination of DW4. Thus, I take the firm view that the court below was right in making the

award under this head. In this wise, the term "Liquidated damages and "Penalty" would appear to me to be interchangeably the same. See Osborn's Concise Law Dictionary which defines liquidated damages to mean inter alia as "A genuine covenanted pre-estimate of damages for an anticipated breach of contract ....." and penalty as connoting "A punishment, particularly a fine or money payment ....." adding "The use of the term "penalty" or "Liquidated damages" is not conclusive. Vide Dunlop Pneumatic Tyre Co. Ltd. case (supra). (p. 295 A)

**C *Damages - Liquidated damages***

7. The appellant's contention that "in view of the non-revenue yielding nature of the boreholes, no pecuniary damages could have been suffered by the Respondents on account of the Breach allegedly committed by the Appellant" is misconceived. The fact that the boreholes were for public use cannot be held to also mean that the appellant was contracted to construct the said boreholes free of charge. Since the respondent contracted to pay the appellant the sum of N9,402,241,000 i.e. public money entrusted to the appellant to contribute towards the development and general welfare of the people of Kaduna State, the appellant having derogated from that civil duty by not completing the contract work, cannot be heard to run away from being asked to compensate the respondent with money be it called liquidated damages or penalty. (p. 295 F)

**NOTABLE POINTS OF INTEREST**  
**ONU JSC**

**G** *1. Arguments on a brief should be based on issues not grounds*  
Several cases had hitherto been decided by this court for the guidance of counsel to the effect that arguments on a brief should be canvassed on the basis of the issues and not grounds of appeal; failing which, the brief should be struck out and the appeal dismissed for non-compliance with the rules vide Order 3 Rule 2 (2) and (4) of the Court of Appeal Rules as amended. See also Ojiba v. Ojiba (1991)5 NWLR (Part 191) 296. (p. 282 D)

*2. Inelegant brief will attract reprimand of court but not dismissal*

It is now settled law that a faulty brief cannot be dismissed simply because it is faulty. The faulty brief may be stigmatized with observations of strictures, rebuke and reprimand but under no circumstance has this court dismissed an appeal merely because it was faulty, bad or inelegant. B In saying this, it ought to be borne in mind that there is a difference between filing no brief at all on the one hand, and where on the other hand, the brief is bad or faulty or inelegant in the sense that it has not followed the prescribed format. The content of the brief, it ought to be remembered, its essential part (substance) while the format is a matter of C formality (form). Where a brief is completely devoid of content (the same cannot be said here of the respondents' brief) it is no brief and may lead to its dismissal, whereas inelegance and lack of format will only attract the stricture or reprimand of the court. See Atipioko Ekpan & D Anor. v. Chief Agunu Eyo (1986)3 NWLR 63 at 67 and Obiora v. Osele (1989)1 NWLR (Part 97)279. (p. 282 G)

*3. Nature of general damages and principles governing same*

Now, in the law of contract, general damages are those damages which the law implies in every breach and in every violation of a legal right. See Famojuro v. Otamu (1955-56) WNLR 67. It is the loss which flows naturally from the defendant's act and its quantum need not be pleaded or F proved as it is generally presumed by law. The manner in which general damages is quantified is by relying on what would be the opinion and judgment of a reasonable person in the circumstances of the case. 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 G unwarranted, excessive, extravagant, unreasonable and unconscionable in comparison with the greatest loss that would possibly flow from the said breach of contract and without stating whether the amount awarded is for loss of business or loss of profit or anticipated profits and the H measure or basis of its assessment such an award would not be allowed to stand. Indeed, the courts have repeatedly held that apart from damages naturally resulting from the breach, no other form of general dam-

ages can be contemplated. (p. 283 B)

*4. Appellate court should not interfere with trial court's findings of fact*

Be that as it may, with regard to the argument proffered by the appellant  
 B to the effect that the court below inadvertently refused to award 10%  
 interest on the judgment sum, it is my considered view that the court  
 below rightly declined to do so by interfering with the exercise of the  
 discretionary powers of the trial court on the basis that the appellant  
 “*had not adduced any convincing argument in support of the same.*”  
 C See Awoyale v. Ogunbiyi (1985)2 NWLR (Part 10) 861. It is trite law  
 that a Court of Appeal should not interfere with the findings of facts of  
 the lower court except such findings are perverse having been based on  
 inadmissible evidence or that having been rejected, it in either way occa-  
 D sioned a miscarriage of justice. See Amasa v. Kososi & Ors. (1986)4  
 NWLR (Part 33) 57. (p. 291 H)

*5. Ordinary meaning of words is subordinate to its legal definition*

Be it noted, however, that it is settled law that where words or expres-  
 sions have been legally or judicially defined, their ordinary meaning will  
 surely give way to their legally or judicially defined meaning. See Wilson  
v. Attorney-General Bendel State & ors. (1985) 1 NWLR (PART 4) 572;  
 F (1985) vol. 16 part 1 NSCC 191 at 220. Be it also noted that from the  
 onset, the respondent did claim the sum of N416,006.87 as penalty for  
 the appellant's incessant stoppages and desertion of site. Furthermore,  
 DW4 in his testimony did claim this same sum as "liquidated damages"  
 and "penalty". (p. 295 D)

**OGWUEGBU JSC**

*6. Contracts - When damages for loss of profit will be refused*

Nominal damages may be awarded where the fact of loss is shown but  
 H the necessary evidence as to its amount is not given. In view of the  
 reasons given by the court below for awarding nominal damages, I will  
 add that this is a case of technical liability but no loss how the appellant  
 who failed to comply with most of the conditions of the contract us who



was away from the site for about twenty two months can turn round to claim damages for loss of profit merely because the defendants waived their right to terminate the contract earlier than the time they did so and without following the procedure laid down in the Agreement. The breach by the respondents in my view gave the appellant no right to real damages. See Owners of Steamship "Medina" v. Owners, Master And Crew of Lightship "Comment" (1900) A.C. 113. He was an undeserving plaintiff as far as the claim for loss of profit was concerned. He did not lead adequate and credible evidence of the loss and the fact that such inadequate evidence was unchallenged and uncontradicted is no basis for the court giving him the sum claimed in his Writ of Summons and the statement of claim. (p. 298 G)

### **REPRESENTATION**

Appellant's Counsel, Prof. Taiwo Osipitan (Now Special Adviser in CGS's Office) wrote to be excused.

H. A Balogun Mrs. Director, Civil Litigation, Ministry of Justice, Kaduna State, with her M. Ladan, Assistant Director Civil Litigation.

### **CASES REFERRED TO**

Ekwunife v. Wayne (West Africa) Ltd. (1989)5 NWLR (Part 122) 422

Ojiba v. Ojiba (1991)5 NWLR (Part 191) 296 at 316

Agbai v. Okogbue (1991)7 NWLR (Part 204) 391 421

Aja v. Okoro (1991)7 NWLR (Part 203) 260 at 277

Ekpan v. Eyo (1986)3 NWLR 63 at 67

Obiora v. Osele (1989)1 NWLR (Part 97)279

Famajuro v. Otamu (1955-56) WNLR 67

Amasa v. Kososi (1986)4 NWLR (Part 33) 57

Adimora v. Ajufo (1989)3 NWLR (Part 80)1

Obodo v. Ogba (1987)2 NWLR (Part 54) 1

Okafor v. Idigo 1 (1986)6 SC. 1

Wilson v. Attorney-General Bendel State (1985) 1 NWLR (PART 4) 572; (1985)

**RULES REFERRED TO**

Court of Appeal Rules 1981, Order 3 Rule 2(2) AND (4).  
Kaduna State High court (Civil Procedure) Rules 1987,  
Order 39 Rule 7.

**BOOKS REFERRED TO**

Keating, Building Contracts 4th Edition p. 144.  
Macgregor on Damages 14th ed. p. 250.  
Hudson's Building and Engineering Contracts 10th ed., p. 596.

**LEAD JUDGMENT BY ONU JSC**

The appellant as plaintiff, had instituted the action giving rise to the appeal herein against the 1st defendant/respondent for breach of contract in the High Court of Justice, Kaduna State holden in Kaduna. The contract was for the investigation and drilling of productive boreholes in Kachia and Jema'd Local Government both of Kaduna State. The 2nd defendant/respondent was sued as a nominal party thereto. The facts of the case may be briefly summarized as follows:-

The respondents awarded a contract for the construction of 320 productive boreholes in the Kachia and Jema'd Local Government Areas of Kaduna State to the appellant. The contract price was Nine million, four hundred and two thousand, two hundred and forty-one Naira only (9,402,241.00) and was signed by both parties on the 21st October, 1981.

The contract which consisted of some conditions which regulated the obligations of the contracting parties contained one requiring that the 1st respondent would pay the appellant 10% of the total value of the contract price as mobilization fees, to assist the appellant financially, upon the production of a Bank guarantee. The appellant on its part was to repay the mobilization fee from the first ten invoices submitted by its to the 1st respondent for payments.

The contractual period was agreed by the parties and fixed for completion within 24 months from the date of commencement of work. The appellant was to commence work upon directives to do so by the 1st respondent. It was also agreed that 6 rigs were to be used for the execu-

tion of the contract.

By a letter dated 10th November, 1981, the appellant was directed by the 1st respondent to commence work as agreed. The appellant was not paid part of the mobilization fee until March, 1982 because, instead of producing a Bank guarantee as agreed by the parties, it (appellant) produced an Insurance Bond which the 1st respondent rightly rejected. The work was not completed within the scheduled period of 24 months. Due to a number of factors, the parties exchanged correspondences and also held meetings over the way and manner the contract was being executed. Consequently, by letters dated 23rd July and 7th August, 1985, the 1st Respondent terminated the contract. After the receipt of the letters terminating the contract, the appellant commenced the suit culminating in this appeal.

Pleadings were ordered, filed; subsequently amended and duly exchanged. The reliefs sought in appellant's Amended Statement of Claim were as follows:-

*“(A) A declaration that the termination of the aforesaid contract by the 1st Defendant vide its letters of 23rd July, 1985 and 7th August, 1985 is wrongful and constitutes a breach of contract.*

*(B) The sum of 274,390.00 being the value of certified but unpaid works due to the plaintiff from the 1st Defendant.*

*(C) The sum of 108,216.00 being retention fees on paid certificates.*

*D) Interest at the rate of 8% per annum in the said sum of 274,390.00 from 15th November, 1982 until the date of judgment.*

*(E) The sum of 1,664,000.00 being general damages/loss of profit in respect of the uncompleted part of the contract occasioned by wrongful termination of the said contract by the 1st Defendant.*

**PARTICULARS OF SPECIAL DAMAGES**

*Bank charges by Union Bank Limited (the Plaintiff's Bankers) at the rate of 28,206.00 per annum from March, 1982 to March, 1987, on account of Bond issued in First Defendant's favour in respect of the aforesaid contract. The Plaintiff also claims interest on the outstanding debt at the rate of 10% from the date of judgment until the whole debt is*

*finally liquidated.”*

The respondents in their Amended Statement of Defence joined issues with the appellant and counter-claim for the following reliefs:-

“(a) *Balance of mobilization fee still outstanding* N : K:

B *against the defendant:* 181,450.00

(b) *Interest on the balance of mobilization at 8% per annum from October, 1983 until liquidated:* 82,720.00

(c) *Difference of contract price to complete execution*  
1,696,494.00

C (d) *Penalty for delay in execution due to incessant stoppages and desertion of site:* 416,000.87

(e) *Cost of loss of political goodwill and social services to the people of the project area:* 10,000,000.00

D 12,376,871.87

The case went to trial. The parties having adduced evidence in support of their respective claims, their counsel proceeded to address the trial court. The learned trial Chief Judge is a considered judgment granted

E appellant its claims:-

(i) For outstanding certificates Nos. 3 and 4 as well as the Retention fees.

(ii) Dismissed other parts of the appellant’s claim for declaration of breach of contract/loss of profit, interest on the unpaid certificates and judgment debt.

F For the respondents, the learned trial Judge granted:-

(a) their counterclaimed in part

(b) their claim for the refund of the excess money paid to the appellant, and

G (c) claim for penalty for delays in the execution of the contract and

(d) the (respondents) claim for political goodwill was disallowed.

Dissatisfied with this part of the decision dismissing its claim for -

(i) declaration

H (ii) general damages for breach of contract/loss of profit as well as

(iii) claims for interests,

the appellant/appealed to the Court of Appeal, Kaduna Division (Coram

Mohammed, J.C.A as he then was, Ogundare and Okunola, JJ.C.A.) hereinafter referred to a the court below.

After listening to the address of counsel to the parties based on the Briefs of argument earlier exchanged by them, the court below in its judgment dated 26th February, 1991, allowed part of the appellant's appeal. In particular, the court below upheld the appellant's claim for declaration to the effect that:-

(i) the 1st respondent breached the contract by terminating same without first complying with the procedure specified in the contract (Exhibit 2) as agreed upon by the parties for the termination thereof;

(ii) they further held that the appellant was entitled to interests on the unpaid certificates up to and including 23rd July, 1985 i.e. (when the contract was wrongly terminated);

(iii) the respondents' claim for penalty and refund of the overpayment/mobilization made in favour of the 1st respondent were confirmed.

Further aggrieved by part (not the whole) of the decision the appellant with leave of the court below, appealed tot his court filing a total of seven grounds. The parties subsequently exchanged Briefs of argument in accordance with the rules of this court. Seven issues were formulated therefrom (the respondents having adopted same) as arising for our determination, to wit:

*“(1) Whether having found the 1st Respondent liable for breach of contract, learned Justices of the Court of Appeal did not have sufficient evidence/materials before them, to assess and award General Damages/Loss of profit in favour of the Appellant for the breach committed.*

*(2) Whether having regard to the specific findings the learned Justices of the Court of Appeal, that the breaches allegedly committed by the Appellant were waived/condoned to by the Respondents, the learned Justices of the Court of Appeal were still justified to have relied on the Appellant's said condoned/waived breach of the Appellant as the basis for awarding nominal damages in favour of the Appellant.*

*(3) Whether having regard to the authoritative decisions of this honourable Court in Onaga v. Micho (1961) All NLR page 324 and Ijebu Ode Local Government v. Balogun (1991) NWLR (Part 166) page*

133, learned Justices of the Court of Appeal were right in holding that the Appellant did not “strictly” discharge the onus of proving its claim for Loss of Profit/General Damages against the Respondents. What standard of proof must a plaintiff claiming loss of Profit/General Damages B attain?

(4) Whether learned Justices of the Court of Appeal were right to have limited the award on the Appellant’s 8% per annum contractual interest claim in respect of unpaid certificates Nos. 3 & 4 to 23rd July, 1985 (date of wrongful termination or whether the interest claimed ought C to have been calculated to the date of judgment as claimed and proved the Appellant.

(5) Whether the learned Justices of the Court of Appeal, having regard to the state of the pleadings and the evidence adduced, were not in D error to have failed to interfere with the wrongful exercise of the discretion of the learned trial Judge to wit: Refusal to award statutory interest on outstanding Judgement Debt in favour of the Appellant.

(6) Whether having regard to the pleading and evidence placed E before the court, the learned Justices of the Court of Appeal were right to have upheld the award of penalty in the sum of 416, 006.87 made in favour of the 1st Respondent by the learned trial Judge.

(7) Whether the learned Justices of the court of Appeal were right F to have found that the Appellant was primarily responsible for delays in the execution of the Borehole contract due to lack of technical and financial capacities to execute the contract.

In my treatment of this appeal I wish to consider the above issues seriatim commencing with the first, second and third issues taken together thus: G

#### ISSUES 1, 2 AND 3 - Grounds 1 & 2

In a rather prolix argument spanning pages 6 to 19 of appellant issues, learned counsel for them having in his letter to court sought court’s H permission to argue his brief following his unavoidable absence therefrom, submitted as follows:-

That it was his desire to demonstrate that the nominal damages of the sum of 1,000.00 in the appellant’s favour against the 1st respondent

for the latter's breach of contract, was not merely a nominal award but rather a highly contemptuous award. Not only had appellant challenged the dismissal of its claim for general damages/loss of profit (in the sum of 1,664,000.00) but it had further challenged the learned trial Judge's failure to make alternative assessment of damages he would have awarded B should his finding of breach of contract be upset by the court below. It was therefore inviting the court below to assess damages claimed and proved by it (appellant) and for it to exercise powers vested in it by Section 16 of the Court of Appeal Act to make the award accordingly. Appellant further maintained that the court below rightly found that the C 1st respondent was in breach of the contract; consequently the court below by granting the declaration it sought and awarding it only 1,000.00 as opposed to its claim for general damages/ loss of profit of 1,664,000.00, ignored the relevant issues and evidence before them by proceeding to D act solely on extraneous and irrelevant facts. The appellant next submitted that once the 1st respondent was found to have breached the contract, the court below was obliged to assess damages based on the relevant evidence before them and uninfluenced by irrelevant considerations. E After we were referred to relevant pleadings in the Amended Statement of claim as well as the evidence of 1st and 2nd P.W's which was said to have corroborate each other, it was maintained that evidence adduced by these witnesses in relation to the breach committed by the 1st Respon- F dent went unchallenged throughout the trial. Furthermore, it was argued, the respondents did not cross-examine the appellant's witnesses on the accuracy or otherwise of the claim for general damages. The respondents', it was argued in addition, failed to lead any independent G rebutting evidence to contradict the evidence proffered by these witnesses. The appellant further submitted that once the learned Justices of the Court below had resolved the question of breach of contract in its favour, they (learned Justices of the court below) were obliged to proceed to determine whether the appellant had adduced enough evidence or H placed enough materials before the learned trial Judge to support its claim for loss of profit/general damages against the 1st respondent. The relevant question before the learned Justices of the court below, at that

stage, was whether, having regard to the evidence adduced, the appellant was entitled to the award for loss of profit as claimed. The learned Justices of the court below, it was argued, chose not to consider these relevant issues and consequently arrived at a wrong decision. We were next referred to various portions of the judgment of the court below, several decisions and text books on breach of contract were cited to buttress its argument, and it was contended that even if appellant had delayed in the execution of the contract, in as much as the learned Justices of the court below had held that its breach had been condoned/ waived by the 1st respondent it was no longer open to the learned Justices of the court below to rely and refer to the said condoned breach as basis for awarding nominal damages in its appellants favour. The appellant went on to submit that once the learned Justices rightly or wrongly decided to invoke the penalty clause against it for delay in the execution of the contract, they could no longer be seen to use the same delay which they had found to have been waived/condoned as the basis for the award of the nominal damages, adding that the award of nominal damages does not extend to or apply to a party whose breach was found to have been condoned by his adversary. After our attention was therefore adverted to the views expressed by Keating: Building Contracts 4th Edition, page 144 as well as Macgregor on Damages 14th Edition, page 250 Article 399, it was argued that judicial decisions also pointed to the same conclusion. Reliance was placed on the following decisions:

1. Nocales v. Atkinson (1909) T.L.R. 658
2. Anglo - Cyprian Agencies v. Paphos Industries (1951) 1 All E.R. 873 at 876, adding that the decisions relied upon by the learned Justices of the court below, to wit:

1. Jammal Engineering v. Wrought Iron (1970) NCLR 296.
2. Obere v. Eku Baptist Hospital (1978) 6-7 SC. page 15 and
3. Barau v. Cubbits Nig. Ltd. (1990)5 NWLR (Part 52) 630, do not support the rather strange proposition of that court that breach which had been condoned or waived, can form the basis of the award of nominal damages to a party whose breach had been condoned. Learned counsel



for the appellant after distinguishing the facts of the above cases one from the other and contending that there was abundant evidence/materials before the learned trial Judge and the court below to support the award of 1,664,000.00 in favour of the appellant, went on to submit that appellant's case was more in line with this court's decisions in Onaga v. Micho (supra) and Ijebu-Ode Local Government v. Balogun (1991)1 NWLR (Part 116) page 139. The Appellant further submitted that both the 1st and 2nd PWs gave evidence which went unchallenged. The 1st respondent, it was pointed out, did not cross-examine these witnesses with respect to the accuracy or extravagance of the basis of the calculation of loss of profit in respect of the uncompleted part of the contract at the time of the wrongful termination, adding that the 1st respondent also failed to adduce independent evidence in rebuttal of the basis of calculation of the loss of profit as claimed by the appellant. The appellant maintained that based on the unchallenged and uncontradicted evidence of witnesses called by it, the learned Justices of the court below should have invoked the power vested in them under section 16 of the Court of Appeal Act to assess general damages/loss of profit as claimed and proved by it. The cases of:

1. Boshali v. Allied Exporters Ltd 91961) All NLR 912
2. Incar Nigeria Ltd. v. Adegbeye (1985)2 NWLR (Part 9) 453 at 461 - 462.
3. Omoregbe v. Lawani (1960) NSCC 164
4. Kosile v. Folarin (1986)1 NWLR 339

were called in aid. In view of the uncontradicted evidence of the appellant on the measure of damages, (i.e 20%) of margin of profit on the uncompleted work), the learned Justices of the court below, it was finally submitted, ought to have awarded general damages instead of nominal damages in its favour, adding that the court below ought to have been guided by the approach approved by this court in Onaga v. Micho (supra); Ukoha v. Okoronkwo (1972)5 SC. 260 and Ijebu-Ode Local Government v. Balogun & Co. (supra) - cases which are binding on that court. The views expressed in Hudson's Building & Engineering Contracts, 10th Edition, page 596 were relied on, adding that since the court

below rightly found that the 1st respondent wrongly terminated the contract, their Lordships should have awarded general damages/loss of profit in the sum of 1,664,000.00 as claimed and proved by the appellant, in line with the binding authoritative decisions of this court.

B In response to the appellant's argument above, the respondents under the general cover of adopting the introductory part of appellant's Brief, asserted that they would also be adopting the statements of "*Issues for Determination contained in the appellant's brief*" and then proceed to argue the grounds of appeal in their own Brief. As at the time they C (respondents) filed their brief through their counsel, U.M. Ebo Esc., on 19th January, 1993 (that brief having been dated a day earlier on 18th January, 1993), the practice of brief-writing had firmly taken root in the Supreme Court for over two decades. Counsel had no excuse whatsoever D to have argued the grounds of appeal as he did in his briefs. Several cases had hitherto been decided by this court for the guidance of counsel to the effect that arguments on a brief should be canvassed on the basis of the issues and not grounds of appeal; failing which, the brief should be E struck out and the appeal dismissed for non-compliance with the rules vide Order 3 Rule 2 (2) and (4) of the Court of Appeal Rules as amended. See also Ojiba v. Ojiba (1991)5 NWLR (Part 191) 296 at 316; Agbai v. Okogbue (1991)7 NWLR (Part 204) 391; 421 and Aja v. Okoro (1991)7 F NWLR (Part 203) 260 at 277. However, as in the instant case on appeal, the respondents are not those appealing and they clearly seem to be adopting the appellant's line of argument (though arguing the grounds of appeal) I will do nothing by way of dismissing or striking out their (respondents) appeal but to consider the appellant's issues though bearing in mind all G that the respondents say in their grounds of appeal albeit faulty, for what they are worth. It is now settled law that a faulty brief cannot be dismissed simply because it is faulty. The faulty brief may be stigmatized with observations of strictures, rebuke and reprimand but under no circumstance H has this court dismissed an appeal merely because it was faulty, bad or inelegant. In saying this, it ought to be borne in mind that there is a difference between filing no brief at all on the one hand, and where on the other hand, the brief is bad or faulty or inelegant in the

sense that it has not followed the prescribed format. The content of the brief, it ought to be remembered, its essential part (substance) while the format is a matter of formality (form). Where a brief is completely devoid of content (the same cannot be said here of the respondents' brief) it is no brief and may lead to its dismissal, whereas inelegance and lack of format will only attract the stricture or reprimand of the court. See Atipioko Ekpan & Anor. v. Chief Agunu Eyo (1986)3 NWLR 63 at 67 and Obiora v. Osele (1989)1 NWLR (Part 97)279.

Now, to the consideration of the complaint about the award of nominal damages of 1,000.00 in favour of the appellant as against the respondents' for the latter's breach of contract, I am satisfied that learned Justices of the court below did not err or misdirect themselves on the facts when they so held. This is because the learned Justices correctly considered the appellant's progress of work when the 1st respondent gave directives to the appellant to commence work and a fortiori/ correctly applied the principle of assessment of damages enunciated in the cases of Jammal Engineering v. Wrought Iron (supra); and Obere v. Board of Managing of Eku Baptist Church (supra); (1978)1 LRN 240 at 250-251; (1978) 6-7 SC. 15. The Jammal's case was, for instance, decided on the basis that the defendant's who counter-claimed against the plaintiff, was unable to prove general damages arising from the breach. Consequently, nominal damages were awarded.

Now, in the law of contract, general damages are those damages which the law implies in every breach and in every violation of a legal right. See Famojuro v. Otamu (1955-56) WNLR 67. It is the loss which flows naturally from the defendant's act and its quantum need not be pleaded or proved as it is generally presumed by law. The manner in which general damages is quantified is by relying on what would be the opinion and judgment of a reasonable person in the circumstances of the case. See Osuji v. Isiocha (1989) 3 NWLR (Part III) 623 at page 636 paragraphs C - D and E. See also Odulaja v. Haddad (1973)11 SC. 357 at 360; Incar (Nig) Ltd v. Benson Transport Ltd. (1975)3 SC. 117; Omonuwa v. Wahabi (1976) 4 SC. 37; Lar v. Astaldi (1977) 11-12 SC. 53 at 62;

Odumosu v. African Continental Bank Ltd. (1976)11 SC. 55 and Idahosa v. Oronsaye (supra). 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 and without stating whether the amount awarded is for loss of business or loss of profit or anticipated profits and the measure or basis of its assessment such an award would not be allowed to stand. See Hadley v. Baxendale (1854) 9 Exch. 314; Victoria Laundry Ltd. v. Newman Industries Ltd. (1949)2 KB. 528; Osuji v. Isiocha (supra); Okoro v. Ezuma (1961) 1 All NLR 183; P.Z. & Co. v. Ogedengbe (1972) All NLR (Part 1) 202 at pages 205-206; Uwa-Printers (Nig) Ltd. v. Investment Trust Ltd. (1988)5 NWLR 110 at 111-112; Okongwu v. NNPC (1989)2 NWLR 174 at 225 and 260 and Ziks Press Ltd v. Alvan Ikoku 13 WACA 188 at 189. Indeed, the courts have repeatedly held that a part from damages naturally resulting from the breach, no other form of general damages can be contemplated. See Nigeria Produce marketing Board v. Adewunmi (1972)1 NLR (Part 2) 433 at 438 and P.Z. & Co. Ltd. v. Ogedengbe (1972)1 All NLR (Part 1) 202 at pages 205-206. For as Devlin, C.J. observed in Biggin v. Permanite (1951)1 K.B. 422 at 438 in 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.”*

Be it noted, however, that the main focus in the issues under consideration has to do with why it is nominal damages and not general that were awarded to the appellant.

**Thus, the appellant’s contention here which is that the learned Justices of the Court below based their evaluation on extraneous and irrelevant” facts, cannot, with the utmost due respect, be sustained. That the contention cannot be correct may be gleaned from the evidence adduced through two witnesses called by the appellant as follows:-**

***“PW1: We also ask for General Damages of 1,664,000 caused by the wrongful termination. This is 20% of the contract price which***

*the plaintiff would have made as profit and since the 1st Defendant stopped the plaintiff from performing, they should pay this sum to the plaintiff."*

**"PW2: We are claiming 1,664,000. This amount represents 20% of the uncompleted job which is the lowest profit margin in construction and drilling industry. The un-completed job was worth 8,239,137.58. We ask for this sum because 1st Defendant wrongfully terminated the contract."**

The snowball demand by the appellant to the tune of 1,664,000 as opposed to the nominal sum which the trial court assessed and awarded and which the court below upheld, has been so demanded because the appellant would appear to be oblivious of its own debilitating failures or shortcomings, to wit:

1. That the contract for the drilling of the 320 productive boreholes was to be fully executed within 24 months using 6 Nos. drilling rigs from the date of commencement which was 24th November, 1981 but this was not done.

2. That the contract agreement (Exhibit 2) which originally provided for a Bank or Insurance bond was amended at the instance of the appellant to read "*BANK GUARANTEE only*". The latter, the appellant was unable to produce until 8th March, 1982, - thus leading to delay in the execution of the contract. To further exemplify that delays were at the appellant's instance, for the first three certificates relating to payment of executed contract when asked to justify discrepancies and irregularities on the valuation certificates, it took appellant 5 weeks, 9 weeks and 3 weeks respectively, to come up with explanation.

3. That non-payment on Certificates 3 and 4 was attributed to the appellant's desertion of the work site for 22 months leading to the Boards of the respondents to convert the outstanding Certificates to repayments of mobilization fees as a result of the appellant's refusal to work.

4. That at the rate or snail speed the appellant was drilling the 320 boreholes it contracted to do, it would take it at least 80 years to execute the contract, especially that it deployed only 2 rigs instead of 6 to

effectively do the job. Further, that by the time 1st respondent terminated the contract in July, 1985 only 16 productive boreholes were completed.

**The foregoing in effect, enable me to hold as done in the Jammal's case (supra) which is on all fours with the instant case, to the effect inter alia, that:**

*"..... perhaps the greatest difficulty in the way of the defendants at any rate is the absence of evidence on the amount it had cost them to get the reinstatement of their structural work or the monetary value of the shortfall in the performance of the diminution in the value of the work done in fact. A breach is established but there is no evidence on which the necessary assessment can be based. In such circumstances, the law allows a court to award only nominal damages."*

See also Obere v. Eku Baptist Hospital (supra) and Barau v. Cubbits Nig Ltd. (supra) the latter being a recent Court of Appeal decision. Jammal's case (supra) was decided on the basis that the defendant therein who counter-claimed against the plaintiff, was unable to prove general damages arising from the breach. Consequently, an award of nominal damages was made.

Further, on damages - both for loss of profit and nominal the court below held as follows:-

*"Now is the appellant entitled to an award of 1,664,000.00 as damages for loss of profit? In looking for an answer to this question, I have to refer to the progress of work when the 1st Respondent gave an order to the Appellant to commence work. The learned trial Chief Judge listed a number of failures on the side of the appellant which, in his opinion, were the main causes of the delay to execute the contract. The first of these failures is in the Appellant's inability to commence work when ordered to do so. The second was where the agreement provided that the Appellant should obtain a Bank Guarantee before mobilization fee is paid and the Appellant produced an Insurance Bond which the Respondent rejected. It took the Appellant four months before it could produce a Bank Guarantee. The Third failure was where the agreement*

mentioned that six drilling rigs were to be used for the job and the Appellant could only obtain two. Again the learned trial Chief Judge established by reference to evidence before him that the Appellant abandoned the site for 22 months. Another observation made by the learned Chief Judge is that only two valuation certificates were submitted by the Appellant for payment, the first in 1982 and the second in August, 1983. By the time the 1st Respondent terminated the contract in July, 1985, only 16 productive boreholes were completed .....

Looking through these failures. I have to say that the Appellant will only be entitled to the award of nominal damages for the breach of agreement .....” (underlining above is mine for emphasis).

And as to what constitute nominal damages and how the court below viewed it in the context of the instant appeal, that court went on to held as follows:-

“At common Law, nominal damages is a technical phrase. It means that the Plaintiff (Appellant) has negatived anything like real damages. It means that he (Plaintiff) is affirming that by his nominal damages there is an infraction of a legal right, which though it gives him no right to the verdict or judgment because his legal rights have been infringed. See Obere v. Eku Baptist Hospital (1978) 6-7 SC. 15.

For the above reasons, I believe that the only amount I can award to the Appellant for the breach committed by the 1st Respondent in terminating the contract without following the procedure he parties agreed upon in 1,000.00 only.”

I cannot agree more. Indeed, in the leading judgment, Uthman Mohammed, JCA (as he then was), held in conclusion on the point as follows:-

“In the result, this appeal succeeds in part. The Respondents are in breach of this Contract Agreement when they terminated the contract without following the proper procedure laid down in the Agreement. However, having accepted the findings of the learned Chief Judge that the Appellants were responsible for the delay in executing this contract. I hold that the company is only entitled to nominal damages which I assessed at 1,000.00 .....

Contrast the case of Ijebu Ode Local Government v. Adedeji Balogun

(1991)1 NWLR (Part 166) 136 in which one of the issues formulated for this Court's determination was:

B *"Is there any legal basis for the award of 2,552,108 as general damages to the plaintiff/respondent by the Court of Appeal in substitution for the award of 25,000.00 awarded in that regard by the High Court?"*

In answering the question, this Court (per Karibi-Whyte, JSC) held inter alia at page 159 as follows:-

C *"Thus, the amount of damages to be paid in respect of the breach is the amount it will entail to put the respondent wronged and aggrieved in the position he would have been if there had not been any breach - see Idahosa v. Oronsaye (1959)4 FSC. 166; (1959) SCNLR 407. This is the measure of damages.*

D *In the instant case it cannot be seriously dispute that the parties had foreseen that if the contract was terminated by its breach the plaintiff will lose the profit he would have made if he had been allowed to execute the contract successfully - See Swiss Nigeria Wood v. Bogo (1971)1 E UILR 337; (1972)1 All NLR (Part 7) 433."*

As Akpata, JSC succinctly put it at page 165 of the Report:

F *"On the first issue I am satisfied that the award of 2,552,108.00 by the Court of Appeal as general damages for breach of contract is justified both in law and on the evidence placed before the trial court ..... When in a claim for damages the plaintiff pleads and gives evidence in support of his claim, and his evidence is uncontradicted, the trial court should accept the evidence unless there is something inherent in the evidence which disproves it. If the trial court wrongly*  
 G *evaluated the evidence, the appeal court will be in a position to correct the error. It is patently clear that there is a typographical error in paragraph 16 of the statement of claim where it was erroneously pleaded that*  
 H *"the plaintiff anticipates a net profit margin of 20% of 2,552,108.00 of the contract on successful completion of the contract "instead of "the plaintiff anticipates a profit margin of 20% of the contract price (amounting to 2,552,108.00) on the successful completion of the contract." I am in agreement with the amendment made by my learned brother, Karibi-*



Whyte, JSC on this issue. The case was fought on the basis that the respondent was claiming damages based on anticipated profit of 2,554,108 being 20% of the contract price.

*The judgement of the Court of Appeal varying the award of damages made by the trial court is according upheld by me .....*” B

**Consequently, anticipated profit (i) the realm of civil cases) must be established by evidence and hence the burden is on the appellant who asserts since he it is, who must discharge that burden before the respondents can be called upon to show that the anticipated profits were probable. See Kate Enterprises Ltd. v. Deawoo (Nig) Ltd. (1985)2 NWLR (Part 5)116 and section 134 (1) and 136(1) of the Evidence Act, Cap. 112, Laws of the Federation, 1990. See also Lewis & Peat (NRI) Ltd. v. Akhimien (1976)7 SC. 157 at 169 on the burden of proof on the pleadings and on the burden of adducing evidence. As this court had occasion to state in the Kate Enterprises Ltd. case (supra):** C D

*“The burden of proof is not a burden that does not shift at all. It is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence.”* E

Indeed, the burden of proof rests initially on the plaintiff. See also Olowu v. Olowu (1985)3 NWLR (Part 13) 372; Okubule v. Oyagbola (1990)4 F NWLR (Part 147)723; Ike v. Ugboaja (1993) 6 NWLR (Part 301) 539 and UBN Ltd v. Prof. Albert Ozigu (1994) 3 NWLR (Part 333) 385 at 407. This court has stated times without number that the court does not make a case for the parties. A party establishes his case or fails. See Alhaji A.W. Elias v. Olayemi Disu (1962)1 All NLR (Part 2) 214 and Abdul Hamid Ojo v. Primate E.O. Adejobi & Ors. (1978)3 SC. 65 at 75. G

**In the case in hand, I agree with the respondent’s submission that the appellant failed to adduce additional evidence showing that 1,664,000.00 represents 20% of the contract price which they H would have made as profit had the contract not been terminated. I also accept the respondents’ submission that the court below was right in taking into consideration the fact that the termination of**

**the contract was occasioned by the inability of the appellant to commence work when ordered to do so.** After all, it is the duty of the appellant to mitigate his loss in a case of contract such as the one in hand. See Uwa printers (Nig) Ltd. v. Investment Trust Co. Ltd. (1988) Vol. 19 (Part III) NSCC 195 at 211; Okongwu v. NNPC (1989) Vol. 20 (Part III) NSCC 118 at 122 and Shell BP Petroleum Dev Vo. v. Jammal Engineering (Nig) Ltd. (1988) (Part II) Vol. 19 NSCC 1 at 27. In my respectful view, the two cases of Nicoles Atkinson and Anglo-Cyprien Agencies v. Paphos Industries (supra) cited and relied on by the appellant are of no avail. I am therefore of the firm view that the appellant is only entitled to nominal damages of 1,000.00 award and no more.

In the light of the above, the views expressed in Hudson's Building & Engineering Contracts, 10th Edition, page 596 relating to measure of damages to which our attention was adverted at page 18, paragraph 3.16 of the appellant's brief are, in my respectful view, distinguishable from the circumstances available in the instant case.

#### ISSUES 4 & 5 - GROUNDS 3 & 4

These two issues which I hereby consider together, deal with the restriction by the court below of interest of 8% per annum on unpaid Certificates No. 3 & 4 from the due date to 23rd July, 1985 to wit: the date when the contract was alleged to have been wrongfully terminated of whether the interest claimed ought to have been calculation the 15th November, 1982 until the date of judgment. It is the appellant's contention that while the court below had found as a fact that Certificates 3 and 4 remained unpaid as at the time of the judgment of the trial court, it was its submissions that interest on these unpaid Certificates amounting as they do to a claim for contractual interest - the contract stipulating that "*Any delay in payment exceeding the period stipulated (20 days) above shall be subject to payment of interest of 8% of the due amount.*"

**I am to point out that the court below rightly limited the award of 8% interest to 23rd July, 1985 instead of from 15/11/82 to the former date. In the first place, the appellant having woefully failed to adduced any tangible reasons why the period ought to have been extended to 27/10/89 should limit itself to when the contract**

was terminated on 23rd July, 1985 but not to continue to operate thereafter. Pertinent in this regard is the case of Reuben N.A. Ekwunife v. Wayne (West Africa) Ltd. (1989)5 NWLR (Part 122) 422 where one of the issues that arose for the resolution of this court was whether a court can order interest to be paid on a judgment debt from the date before the date of the judgment. It was held inter alia at page 446 of the Report that:

*“Interest on a judgment debt is therefore interest after adjudication. It cannot be before that incident. So, to award interest on the judgment debt from the date of accrual of the cause of action, as the learned Judge had done, and as the Court of Appeal impliedly thought, is a contradiction in terms.”*

See also Himma Merchants Ltd v. Aliyu (1994)5 NWLR (Part 347) 667 and Ogbu v. Ani (1994)7 NWLR (Part 355) 128. In the case of N.G.S Co. Ltd. v. Nigeria Ports Authority (1990)1 NWLR (Part 129) 741 where the second of two issues for the resolution of the Court of Appeal was as to whether, having regard to the judgment of the Court of Appeal on 12th July, 1989, interest ought to have been awarded as claimed. It was held by the Court of Appeal in that case inter alia that the basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it to himself for which he ought to compensate the plaintiff accordingly. Such an interest which is usually referred to as contractual interest which accrues from due date until date of judgment is, with due respect, not the same as that decided in the two cases above. They accordingly do not support the appellant’s claim that the period of the award ought to have been extended to 27/10/89. The principles these two case enunciate are principles guiding the award of interest on judgment debts whereas the 8% interest being claimed by the appellant is not one that can be considered as a judgment debt. Be that as it may, with regard to the argument proffered by the appellant to the effect that the court below inadvertently refused to award 10% interest on the judgment sum, it is my considered view that the court below rightly declined to do so by

interfering with the exercise of the discretionary powers of the trial court on the basis that the appellant “*had not adduced any convincing argument in support of the same.*” See Awoyale v. Ogunbiyi (1985)2 NWLR (Part 10) 861 and Fawehinmi v. Akilu (1987) 1 NWLR (Part 51) 554. It is trite law that a Court of Appeal should not interfere with the findings of facts of the lower court except such findings are perverse having been based on inadmissible evidence or that having been rejected, is in either way occasioned a miscarriage of justice. See Amasa v. Kososi & Ors. (1986)4 NWLR (Part 33) 57; Adimora v. Ajufo (1989)3 NWLR (Part 80)1; Obodo v. Ogba (1987)2 NWLR (Part 54) 1 and Okafor v. Idigo 1 (1986)6 SC. 1.

Thus, despite the fact that the learned trial Judge and the learned Justices of the court below respectively made the award of 274,390.00 and 108,216.00 on the two Certificates numbers 3 and 4 as well as the Retention fee to the appellant, they declined to exercise their statutory and inherent powers to award interest on the outstanding judgment. The learned trial Judge having earlier borne in mind the need to award the 10% interest by making the observation:

*"The claim of 10% court interest is clearly consequential and dependent on the sum awarded in favour of the Plaintiff."*

further still declined to award the statutory interest but gave reason for such a refusal as specified in Order 39 rule 7 of the Kaduna State High Court (Civil Procedure) Rules, 1987. I endorse the refusal of the court below which affirmed the trial court's decision in that regard. Said the court below (per Mohammed, JCA) while refusing to interfere with the exercise of the learned Chief Judge's discretion:

*"I do not intend to review the issue of award of interest against the judgment debt. Mr. Osipitan referred to Order 39 rule 7 of the High Court (Civil Procedure) Rules of Kaduna State, 1987. I believe that the award of interest against the judgment debt is a discretionary exercise by the court and it is difficult to interfere with such a finding. I have not been convinced that such a decision could be reviewed in view of the fact that the Appellant's counsel has not adduced any convincing argument in support of the sum."*

The reliance placed on the principle decided in the case of Ekwunife v. Wayne (supra) is of no avail to the appellant since not only had it been demonstrated that the trial court exercised its discretion judicially and judiciously by conceding that "claim of 10% interest is clearly consequential and dependent on the sum awarded in favour of the plaintiff but it gave reasons for exercising the discretion one way or the other and the court below, rightly, in my view, affirmed same.

**It is trite law that once a superior court as in the instant case, is shown to have exercised its discretion judicially and judiciously in the exercise of its authentic jurisdiction, that exercise of discretion should and must not be disturbed by a higher tribunal for the reason it would have exercised that discretion differently. See The university of Lagos & Anor. v. Aigoro (1985) 1 NWLR (part 1) 143; Jammal Engineering Co. Ltd. v. Missr. Nigeria Ltd. (1972) 1 All NLR (part 1) 322 and William v. Williams (1987) 2 NWLR (part 34) 66 and Resident, Ibadan Province & Anor. v. Memudu Lagunju (1954) 14 WACA 549 at 552.**

**In as much as the trial court did not exercise its discretion in the instant case arbitrarily in refusing to award interest on the judgment debt, the court below was right to have upheld that decision. There has been no miscarriage of justice occasioned thereby and I so hold. See Far East Mercantile Co. Ltd. v. Jackie Philip Photos Ltd. (1974) 11 SC. 225, 231-232; Eme v. The State (1964) 1 All NLR 416 and Ojomu v. Ajao (1983) 9 SC. 22 at 53.**

These issues are accordingly resolved against the appellant.

#### ISSUE NO. 6 - GROUND 5.

The appellant's grouse in this issue is simply that the award of N416,006.87 in favour of the respondent under the heading of liquidated damages for delays and incessant desertion on the site by the appellant is purely penal. While conceding to the principle enunciated by the House of Lords in Dunlop Pneumatic Tyres Co. Ltd. v. New Garage Co. Ltd. (1919) AC. 77 at 86, to the effect that whether a clause in a contract is a penalty clause or a clause which deals with liquidated damages, is essentially a matter of the construction of the partial contract. It was then

contended that as neither the pleadings nor the evidence adduced by the respondent supported the award of liquidated damages, the appellant's further contention is that the above principle failed to support the award of N416,066.87.

B The submission in my respectful view is misconceived in that what indeed the trial court awarded was penalty for delay in the execution of the work. In that regard, the learned trial Judge was right in relying and applying the principle enunciated in the Dunlop Pneumatic Tyres Co. Ltd. case (supra) and the learned Justices of the court below  
C were right to have upheld the award of N416,006.87 being penalty for the delay occasioned by the appellant.

Further, since the respondents in Clauses 16.1 and 16.2 of Exhibit 2 which they pleaded in their Amended Statement of Defence specifically  
D referred to liquidated damages by way of penalty, the case cited is apt. The respondents were therefore justified, in my opinion, to have terminated the contract inter alia on the ground of the appellant's guilt of non-performance and abandonment of site. In Clause 16 under the heading:  
E Liquidated damage - penalty, it was provided in sub-clauses (1) and (2) as follows:-

*"16. 1 If the contractor shall fail to complete the works within the agreed execution period as per article 4.5 of the Appendix No. 2, or in  
F the period prolonged after mutual agreement or cause by force majeure, then he will pay to the Employer the sum stated herein as liquidated damage for every 30 days which shall elapse between the time prescribed hereof or extended time as the case may be and the date or  
G completion of the works.*

*16.2 The rate of the penalty for every 30 days of the delay will be rated as 1 (one) percent of the price for the uncomplete work of the contract, but the total sum of the penalty shall not exceed 5 (five) percent of the total sum of such uncomplete work. The payment of the penalty  
H shall not relieve the contractor from his obligation to complete the liability under the contract."*

Thus, the question of the respondent not being entitled to the claim of N416,006.87 will amount to the appellant seeking to benefit from their

wrong doing and therefore their argument neither can arise not be sustained. See Re London Cellu Oid V.O (1888) 3 Ch. E. 205 and Solanke v. Abed (1962) NRNLR 92; (1962) 1 All NLR 230. Furthermore, the evidence of D.W.4 for the respondent's claim for the sum of N416,006.87 was computed on the basis of 1% of unexecuted works as set out in Exhibit 2 which was neither challenged nor countered by the appellant, particularly under the cross-examination of DW4. Thus, I take the firm view that the court below was right in making the award under this head. In this wise, the term "Liquidated damages and "Penalty" would appear to me to be interchangeably the same. See Osborn's Concise Law Dictionary which defines liquidated damages to mean inter alia as "A genuine covenanted pre-estimate of damages for an anticipated breach of contract ....." and penalty as connoting "A punishment, particularly a fine or money payment ....." adding "The use of the term "penalty" or "Liquidated damages" is not conclusive" - Vide Dunlop Pneumatic Tyre Co. Ltd. case (supra). Be it noted, however, that it is settled law that where words or expressions have been legally or judicially defined, their ordinary meaning will surely give way to their legally or judicially defined meaning. See Wilson v. Attorney-General Bendel State & ors. (1985) 1 NWLR (PART 4) 572; (1985) vol. 16 part 1 NSCC 191 at 220. Be it also noted that from the onset, the respondent did claim the sum of N416,006.87 as penalty for the appellant's incessant stoppages and desertion of site. Furthermore, DW4 in his testimony did claim this same sum as "liquidated damages" and "penalty". The appellant's contention that "in view of the non-revenue yielding nature of the boreholes, no pecuniary damages could have been suffered by the Respondents on account of the Breach allegedly committed by the Appellant" is misconceived. The fact that the boreholes were for public use cannot be held to also mean that the appellant was contracted to construct the said boreholes free of charge. Since the respondent contracted to pay the appellant the sum of N9,402,241,000 i.e. public money entrusted to the appellant to contribute towards the development and general welfare of the people of Kaduna State,

**the appellant having derogated from that civil duty by not completing the contract work, cannot be heard to run away from being asked to compensate the respondent with money be it called liquidated damages or penalty**

**B ISSUES 6 AND 7.**

These issues complain among other things of lack of proper evaluation and failure of the parties to join issues in their pleadings. It is sufficient to point out here that a careful perusal of paragraphs 11, 12 and 13 of the Amended Statement of Claim and paragraphs 11, 12, 13 and 20 of the Amended Statement of Defence will show that the parties joined issues on the relevant facts in issue. Furthermore, the testimony of DW4 which the appellant failed to contradict in any manner whatsoever, clearly reveals the appellant's non-performance and breach through its finally abandoning the site. By the abandonment of the work, the appellant no longer could hang on to the excuse of the respondents' termination of the contract (Exhibit 2) by not observing the terms and conditions therein instead of attacking the reasoning for the abandonment. The appellant relied for the success of its case on the testimony of PW1 whose evidence was after all vague and scanty and whatever weight it had, had been watered down by the import and impact of Exhibit 6 (a) and 6 (b).

Thus, the learned trial Judge by his evaluation of the evidence adduced before he came to the conclusion that the appellant's paragraphs 11, 12 and 13 of the Statement of Claim are vague was correct when he stated that paragraph 20 of the Amended Statement of Defence should not be taken as amounting to an admission, moreso that it was considered along with the other paragraphs of the pleading considered.

These issues are also resolved against the appellant.

In the result, this appeal fails and it is accordingly dismissed by me. I award costs assessed at N10,000.00 in favour of the respondents.

H

**BELGORE JSC**

I agree with my learned brother, Onu, JSC., that the appeal has no merit. It is the duty of every plaintiff to prove his case and failure to



prove attracts only dismissal. (Okongwu v. NNPC (1989) 19 nscc 118, 122; Shell-BP Petroleum Development Company v. Jammal Engineering (Nig) Ltd. 19 NSCC 1, 27). The plaintiff's case has not been proved and for the fuller reasons in the judgment of Onu, JSC., I also dismiss the appeal with N10,000.00 costs to respondents.

B

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**WALI JSC**

I have had the advantage of reading in advance, the lead judgment of my learned brother, Onu JSC, and I agree with his reasoning and the conclusions he arrived at therein for dismissing the appeal.

C

For the same reasons ably stated, I also hereby dismiss the appeal and adopt the consequential orders contained in the lead judgment.

D

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**KUTIGI JSC**

I read before now the judgment just delivered by my learned brother, Onu, J.S.C., I agree with the conclusion that the appeal lacks merit and ought to fail.

E

It is accordingly dismissed with N10,000 costs in favour of the Defendants/Respondents.

F

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**OGWUEGBU JSC**

I have had the advantage of reading in draft the judgment just delivered by my learned brother Onu, J.S.C. and I am in full agreement with him that the appeal must fail.

I however wish to add a few comments of mine in respect of the complaint of the appellant as to the award of N1,000.00 as nominal damages for breach of contract.

G

The court below rightly found that the respondents were in breach of Clauses 17 and 18 of Exhibit 2 (Tender documents for Building 320 H No. Productive Boreholes) which Clauses provide for the termination of the contract. For not complying with the said Clauses of Exhibit 2, the court below awarded N1,000.00 nominal damages in favour of the ap-

H

pellant.

In coming to that award, the court below considered a number of failures on the part of the appellant leading to his delay in executing the contract. The failures include the inability of the appellant to commence  
B work when ordered to do so, delay of four months on his part to provide bank guarantee before mobilization fee was paid, a provision in the contract for the use of six drilling rigs for the job and the appellant provided two only, the abandonment of the work for twenty two months and the  
C completion of only 16 productive bore holes as against 320 which were to be completed by the appellant within 24 months from the date of commencement.

On this issue, the court below held as follows:

*"Looking through these failures I have to say that the appellant  
D will only be entitled for the award of nominal damages for the breach of the Agreement which I found. .... In the result, the appeal succeeds in part. The respondents are in breach of this Contract Agreement when they terminated the contract without following the proper procedure laid  
E down in the Agreement. However, having accepted the finding of the learned Chief Judge that the appellants were responsible for the delay in executing this contract I hold that the company is only entitled to nominal damages which I assess at N1,000.00."*

F All that I can deduce from all the circumstances of this case is that by the respondents not terminating the contract in the manner provided for in the Agreement, there was an infraction of the appellant's legal right. The next question is whether the breach entitled him to the award of N1,664,000.00 as damages for loss of profit which he claimed?

G Nominal damages may be awarded where the fact of loss is shown but the necessary evidence as to its amount is not given. In view of the reasons given by the court below for awarding nominal damages, I will add that this is a case of technical liability but no loss how the appellant  
H who failed to comply with most of the conditions of the contract as who was away from the site for about twenty two months can turn round to claim damages for loss of profit merely because the defendants waived their right to terminate the contract earlier than the time they did so and

without following the procedure laid down in the Agreement. The breach by the respondents in my view gave the appellant no right to real damages. See Owners of Steamship "Medina" v. Owners, Master And Crew of Lightship "Comment" (1900) A.C. 113. He was an underserving plaintiff as far as the claim for loss of profit was concerned. He did not lead adequate and credible evidence of the loss and the fact that such inadequate evidence was unchallenged and uncontradicted is no basis for the court giving him the sum claimed in his Writ of Summons and the statement of claim. B

It is the law that an aggrieved contractor is entitled to any balance of payment for work done and also for loss of profit on the work he has been prevented from doing. See Onaga & Ors. v. Micho & Company (1961) 1 ALL N.L.R. (pt. 2) 324, but the circumstance of each case must be taken into consideration before such contractor recovers damages for loss of profit. C D

As to the inadequacy of the nominal damages awarded, this court will not be justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. Before this court does so, it must be satisfied that the court below applied a wrong principle of law such as taking into account some irrelevant factor or leaving out of account some relevant factor. The amount awarded by the court below cannot be said to be ridiculously low as to amount to a wholly erroneous estimate of the damage. See Shodipo & Co. Ltd. v. The Daily Times of Nigeria Ltd. (1972) 1 All N.L.R. (pt. 2) 406 at 411-412, Zik's Press Ltd. v. Ikoku (1951) 13 W.A.C.A. 188 at 189 and Obere v. Eku Baptist Hospital (1978) 6-7 S.C. 15, F G

For these and the fuller reasons contained in the judgment of my learned brother Onu, J.S.C., I too will dismiss the appeal and abide by the order of costs made therein. H