

**SUPREME COURT OF NIGERIA**  
16TH JANUARY, 2004. SC. 32/1997  
**CORAM:- I. L. KUTIGI, S. U. ONU, A. I. IGUH,**  
**S. O. UWAIFO, I. C. PATS-ACHOLONU, JJSC**

NEKA B.B.B. MANUFACTURING CO. LTD. .... APPELLANT  
AND  
AFRICAN CONTINENTAL BANK LTD. .... RESPONDENT

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ACTIONS - Claim - Language that flows freely - Is necessary in putting across a clear claim - Devoid of confusion (H7)

BANKING - Special damages - Evidence - Claim of great loss - Where based on approximation and expression of opinion - Without factual un-assailable evidence - The claim will fail (H3)

DAMAGES - Special damages - Proof - Submission by appellant's counsel - That it was adequately pleaded and proved - Is not correct - As the evidence is deficient and weak (H2)

EVIDENCE - Proof - Probable certainty - Where there are specific claims - Plaintiff's duty is to prove essential facts succinctly (H4)

EVIDENCE - Unchallenged evidence - Evidence that is weak and devoid of substance - Can be safely ignored - By the other party and the court (H5)

EVIDENCE - Uncontradicted evidence - Court's acceptance of it - Is subject to its credibility and probability (H6)

TORTS - Damages - Special damages - Compensation for loss - Where claimant alleges that he suffered special damages - It must be proved by concrete evidence (H1)

### **FACTS**

The plaintiffs/appellants obtained a loan. The collateral was the title deeds of two of their Directors. After paying their indebtedness, efforts to recover the title deeds from the defendant/respondent failed. Appellants claimed that detention of the title deeds led to their inability to obtain loan from the Union Bank and other financial institutions. This loan should have been used in pursuing foreign business transactions. Failure or refusal to release the title deeds robbed appellants of the gains they would have realized had the proposed transactions succeeded. But the appellants failed to tender credible specific evidence as their claim seem to be based on presumptions and thereby appear to be confused.

Respondents denied the appellants' claim. They explained that the title deeds were not being detained but missing. Certified true copies they secured were rejected by the appellants. The trial court found in favour of the appellants awarding N1,963,465.50 special damages and N6,000.00 general damages. Respondent's appeal to the Court of Appeal was upheld. Being aggrieved, appellants have now appealed to the Supreme Court raising 4 issues. But the apex court preferred the single issue raised by the respondent.

### **ISSUE FOR DETERMINATION**

*“Whether on the pleadings and evidence there is a legal basis for the award of special damages or in the alternative whether the (Plaintiff) Appellant discharged the burden of proof required to succeed in its claim for special damages”.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **PATS - ACHOLONU JSC**)

### ***Special damages - Compensation for loss***

1. Damages in tort is a compensation for loss sustained arising out of the act or omission of a defendant. It is a trite law that where the claimant specifically alleges that he suffered special damages he must per force prove it. The method of such proof is to lay before the Court concrete evidence demonstrating in no uncertain terms easily cognizable, the loss

or damages he has suffered so that the opposing party and the Court as the umpire would readily see and appreciate the nature of the special damages suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such like fractions. (p. 46 B)

### ***Special damages - Proof***

2. The learned Counsel for the Appellants had submitted that in line with the evidence of P.W.4, special damages were adequately pleaded and evidence in proof of the special damage was adequately given.

In none of the exhibits was it shown or stated that the Union Bank had been approached and they specifically insisted that the original title deeds must be produced. This must be understood against the background of the denial made contained both in the pleadings and testimony of the Respondents to the effect that ordinarily Banks accept certified true copies of title deeds. In this case there is evidence that the Appellants rejected the deed of Release as well as the certified true copies of the documents.

Indeed the so called special damages were based on the evidence of P.W.4 whose evidence on the specific claims was nothing to write home about. When the evidence of a witness is hazy or deficient or utterly hollow, then it would prove nothing and in the case of specific claims such weak evidence would be so wanting in its substantiality that it may be regarded as a mere effusion of an incompetent witness. (pp.47 A/E & 54 C)

### ***Banking - Special damages - Evidence***

3. So much reliance was placed on the claim of great loss sustained by the appellants. A close look at the evidence of P.W. 4 shows that he was merely stating the possible cost of the materials and profits if they had been bought; a belief which was hinged on the premise of a Bank granting the facility required. The Appellants it must be pointed out did not in a way prove any distinct loss arising out of any clear cut case of Business transaction which they embarked, *id est*<sup>3</sup>, such as placing an order and

relying on any Bank as its agent to do the rest. Even from the evidence of P.W. 4, the whole testimony was based on approximation and a general expression of opinion as to what could or might be realized.

It cannot be over emphasized that neither the pleadings nor the most forensic eloquence of any brilliant lawyer can be a substitute for evidence that was not given. Evidence whether oral or documentary consists of facts, and facts are the fountain head of law. In a case such as this, it is not enough to marshal or reel out intimidating figures to show losses whether probable or estimated. Such figures duly set out to prove special damages must be amply and fully supported by exhibits that would be unassailable as to persuade the Court to find in favour of the proponent of the case. (pp. 47 G & 48 E)

**D Proof - Probable certainty**

4. The evidence of facts and circumstances on which a party relies such as in the case, and the inferences deducible therefore must so preponderate in the favour of the basic proposition he is seeking to establish by proof as to exclude any equally well supported belief, and that in the administration of Justice the Court must be satisfied with proof which leads to a conclusion with probable certainty where absolute certainty is either impossible or not necessary or essential. Where there are specific claims it is the duty of the Plaintiff to prove all the essential facts succinctly and with clarity to leave no one in doubt. (p. 54 E)

**Unchallenged evidence**

5. An opposing party should not be expected to challenge an evidence that is hollow, empty or bereft of any substance as that would to my mind amount to chasing a shadow. I am familiar with the case of Odulaja v. Haddad (1973) A N.L.R. 36 to the effect that an evidence not challenged by the party that had the opportunity to do so should ordinarily be believed and accorded credibility. I believe that such holding rests on the premise that such evidence is capable of being believed if not challenged. In other words, when the evidence is weak in content as not to assist the Court or is manifestly unreasonable or is devoid of any substance as not

to help to resolve the matter in issue it will be safe to ignore it as it does not attain the standard of credibility. (p. 56 A)

### ***Uncontradicted evidence***

6. Although it is the general rule that uncontradicted evidence from which reasonable people can draw but one conclusion may not ordinarily be rejected by the Court but must be accepted as true, it is also true to say that the Court is not in all the circumstances bound to accept as true testimony an evidence that is uncontradicted where it is wilfully or corruptly false, incredible, improbable or sharply falls below the standard expected in a particular case. (p. 56 C)

### ***Claim - Language that flows freely***

7. Another disconcerting point if not entirely confusing to the point of being almost melo-dramatic aspect of the appellants' case is that it is difficult to understand what the claim is all about. For example if it involves negligence, there are no particulars of negligence. It is not a case founded in the tort of detainee. A Plaintiff must fully understand the case he is putting across and what he expects the Court to do for him and this should be put in a language that flows freely. This appeal was dead, right from the word go. It is unnervingly bad and irremediable. It is completely bereft of any merit and I must confess it reached the nadir of utter hopelessness in this Court. In the circumstances the appeal fails as lacking in merit. (pp. 56 E & 57 D)

## **NOTABLE POINTS OF INTEREST**

### **PATS-ACHOLONU JSC**

#### ***1. Business Venture - Definition of***

A business venture to my mind can be said to be a commercial or Industrial intercourse or transaction with commercial or trading flavour. It could be perilous and be a risky undertaking and therefore may be marked by its vulnerable nature, as there is always a possibility of a loss. Such business or venture - a term being a short form of adventure, does not confer any benefits or be said to connote by its very nature, profitability

as it is no more than what it says. I fail to see how a loss or profit can be said to have been occasioned by reason of a mere existence of business proposition where there are no facts to show the risk taken to afford the Court the opportunity to determine the nature and character of the claim made. (p. 48 H)

### **UWAIFO JSC**

2. *Appellant had no offer for a loan but invitation to treat*

C It would appear that the appellant's case was based partly on untruths, partly on speculation and partly on misconception of what the cause of action is, and the extent of the damages it could claim. It must be recognized that the Union Bank did not make any offer to the appellant for a loan. The best that happened was really an invitation to treat. This is D contained in exhibit G3, where the bank said "*We must emphasize that there is yet no commitment on our part. The documents/information you make available will determine the bank's reaction to your request .*" An invitation to treat is not an offer that can be accepted to lead to an agree- E ment or contract and therefore cannot form the basis of any cause of action: see *Harvey v. Facey* (1893) A.C. 552; *Clifton v. Palumbo* (1944) 2 All ER 497. (p. 69 B)

### **REPRESENTATION**

F Chief E. L. Akpofure (SAN) with him is G. E. Odiete for the Appellant. G. U. E. Onyiuke (Ms.) for the Respondent.

### **CASES REFERRED TO**

G J.O. Imana v. Robinson (1979) 1 All N.W.L.R. 1 at 16  
 U.B.N. v. Oduote Bookstore Ltd. (1994) 3 N.W.L.R. (pt. 331) p. 129  
 Fabiyi v. Adeniji (2000) 6 NWLR (pt. 662) 532, (2000) 5 KLR (pt. 103) 1505  
 Clifton v. Palumbo (1944) 2 All ER 497  
 H Odumosu v. ACB Ltd. (1976) 11 SC 55 at 65-66

### **LEAD JUDGMENT BY PATS-ACHOLONU JSC**

The Appellants as Plaintiffs had obtained a loan from the Nigerian Build-

ing Society by using the title deeds of two of their Directors as collateral. The Respondents as defendants redeemed the loan facility hitherto granted by the Nigerian Building Society and retained the title deeds formerly in the possession of the Nigerian Building Society as security. The Appellants claim that later they paid their indebtedness to the Respondents and demanded the return of the title deeds of their Directors which were being detained as claimed by the Appellants. From time to time the Appellants demanded the return of the documents from the Respondents as they stated that they had good offers for a loan from the Union Bank and other Financial Institutions. The Appellants said that when it appeared that the Respondents were unable to trace the whereabouts of the documents after what the letter claimed was an extensive search, the Respondents "pleaded" with the Appellants to renew their application with them instead of the Union Bank or any other Financial Institution for that matter. This advice was based on the assertion by the Appellants that they obtained good and reasonable business propositions from some foreign Companies and they needed facility from a Bank to be in a position to engage in those business concerns, but that the failure or refusal of the Respondents to release these documents to them robbed them of the gains or profits they would or might have realized had the proposed transactions succeeded.

The Respondents in rejecting the claim of the Appellants stated that though the documents were missing, and not being detained, but that after fruitless searches, they obtained or procured the certified copies of those documents which they believed that the Appellants could use for the interim period. But, instead of accepting them, the Appellants refused, and rather asked for the duplicate of the certified true copies. They equally denied advising the Directors of the Appellants to proceed to overseas tour for business transactions, or were aware that the Appellants had applied for a loan facility from the Union Bank and stated that they would have been prepared to give a bond or a guarantee should that have been requested. After the hearing in the High Court, judgment was in the main given to the Appellants although the claim under the head of raw materials was refused. The Respondents being the losing party ap-

pealed to the Court of Appeal while the Appellants cross-appealed. The appeal was largely successful.

In its judgment the Court of Appeal held as follows:-

“The amount of N6,00.00 awarded in respect of general damages  
 B is allowed to stand, since there was neither an appeal nor cross-appeal  
 against it. But the appeal against the special damages awarded succeeds  
 and is hereby allowed, while the cross-appeal against same fails and is  
 hereby dismissed. For the avoidance of doubt the amount of N1,963,465.50  
 C awarded in favour of Respondents as special damages is hereby set aside,  
 as there was no evidence to support it, while the general damages of  
 N6,000.00 is hereby affirmed”.

Piqued no doubt by this turn of events, the Appellants appealed to  
 this Court and filed 5 grounds notice of Appeal from which they distilled  
 D four (4) issues for determination. They are as set down below.

1. Whether the learned Justices of the Court of Appeal were right  
 in law when they held that in the absence of any evidence to show that  
 certain monies were actually paid to the Respondents by the Appellant for  
 E transmission to the European experts in 1982 there can be no claim for  
 special damage based on the foreign exchange differentials in the value of  
 the Naira.

2. Whether the learned Justices of the Court of Appeal were right  
 F in law when they held that the evidence as given by P.W. 4 relating to  
 differentials in the cost of importation of the goods in 1982 and 1987 and  
 tendering of the proforma invoices does not amount to sufficient proof  
 of those arm of special damages.

3. Whether the learned Justices of the Court of Appeal were right  
 G when they held that there was no evidence whatsoever as to what the  
 estimated income and profit would be and therefore the special damages  
 were not strictly proved by the Appellant.

4. Whether the learned Justices of the Court of Appeal adequately  
 H considered the cross-appeal of the Appellant before dismissing same.

It is noticeable that the general characteristic or nature of the issues  
 formulated is their ungainly verbosity, id est, lacking in precision and  
 clarity. Besides, those to be determined seem repetitive of each other



thereby robbing them of the refined or exquisite taste in prose they should ordinarily possess.

On the other hand, the Respondents framed only one issue which I hereby set down and which runs thus;

*“Whether on the pleadings and evidence there is a legal basis for the award of special damages or in the alternative whether the (Plaintiff) Appellant discharged the burden of proof required to succeed in its claim for special damages”.*

After I have carefully studied the case file, and dutifully considered the briefs filed. I am convinced that strictly speaking there is only one issue and that is as formulated by the Respondents. It is not in all occasions that a Court must inevitably accept the issues framed by the appellant as though they are immutable particularly when the issues formulated by the Respondent address the points in consideration or in controversy much more squarely. Indeed the Court may decide in an appropriate case to suo-motu frame issues which though do not and ought not in any way depart from the contents or purport and ramifications of the issues already framed by the parties, and distilled from the grounds of appeal, but are much more succinct, precise and readily understandable. Thus in *Lebile V. Registered Trustees C & S* (2003) 2 N.W. L.R. (PT. 804) 399 AT 424, Uwaifo JSC said;

*“As to issue 5, what the court below did was to summaries what it found to have survived out of the six issues raised by the Plaintiff, and then considered them under two issues which it framed from those other issues the way it understood them to connote. There is nothing improper about that so long as the summary was reasonably reflective of the issues in question as they relate to the grounds of appeal”.*

See also *Fabiyi v. Adeniji* (2000) 6 N.W.L.R. (Pt. 662) 532 at 546; *Oloba v. Akereja* (1988) 2 N.S.C.C. 120. Even when the appellate Court is of the view that the issues formulated by both sides do not quite reflect the questions that would ordinarily be distilled from the grounds of Appeal, it may on its own formulate new issues based on the grounds of Appeal but care should be taken that the new issues formulated by the Court are brought to the attention of the parties for any possible objection. In that

way no party will complain of unfair hearing. In the Appellants reply brief no new issue was raised but they have sought to put more teeth and vigour in their original brief and whittle down the tenor of the Respondents brief.

B The appellants' Counsel had submitted in his brief that what calls for immediate resolution is this; if the action is founded on negligence as opposed to being in detinue whether special damages if proved could be awarded? **Damages in tort is a compensation for loss sustained arising out of the act or omission of a defendant. It is a trite law that**  
 C **where the claimant specifically alleges that he suffered special damages he must per force prove it. The method of such proof is to lay before the Court concrete evidence demonstrating in no uncertain terms easily cognizable, the loss or damages he has suffered so**  
 D **that the opposing party and the Court as the umpire would readily see and appreciate the nature of the special damages suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. It should not rest on a puerile concep-**  
 E **tion or notion which would give rise to speculation, approximation or estimate or such like fractions.** Now part of the evidence of P.W.I runs thus;

F *"The union Bank did not give us the loan as we failed to supply the title documents and the defendant refused to give us a bond or indemnify us as to the lost documents. As a result we have suffered a lot of loss and damages. I am asking for the claim as per paragraph 27 of the statement of claim. The Accountant will give account of the special damages".*

G In his evidence Gregory Obem Omokivie P.W. 4 who is the accountant testified as follows:-

H *"The Plaintiff have suffered damages and in the regard I know the plaintiffs would have made profit and taking into account the present conversion rate of the Naira. The plant and equipment were estimated to cost N1.5m raw materials N1.00m and PVC titles N.7m, totalling N3.00m. These figures were calculated basing them on rate differentials between 1982 and 1988. These are C.B.N. Rate and at the time of the calculations*

*I make some jottings. Rates of conversion Swiss Franks 476,142.70 converted at \$F.3.1293= N1.00 = N152,156.30. The conversion rate and their equivalents are as contained in paragraph 27 of the Further Amended Statement of Claim.”*

**The learned Counsel for the Appellants had submitted that in line with the evidence of P.W. 4, special damages were adequately pleaded and evidence in proof of the special damage was adequately given.** B  
It is instructive here to set down some portions of the pleadings of the appellants’

“Para 17 The Plaintiffs had good offers for a loan from the Union Bank of Nigerian PLC. And other Financial Houses on the condition that they could get the original documents which were released to the defendants by the Nigeria Building Society on behalf of the Plaintiffs:. Para. 18 The Plaintiffs reviewed their demands for their title documents from the defendants to use as collateral or security for the four other Banks or Financial Institutions. Para 19. The defendants refused and or neglected to surrender the title documents of the Plaintiffs to them and the Plaintiffs instructed their “Solicitors” Senator Anna and Associates to demand their title documents. E

**In none of the exhibits was it shown or stated that the Union Bank had been approached and they specifically insisted that the original title deeds must be produced. This must be understood against the background of the denial made contained both in the pleadings and testimony of the Respondents to the effect that ordinarily Banks accept certified true copies of title deeds. In this case there is evidence that the Appellants rejected the deed of Release as well as the certified true copies of the documents.** F G

**So much** reliance was placed on the claim of great loss sustained by the appellants. A close look at the evidence of P.W. 4 shows that he was merely stating the possible cost of the materials and profits if they had been bought; a belief which was hinged on the premise of a Bank granting the facility required. The Appellants it must be pointed out did not in a way prove any distinct loss arising out of any clear cut case of Business transaction which they H

**embarked, id est<sup>3</sup>, such as placing an order and relying on any Bank as its agent to do the rest. Even from the evidence of P.W. 4, the whole testimony was based on approximation and a general expression of opinion as to what could or might be realized.**

B            In the judgment of the lower Court, the Court of Appeal per Akpabio JCA held as follows in respect of the much vaunted degree of loss sustained.

C            *“In the instant case however, all that the Respondent had succeeded in doing through P.W. 4 was to show that goods that could have been imported with N152,158.30 in 1982, later cost N1,239,275.52 to import. Raw materials that initially cost N193,440.00 to import in 1982, later cost N1,017,299.15 to import in 1987. But it was never averred that the 1982 value of those goods was ever paid to the appellant to transfer*  
D *to Western Germany or Italy, and it failed to do so by negligence. The evidence tendered in Court was proforma Invoices to show the value of goods to be sent to Nigeria by the Overseas exporters. In the absence of any evidence to show that certain monies were actually paid to the Appellants by Respondent for transmission to the European Exporters in 1982, there can be no claim for special damages based on the foreign exchange differentials in the value of the Naira”.*

F            **It cannot be over emphasized that neither the pleadings nor the most forensic eloquence of any brilliant lawyer can be a substitute for evidence that was not given. Evidence whether oral or documentary consists of facts, and facts are the fountain head of law. In a case such as this, it is not enough to marshal or reel out intimidating figures to show losses whether probable or estimated. Such**  
G **figures duly set out to prove special damages must be amply and fully supported by exhibits that would be unassailable as to persuade the Court to find in favour of the proponent of the case.**

H            Further, the appellants in their brief submitted that evidence which established the legitimacy and the existence of the business venture from where the loss was occasioned was given by P.W.I. The existence of a business venture should be separated from anticipated profit or probable loss if the so called business is not realized. A business venture to my

mind can be said to be a commercial or Industrial intercourse or transaction with commercial or trading flavour. It could be perilous and be a risky undertaking and therefore may be marked by its vulnerable nature, as there is always a possibility of a loss. Such business or venture - a term being a short form of adventure, does not confer any benefits or be said to connote by its very nature, profitability as it is no more than what it says. I fail to see how a loss or profit can be said to have been occasioned by reason of a mere existence of business proposition where there are no facts to show the risk taken to afford the Court the opportunity to determine the nature and character of the claim made. C

The appellants Counsel referring to the evidence of P.W.I submitted that the facts stated in the testimony "*though given orally were supported by documents some of which are Exhibits D1 and D2*", showed the losses suffered. Let me set down the contents of Exhibits D1 and D2. D

EXHIBIT 'D1'

XX 241917

ROAbok/LD/82

9<sup>TH</sup> February, 1982

The Chief Legal Officer,

Legal Department,

A.C.B. Limited

Head office,

Lagos.

Dear Sir,

RE: RETURN OF TITLE DOCUMENTS – A/C NEKA B.B.B. MANUFACTURING' CO. NIG. LTD.

We refer to your letter LD/BR. 121/44 OF 11<sup>th</sup> November, 1981 regarding our above-named company customers' account and confirm that their indebtedness with us had been cleared with their Union Bank cheque for N73,463.49 lodged on 7<sup>th</sup> October, 1981, photocopy of their ledger card attached. G

At the customers' request, we implore you to deliver both their title H document based in Enugu on which legal mortgage had been perfected with registration number as 49/49/599 Enugu and the one with the Federal Mortgage Bank referred to in your letter under reference.

The customer claimed that we contracted to settle their debt with Nigeria Building Society, redeem and keep their mortgaged documents. We are therefore surprised to note from your letter that this property is still not in our custody. Customers elect to deliver this letter to you and you have our authority to release their title documents to them and endorse your action to us. The customers Deed of mortgage dated 9<sup>th</sup> June, 1997 and registered as 49/49/599 Benin City was forwarded to Leader, Special Recovery Task Force as per our letter IOEO/ASO/ACS/42/8348/81 OF 15<sup>th</sup> March, 1981.

EXHIBIT 'D2'

<p>Our Ref: N/ACB /83/2          Your Ref:ROA/ASO/ACS/82          The Manager,          African Continental Bank Limited,          1, Ring Road, P.M.B. 1137,          Benin City.          Dear Sir,</p>	<p>No. 81, Forestry Road.          P.O.BOX 682,          Benin City          16<sup>th</sup> November, 1983.</p>
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Re: Your delay in Releasing Our Mortgaged Deed  
on our Property at No. 1 Hospital Avenue, Plot Q  
G.R.A. Enugu.

Your letter dated 29<sup>th</sup> October, 1982 reached us a couple of months ago and despite our surprise at your forwarding the said letter to a wrong address i.e. Enugu, when we wrote to your Bank with our Benin Address we chose to call on you for the collection of our Original Deed.

2. We object in very strong terms to your treatment towards us.
3. We paid you fully in September, 1981 and had since been demanding for our Original Deed of Conveyance but your letter did not indicate that the said Title Document Registered as 94/94/411 Benin City-A/C 8348 is the Original deed which your Bank took over from the Nigeria Building Society now called “ Mortgage Bank.
4. Your failure to surrender the original deed but insisting on our payment of yet another N100.00 (one Hundred Naira) shows that you could not bother what we have lost in terms of business.
5. Be it known to you that

(1) We demand forthwith, the Original Deed. Adequate compensation for you deprivation since we were unable to obtain further loan to carry on with our business.

6. Further correspondence on this matter should be channelled through our Lawyer, Chief G.M. Onyiuke, 1 Adeyemi Lawson Road, P.O. Box 659, Ikoyi-Lagos. B

(Sgd) F.N. Debekeme (Mrs.)

Ref: No. N/ACB/83/2A

81, Forestry Road, C

P.O. Box 682,

Benin City.

16<sup>TH</sup> November, 1983

Copy to: D

Chief G. M. Onyiuke,

1, Adeyemi Lawson Road,

P.O. Box 659, Ikoyi-Lagos.

I would now equally set down the particulars of Special Damages claimed. E

1. TULLIO GUISSI SPA A ,

Cost of Machinery and Equipment for the manufacturing of Buttons and Sheet Blanks as at 24<sup>th</sup> June, 1982 F

.....SFN476,142.70

Conversion Rate as at 24/6/82

N = SF3.1293 Swiss France

Therefore SF475,142.70....= 476,142.70 G

3.1293

=152,156.30

B

Same Machinery and Equipment for manufacturing and Equipment for manufacturing of Buttons and Sheet Blanks as at 11/6/87 and at SFEM rate that is SF1 = N2.9223

Cost of Machinery etc. as above is 476,142.70SG

Converted to Naira at the rate of 2.9223 to 1 Swiss Francs is therefore= 476,142.70 x N2.9223 ..... 1,239,431.82

Loss arising from delay in commencing the industry in 1982 and occasioned by changes in exchange rate is B = A Which is N1,391,431.82

$$B - N128,686.22 = N1,239,275.52$$

## 2. RAW MATERIALS C

Imported Raw Material cost in Us dollars as at 1982 US\$ 285,628.00 = \$1.4.4765 as at 1982

$$C \quad \text{Therefore } \$285,628 - \underline{285,638} \dots 193,449.38$$

$$1.4765$$

The Raw Material cost at SFEM rate on 11/6/87 with conversion rate of Naira to the dollar a N4.2389 to US dollar cost of Raw materials etc in US dollars \$285,628 x N4.2389 ..1,210,748.53 It thus means that D what would have cost N193,449.38 in 1982 if the business had taken-off is now costing N1,210,748.53 The difference now a loss this company has suffered for delay is N1,210,748.53 - N193,449.38 1,017,299.15

Total losses N2,256,574.67

## E     P.V.C. ACOUSTIC CEILING AND WALL PANELLING TILES

Cost of Machinery, Equipment Spare Parts, Finished Goods etc. as at 22/5/86 as per Grant + Hattemeister .. DM3,680.40

Cost of same machinery etc. as above 'A' above at DM37040.00 F as at 11/6/87 but converting at SFEM rate of N2.3962 to DM. This gives DM376040 x N2.3962 = 901,067.05. The loss occasioned by delay and changes in exchange rates is therefore N901,076.05-176,776.99 = 724,290.06

## SUMMARY OF LOSSES INCURRED

- G
1. Machinery     1,239,275.52
  2. Raw Materials 1,017,299.15
  3. P.V.C. Tiles     724,290.06
- N2,980,864.73

H General damages resulting from the refusal and or negligence of defendant to return the title documents to the Plaintiffs

N1,000,000.00

N3,980,864.73



=====

The Appellants seem to rely on the above figures, Exhibit D1 and D2 as proof of special damages. They naively placed their imaginary loss at the feet of the Respondents for refusal or failure to give them back their title deeds. The special damages must be strictly proved. There is no evidence of such a proof for neither P.W 1 nor P.W.4 made any effort to prove the special damages claimed. It is important at this juncture to set down some portions of the evidence of D.W.I

*“In 1982, the plaintiff asked for their title deeds which has (sic) been misplaced. But in 1986 and 1989 they approached the defendants for the documents and they gave them certified true copies which they refused to collect. It is the practice of Banks to take certified true copies of documents from customers and search through the land Registry to assure that it is not encumbered before it is processed. The defendants gave the Plaintiff certified true copy of their documents of their original deed of release which the Plaintiff refused ..... We wrote Exhibit E3 to pacify the customer. Since the Plaintiff refused the certified true copy and the deed of release we felt it was not necessary to issue bond of indemnity but this is quite necessary even though the Plaintiff had accepted the certified copy and deed of release”.*

It would appear that not a forthright effort was made by the Appellants to help themselves by accepting both the certified copies of the title documents, and the deed of release to enable them as they claimed, to seek for a facility from any bank. It is equally important to observe that no bank has promised to give any loan. All that the Union Bank had insisted was to see valid documents. It is possible to assume that no worthwhile Financial Institution would embark on any meaningful discussion relating to a grant of any facility for which collateral is important without first seeing the documents that would be the source of security for the loan. In other words whatever the Union Bank or even the Respondent must have said could only be described as an expression of intent. This much can be garnered from the evidence of D.W.I. where he said;

*"The Plaintiff went to the head office who radioed me and that they had agreed for facilities for the Plaintiff. The Plaintiff met me on a later*

*date and I gave them a form to fill which is Exhibit 'K'. The Plaintiff applied for Naira and Dutch mark. The Head Office was surprised at the amount now requested for when Exhibit 'A' was sent to Lagos. I see Exhibit G2 it is mere invitation to submit documents and it does not mean that loan has been given".*

In such an unsettled situation the appellants could not possibly construe such expression as amounting to a promise that they would be granted the loan. That being the case, it is not conceivable that the Appellants could possibly engage in any meaningful business discussion with foreign companies with whom they hoped to commence some business enterprise as there was yet no fund or facility to effectuate the business. How then one might be tempted to ask did the Appellants incur the losses being claimed. **Indeed the so called special damages were based on the evidence of P.W.4 whose evidence on the specific claims was nothing to write home about. When the evidence of a witness is hazy or deficient or utterly hollow, then it would prove nothing and in the case of specific claims such weak evidence would be so wanting in its substantiality that it may be regarded as a mere effusion of an incompetent witness.**

The evidence of facts and circumstances on which a party relies such as in the case, and the inferences deducible therefore must so preponderate in the favour of the basic proposition he is seeking to establish by proof as to exclude any equally well supported belief, and that in the administration of Justice the Court must be satisfied with proof which leads to a conclusion with probable certainty where absolute certainty is either impossible or not necessary or essential. **Where there are specific claims it is the duty of the Plaintiff to prove all the essential facts succinctly and with clarity to leave no one in doubt.**

In order to meet the standard required in proof of specific or special items of claims, the facts must not be wobbly or bent or susceptible to varying degrees of construction. In the case of J.O. Imana v Robinson (1979) 1 All N.L.R. I at 16 in relation to proof of special damages the Supreme Court per Aniagolu JSC said;

*“The term “strict proof” required in proof of special damages means no more than that the evidence must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses which are exactly known or accurately measured before the trial. Strict Proof does not mean unusual proof, as the play of the appellants’ Counsel on those words tendered to suggest, but simply implies that “a Plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible”.*

Let me consider the case of U.B.N. v. Odusote Bookstore Ltd (1994) 3. N.W.L.R. (Pt. 331) P.129 which both parties have cited. In that case the Respondent had commenced an action against the applicant for negligence in handling operating and management of the Plaintiffs’ business affairs and accounts. They equally claimed some special damages. The case before the Supreme Court was in respect of a motion for stay of the judgment of the Court of Appeal which affirmed the judgment of the High Court. The matter was essentially as to whether the applicant had satisfactorily made out a special case for the Court to consider exercising a discretion in its favour although the facts of the main case would on the surface appear to be exactly the same as in this case. In that case the Respondent had in fact paid some money to the Bank for his business transactions and it was the alleged mishandling that brought the parties to the Court. I really do not know the significance of this case to the present one in which this Court is hearing an appeal on the full force of the main case arising out of the judgment of the Court of Appeal.

In the case under consideration the appellants have paid nothing and the attempt to use figures of the value of Naira relative to the dollars then as to show how much gain might have been made, succeeded in merely obfuscating the appellants’ case. The claims of the Appellants seem to me to be hinged on very flimsy, terribly elastic, and I dare say sadly deficient testimony that could not by any stretch of imagination had guaranteed any compensation by way of damages.

Finally let me discuss the point made in the Appellants’ brief that the evidence of P.W. 4 which I have described as being utterly hollow, was

not challenged. **An opposing party should not be expected to challenge an evidence that is hollow, empty or bereft of any substance as that would to my mind amount to chasing a shadow. I am familiar with the case of Odulaja v. Haddad (1973) A N.L.R. 36 to the effect that**  
B **an evidence not challenged by the party that had the opportunity to do so should ordinarily be believed and accorded credibility. I believe that such holding rests on the premise that such evidence is capable of being believed if not challenged. In other words, when the**  
C **evidence is weak in content as not to assist the Court or is manifestly unreasonable or is devoid of any substance as not to help to resolve the matter in issue it will be safe to ignore it as it does not attain the standard of credibility. Although it is the general rule that uncontradicted evidence from which reasonable people can draw but one**  
D **conclusion may not ordinarily be rejected by the Court but must be accepted as true, it is also true to say that the Court is not in all the circumstances bound to accept as true testimony an evidence that is uncontradicted where it is wilfully or corruptly false, incredible,**  
E **improbable or sharply falls below the standard expected in a particular case. Another disconcerting point if not entirely confusing to the point of being almost melo-dramatic aspect of the appellants' case is that it is difficult to understand what the claim is all about. For**  
F **example if it involves negligence, there are no particulars of negligence. It is not a case founded in the tort of detainee. To understand and appreciate the extent of what I would describe as the disorientated nature of the claim made which boggles and tasks the mind, I shall reproduce some of the portions of the claim made below.**

G      *1. A declaration that defendants in breach of stated condition failed to keep the said title documents safely and did not redeliver them to the Plaintiffs on demand whereby the said documents were and are lost to the Plaintiffs. Or in the alternative the defendants and or their servants,*  
H *are guilty of negligence whereby the said documents were lost or not returned to the Plaintiffs in spite of repeated demands.*

*2. By reason of the matters aforesaid the Plaintiffs have suffered loss of lucrative business and Special and General damages assessed at*

*three million, nine hundred and eighty thousand, eight hundred and sixty-four Naira, seventy-three kobo from defendants' refusal and or failure to return the title documents for the Plaintiffs for them to use as security for loans from other Banks or grant the plaintiffs loan since the defendants cannot return the title documents to the Plaintiffs for them to use as security for loans from their Banks or grant the Plaintiffs loan since the defendants cannot return the title documents".*

Thereafter they proceeded to itemise what they described as special or particular damages. The almost incomprehensible nature of the relief by way of claims for damages is difficult to be pigeon holed into a particular compartment of the law as to enable the Court understand and realistically and seriously deal with the matter. When the nature of pleadings or claim is so disturbingly boorish or negativistic or even waspish, no Court would accord credit to the case being put forward. **A Plaintiff must fully understand the case he is putting across and what he expects the Court to do for him and this should be put in a language that flows freely. This appeal was dead, right from the word go. It is unnervingly bad and irremediable. It is completely bereft of any merit and I must confess it reached the nadir of utter hopelessness in this Court. In the circumstances the appeal fails as lacking in merit.** It is hereby dismissed. I affirm the judgment of the Court below, and as there is no appeal or cross-appeal on the sum of N6,000.00 hitherto awarded, it therefore still stands. I award N10,000.00 costs to the Respondents.

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### KUTIGI JSC

I read in advance the judgment just delivered by my learned brother pat -Acholonu, JSC. I agree with the conclusion that this appeal is lacking in merit. It is accordingly dismissed with costs as assessed.

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### ONU JSC

Having had before now a preview of the judgment of my learned brother Pats-Acholonu, J.S.C just read, I am in full agreement with him

that the appeal is devoid of merit and so ought to fail. I also accordingly dismiss it.

I wish to expatiate briefly on the matter by adding briefly as follows:

B        To a very large extent, the sum total of the Appellant's claim (as  
 plaintiff in the trial court and as Respondent in the Court of Appeal- here-  
 inafter referred to as the court below - was in detinue in that the Defend-  
 ant/Respondent failed and/or refused to redeliver the Appellant's original  
 C title Deeds on demand or alternatively for negligence whereby the 3rd  
 title Deeds were lost and not returned to the Appellant.

In addition, by reason of the matters aforesaid, the Appellant contends that it has suffered loss of business and special and general damages assessed at N3,980,864.73.

D        The Appellant averred in paragraphs 14 and 15 of their Further  
 Amended Statement of Claim (see page 73 of record) it lost a lucrative  
 business deal from two West German Companies for the purchase of  
 their entire machines and machinery, raw materials and other finished  
 E products etc on TURNKEY BASIS at 360, 040 Deutsche Marks and  
 another lucrative business deal from TULIO GIUSI SPA of Italy for the  
 purchase of machines and raw materials etc and polyester buttons at the  
 rate of 476,142,79 Swiss Francs. In paragraph 17 of the said Further  
 F Amended Statement of Claim the Appellant averred that it had good of-  
 fers for a loan from the Union Bank of Nigeria Limited and other Finan-  
 cial Houses on the condition that they could get the original documents,  
 which were released, to the Defendant by the Nigeria Building Society on  
 behalf of the plaintiff.

G        While the Appellant called four witnesses to prove its case, the  
 Respondents called 2 witnesses.

In his considered judgment, Akpomudjere, J. found in favour of the Appellant and concluded thus:

H        *"I award the sum of N1,963,456.58 for losses incurred by the plain-  
 tiffs for the failure of the defendants to grant facilities for them to im-  
 port the machine (sic) and machineries (sic) from both companies in  
 Western Germany and Italy. The claim under the head raw materials is*

*refused because there were already embodied in the proforma invoices for the machineries. The plaintiffs are also entitled to sum of N6,000.00 for the loss of their title documents. There will be cost of N500.00 for the plaintiffs"*

Aggrieved by this decision, the Defendant/Respondent went on appeal to the court below, which proceeded to reverse the decision of the trial court.

Hence, the further appeal by the Appellant to this Court.

While the appellant formulated 4 issues as arising for determination, the respondent submitted a lone issue for the resolution of the appeal.

I am in entire agreement with my learned brother Pat - Acholonu, JSC that the only apposite single issue that arises for determination complains:

*"Whether on the pleadings and evidence there is a legal basis for the award of special damages or in the alternative whether the plaintiff/Appellant discharged the burden of proof required to succeed in its claim for special damages."*

#### ARGUMENT OF THE LONE ISSUE

That the appeal is baseless and that the action founded thereon is based on conjecture may be gleaned from some portions of the claim reproduced hereunder as follows:

*"1. A declaration that the defendants in breach of stated condition failed to keep the said title documents safely and did not redeliver them to the plaintiffs on demand whereby the said documents were and are lost to the plaintiffs. Or in the alternative the defendants and or their servants, are guilty of negligence whereby the said documents were lost or not returned to the plaintiffs in spite of repeated demands."*

*2. By reason of the matters aforesaid the plaintiffs have suffered loss of lucrative business and special and general damages assessed at three million, nine hundred and eighty thousand, eight hundred and sixty - four Naira, seventy - three Kobo from Defendant's refusal and or failure to return the title documents for the plaintiffs for them to use as security for loans from other Banks or grant the plaintiffs loan since the*

*defendants cannot return the title documents for the plaintiffs for them to use as security for loans from their Banks or grant the plaintiffs loan since the defendants cannot return the title documents."*

It is pertinent to stress that before a claim for special damages for breach of contract is awarded the threshold issue of the existence of a contract must first be clearly established and sustained before the court. In his brief the Appellant contends that *"It is not disputed that the Defendant agreed to assuage the Plaintiff by granting him loan to carry on with those business ventures."*

This, in my view, is far from reality. It is trite law that for a contract to exist there must be an offer, an unqualified acceptance of that offer and a legal consideration. Indeed, there must be a mutuality of purpose and intention, the two contracting parties must agree. In other words, there must be an offer and acceptance. See Cheshire and Fifoot's Law of Contract, 9th Edition, page 27 and 31. See Tsokwa Motors (Nig) Ltd v. U.B.N. Ltd (1996) 9 NWLR (pt.471) 129 per Iguh, JSC at page 145 A-H Aforntin v. A.G. Federation (1996) 9 NWLR (pt.475) 634 at E 638.

The Appellant placed heavy reliance on the evidence of pw2, Clement Okoye, who testified inter alia as follows:

*"I am directed by the Chief Legal officer to appease the plaintiff to order the granting of the loan required by her.... in due course there was a tussle as to the amount to be approved..."*

Under cross - examination, the witness said:

*"...We promised to give the plaintiff loan but could not determine the amount..."*

At page 115 of the record, D.W.2 - Samuel Nwabueze Okonkwo testified as follows:

*"I know pw1 (pw2) and he does not have power to bind us with loan promises. There was disagreement between the Bank and the Plaintiff."*

I am fully in agreement with the Respondent that the available evidence merely showed that the Appellant and the Respondent entered into negotiations for the facility for which there was never a binding



contract. No single document indicating an agreement to grant a facility was presented at the High Court neither was any endorsed application for letters of credit proffered. Negotiation no matter how protracted could not take the place of or be likened to an agreement or as a contract to lend money. Hence, as there was no agreement/contract between the Appellant and Respondent to grant a loan facility, the issue of a breach cannot arise and consequently an award for special damages will definitely be without a basis in law. Granted that an agreement was reached for the sake of argument between the Appellant and the Respondent (although this is not conceded) to grant the Appellant that facility, it remains to be seen whether the Appellant pleaded and/or proved its claims in special damages to be entitled to judgment in this appeal. B C

The thrust of Appellant's claim in damages as contained in paragraph 27 of the Further Amended Statement of Claim at pages 78 - 80 of the records is neither founded strictly in negligence (since no particulars thereof were stated) nor strictly in detinue. Albeit, the learned counsel for Respondent although she conceded the N6000 award of special damages made to the Appellant, had there being a cross-appeal by the Respondent against that award, I would have had no hesitation allowing it as having been speculatively awarded. See the evidence of P.W.4 Mr. G.O. Omokivie at pages 97 - 98a of the record. It is a well established principle of law that special damages must be specially pleaded with relevant particulars and strictly proved. See Messrs Dumez Nigeria Ltd v. Ogboli (1972) 1 All NLR 244 at 252 and 253; Adeosun v. Adisa (1986) 5 NWLR 225 and Osuji v. Isiocha (1989) 3 NWLR (part 111) 623 S.C. D E F

Throughout these proceedings from the trial court up to this court, heavy weather was made of p.w4's evidence. It would appear that the success or failure of Appellant's claims in special damages was wholly dependent on the weak, grossly insufficient and tenuous evidence of this witness Mr. Omokivie. G

As for PW1, Mrs. Faith Degekeme, Managing Director of the Appellant Company to the effect that "... The Accountant will give account of the special damages" when pw4 came to testify on special damages which was supposed to be the key to the success of the claim in H

damages, it amounted to a mere recitation of foreign exchange differentials. He testified as follows:

"....the plaintiff have suffered damages and in the (sic) regard I know the plaintiffs would have made profit and taking into account the present conversion rate of the Naira. The plant and equipment were estimated to cost N1.5m, raw materials N1.00m and PVC tiles N.7m totaling N3.00m. These figures were calculated basing them on rate differentials between 1982 and 1988.... The conversion rate and their equivalents are contained in paragraph 27 of the Further Amended Statement of Claim...."

Thus, although P.W.4 testified that the Appellant would have made profit if the facility was granted, the precise amount of the loss in profit sustained was never pleaded or adduced in evidence. Furthermore, even though P.W.1 had testified that the Managing Director of the Appellant Travelled overseas to see the business partners, the amount expended to undertake the trip did not form part of the claims in damages of Appellant and was not specifically adduced in the evidence of P.W.4.

It is trite law that a contract of the kind under consideration is concerned with the rendering of benefits, if one party defaults in performance, the other party is entitled to compensation for loss of profit or the expenses incurred. See Anglia Television Ltd. v. Reed (1971) 3 All E.R 690 at 692.

For a clear appreciation of the lacuna in the Appellant's claim in special damages - the cornerstone of his (Appellant's case) - reference is herein made to Black's Law Dictionary 6th Edition 1990 page 1211 where profit is defined as "*the gain realized from business or investment over and above expenditure.*"

It is noteworthy too that no evidence of the anticipated profit or benefit that the Appellant would have made was rendered in this case. See Odumosu v. ABC (1976) 11 S.C 53 and Odusote Book Stores Ltd v. Union Bank Ltd (1994) NWLR (pt.331) 129 at 138.

Finally, in the Appellant's desperate effort to make capital of the proforma invoice, it feebly contended at pages 10 and 11 of the Brief, that "*the proforma invoice creates the existence of a contract.*" This is

clearly illusory with no foundation or basis in the law of contract. It will be fantasy to imagine therefore that was at any time any contractual agreement between the Appellant and the European exporters. Had there been one, the Appellant would have been entitled to compensation for losses of goods paid by letters of credit for goods shipped but not paid for, as would have been shown by bills of lading or way bills or receipts but not by mere proforma invoices as postulated at the trial in this case. B

It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother Pat - Acholonu, JSC I too dismiss the appeal. I make similar consequential orders inclusive of those relating to costs contained therein. C

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### IGUH JSC

D

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Pats-Acholonu, J.S.C. and I entirely agree that this appeal is without substance and ought to be dismissed.

The facts of this case are fully set out in the leading judgment and no useful purpose will be served by my recounting them all over again. It suffices for me to state that there can be no doubt, as rightly indicated in the respondent's brief of argument, that the main and, indeed, the sole issue for consideration in this appeal is whether on the pleadings and evidence, there is any legal basis for the award of special damages in the case or, in the alternative, whether the plaintiff/appellant discharged the burden to proof placed upon it by law to succeed in its claim for special damages. E F

In this regard, it must be stressed that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and a court is not entitled to make an award of special damages based on conjecture or on some fluid and speculative estimate of alleged loss sustained by a plaintiff. See Dumez (Nig) Ltd v Patrick Ogboli (1972) H All N.L.R. 244, Osuji v Isiocha (1989)3 N.W.L.R. (pt.111) 623, Jaber v. Basma 14 W.A.C.A. 140 etc. This is unlike an award in general damages where, if the issue of liability is established, a trial Judge is entitled to G

make his own assessment of the quantum of such general damages and, on appeal, such general damages will only be altered or varied if they were shown to be either so manifestly too high or so extremely too low or that they were awarded on an entirely wrong principle of law as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See Ziks press Ltd. V. Ikoku (1951) 13 W.A.C.A. 188, Idahosa V. Oronsaye (1959) 4 F.S.C. 166, Bola V. Banklola (1986) 3 N.W.L.R. (pt.27) 141, Ijebu Ode Local Government V. Balogun and Co. Ltd. (1991) 1 N.W.L.R. (part 166) 136 etc. In so far as an award of special damages are concerned therefore, a trial judge cannot make his own individual or arbitrary of assessment of what he conceives the plaintiff may be entitled to. He must in such a case act strictly on the hard facts presented before him which he accepts as establishing the amount awarded.

In the present case, although the appellant led evidence to the effect that he would have made some profits if the respondent were not in breach of the appellant's rights under their transaction, the precise amount of the actual loss of profit sustained by the said appellant in terms of Naira and Kobo was neither pleaded in its Statement of Claim nor adduced in evidence. As a result, no iota of evidence of the precise loss that the appellant suffered was led in this case. On the evidence, the appellant did not commit a single kobo in the business deal he complained of and therefore lost nothing. Its entire case on the issue of the special damages claimed was built entirely on conjecture and this cannot be the basis for an award of special damages as purportedly made by the trial court.

In this regard, the Court of Appeal after a thorough consideration of the award in special damages observed thus-

*"After very careful consideration of all the available authorities on this matter, I am myself of the view that even if it is conceded that the respondent lost valuable business deals or opportunities as a result of the loss of their original title documents by the Appellant, the question still remains as to what amount of profit the respondent could have made if the said European business had not been frustrated. There was no pleadings nor evidence whatsoever on this vital issue. Without such informa-*

tion, this court cannot help the respondent."

The court then added-

*In the instant case, however, not only was the business ventures of the Respondent not yet commenced, but also there was no evidence whatsoever as to what was the projected or estimated income and profit per day, month or year. Following the case of Odumosu vs A.C. Bo. Ltd (Supra) whose facts have already been given in detail above. I am of the considered view that Special damages were not strictly proved by the Respondent, and the learned trial judge should have so held."*

It concluded-

*"In effect therefore the amount of N6,000.00. awarded in respect of general damages is allowed to stand, since there was neither an appeal nor Cross-appeal against it. But the appeal against the special damages awarded succeeds and is hereby allowed, while the Cross-appeal against same fails and is hereby dismissed. For the avoidance of doubt the amount of N1,963,465.5 awarded in favour of Respondent as special damages is hereby set aside, as there was no evidence to support it, while the general damages of N6,000.00 is hereby affirmed."*

I agree entirely with the above observations and conclusion of the Court of Appeal and fully endorse the same.

In the circumstance, I find no substance in this appeal and the same is hereby dismissed with costs as assessed in the leading judgment.

## UWAIFO JSC

The plaintiff company (now appellant) was a customer of the defendant bank (now respondent). The plaintiff took a loan from the Nigerian building Society and used the title document of the landed property of two of its directors, Mr.& Mrs. Debekeme, as security for the loan. The defendant at the request of the plaintiff paid off the indebtedness of the plaintiff to the Nigerian Building Society and retrieved from the Nigerian Building Society the said title document. It kept the title document which later formed the basis of a mortgage deed for the defendant's financial commitment. It was agreed that the title document would be

surrendered to the plaintiff upon its settlement of the accruing indebtedness to the defendant.

It is alleged that on 6 October, 1981, the total indebtedness of N73,463.49 was settled by cheque but that the defendant failed to surrender the title document. It is further alleged that the plaintiff got some business deals in West Germany and also in Italy. In respect of the one in West Germany it required DM 368,040 and the one in Italy 476,142.70 Swiss Francs to execute them.

The plaintiff claimed that it had offers for loans from the Union Bank and other finance houses to cover the foreign exchange necessary for the business deals and in pursuance of this, it needed the said title document as collateral. It said it had to renew its demand for the surrender of the title document but the defendant failed to comply. It said the defendant had instead offered to grant the needed loan but later did not carry this through; and at the same time it failed to return the original of the title document which, as alleged, the Union Bank demanded. Alternatively, it alleged that the Union Bank asked for another condition namely, *"a bond from the defendant to the effect that the subject matter of the title documents was not in anyway subject to encumbrances or prior mortgage to any bank or to any financial institutions."* It alleged that the defendant failed to meet the said condition whereupon the plaintiff sued for negligence based on the refusal to return the title document which it claimed made it impossible for it to secure loans from other banks while the defendant would not grant it such loans.

The plaintiff claimed for special damages of N2, 980,864.73 and general damages of N1,000,000.00 making a total of N3,980,864.73. The special damages were made on certain calculations based on alleged differentials in foreign exchange rates as loss the plaintiff would have sustained from the delay in ordering the machinery and equipment, and also raw materials in respect of the deals in West Germany and Italy. The general damages of N1,000,000.00 were in respect of the failure of the defendant to return the title document in question.

On 28 June, 1991, the High Court, Benin presided over by Akpomudjere j., in a considered judgment, awarded the sum of

N1,963,465.58 as special damages and N6,000.00 as general damages to the plaintiff. There was an appeal against the special damages. There was also a cross-appeal by the plaintiff but it did not touch the award of N6,000.00 as general damages. On 24 November, 1995, the Court of Appeal, Benin Division allowed the appeal and set aside the entire special B damages awarded. It dismissed the cross-appeal.

The plaintiff has further appealed to this court raising the following issues for determination:

"1. Whether the learned Justices of the Court of Appeal were right C in law when they held that in the absence of any evidence to show that certain monies were actually paid to the Respondents by the Appellant for transmission to the European experts in 1982 there can be no claim for special damage based on the foreign exchange differentials in the value of the Naira. D

2. Whether the learned Justices of the Court of Appeal were right in Law when they held that the evidence as given by p.w. 4 relating to differentials in the cost of importation of the goods in 1982 and 1987 and tendering of the proforma invoices does not amount to sufficient E proof of those arm of special damages.

3. Whether the learned Justices of the Court of Appeal were right in Law when they held that there was no evidence whatsoever as to what the estimated income and profit would be and therefore the special dam- F ages were not strictly proved by the Appellant.

4. Whether the learned Justices of the Court of Appeal adequately considered the cross appeal of the Appellant before dismissing same."

It is true that the plaintiff (hereinafter referred to as the appellant) G deposited title deed in respect of the said landed property of Mr. & Mrs. Debekeme registered as No. 94 at page 94 in volume 411 in the office of the Lands Registry, Enugu with the defendant (hereinafter referred to as the respondent) to support a mortgage deed as collateral for the money paid to the Nigerian Building Society by the respondent on behalf of the H appellant. The original title deed was misplaced, according to the respondent, and a certified true copy was made available. The appellant refused to accept that. It would appear from the evidence that the Union

Bank did not specifically ask for that particular title deed. It is, therefore, pertinent to refer to what the said bank requested from the appellant when it applied for loan facilities of N300,000.00 for machinery and raw materials in the bank's letter of 12 August, 1986. In that letter, feasibility report, memorandum of articles of association, photocopies of certificate of incorporation, business permit, Federal Ministry of Finance approval for company to raise loan, approved status of foreign equity, customs and excise provisional approval for company to start production, photocopy of document of title to the proposed factory premises or other security, details of any other security proposed, apart from landed properties already covered above relating to the project e.g. guarantees from shareholders, performance bonds etc were demanded. Thereafter in the Union Bank's letter of 21 April, 1987 to the appellant it wrote thus:

"We refer to your letter dated 31st July, 1986 on the above and advise that you should attend to the under-listed points as fast as possible to enable us appraise your request further:

(1) Documents of title to the proposed factory premises and or other securities.

(2) Copies of your current audited balance sheet."

It will be observed that the Union Bank never insisted on the document of title in the custody of the respondent. It is impossible to relate the failure of the appellant to secure a loan from the said Union Bank to the unavailability of title document which was relentlessly pleaded or referred to in paragraphs 5, 7, 8, 9, 11,11 (b), 12, 13, 17, 18, 19,19 (a), 20, 21, 24, 25 and 26, of its amended statement of claim. In paragraphs 24, 25 and 26, the following were averred:

"24. Because of the refusal of the defendants to grant the loan or to return the title documents of the plaintiffs to them, the plaintiffs negotiations and agreements with their Overseas Customers failed through. (Sic)

25. Their application to the Union Bank also failed because the defendants refused to surrender the original title documents of the plaintiffs' properties to them. There was no guarantee from the defendants as to the whereabouts of the original documents.



26. *The Union Bank insisted on original title documents or a guarantee and or bond from the defendants to the effect that the subject matter of the title documents was not in any way subject to encumbrance or prior mortgage to any bank or to any financial institutions."*

There is no evidence to support the allegations stated in those averments. In fact, the bank did not insist on the original of any title document but on "photocopy" as stated in their letter of 12 August 1986.

It would appear that the appellant's case was based partly on untruths, partly on speculation and partly on misconception of what the cause of action is, and the extent of the damages it could claim. It must be recognized that the Union Bank did not make any offer to the appellant for a loan. The best that happened was really an invitation to treat. This is contained in exhibit G3, where the bank said: "*We must emphasize that there is yet no commitment on our part. The documents/information you make available will determine the bank's reaction to your request .*" An invitation to treat is not an offer that can be accepted to lead to an agreement or contract and therefore cannot form the basis of any cause of action: see *Harvey v. Facey* (1893) A.C. 552; *Clifton v. Palumbo* (1944) 2 All ER 497.

It has been said that an offer, capable of being converted into an agreement by acceptance, must consist of a definite promise by the offeror to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal. He must not merely have been initiating negotiations from which an agreement might or might not in time result. Negotiations may involve the adjustment of so many questions of detail that the courts will require cogent evidence of an intention to be bound before they will find the existence of an offer capable of acceptance: see *Cheshire and Fifoot's Law of Contract*, 9th edition, pages 27 and 31.

The loss of the title document in question in the circumstances, could only give rise to the tort of detinue or conversion. In an action for detinue, a plaintiff can claim for specific restitution of the chattel, or, in

default, its value and damages for its detention up to the date of judgment. But where the chattel is not profit-earning (as in this case) it is extremely difficult to assess the damages incurred by the plaintiff for the detention: see *Odumosu v. ACB Ltd* (1976) 11 SC 55 at 65-66. See also  
 B *J.E Oshevire Ltd v. Tripoli Motors* (1997) 5 NWLR (pt.503) 1. In case of conversion, the damages will be the value of the chattel at the date of the conversion: see *Kosile v. Folarin* (1989) 3 NWLR (pt.107) 1.

In the present case, the plaintiff would appear to have claimed  
 C either in detinue or negligence although it was not itself sure and this is by no means clear because the only mention of that likelihood is in relief (1) which reads thus:

*"A declaration that defendants in breach of stated condition failed to keep the said title documents safely and did not redeliver them to the  
 D plaintiffs on demand whereby the said documents were and are lost to the plaintiffs. Or in the alternative the defendants and or their servants, are guilty of negligence whereby the said documents were lost or not returned to the plaintiffs in spite of repeated demands."*

E However, it is clear that there was no basis at all for the special damages as claimed. It is in evidence that the appellant failed to raise a loan from the Union Bank or any other finance house. It could not fulfil the conditions laid down by the Union Bank before its application for a  
 F loan would be given consideration at all. Therefore, in whatever way the matter is looked at, the appellant was unable to make any financial commitment to the alleged business. All it fell back on as an armchair entrepreneur was the calculation of loss of profit to it, based on an alleged variation or differentials in exchange rate, which the failure to get a loan  
 G caused it. This is nothing better than the probability of probabilities.

In any case, the claim to the special damages as calculated must be considered too remote: see *Benin Rubber Producers Ltd. V. Ojo* (1997) 9 NWLR (pt.523) 388 at 411. In *Liesbosch Dredger v. Edison S.S (Own-  
 H ers)* (1933) AC 449, the appellants sued for damages for the collision with their dredger, the liability for the damages being solely due to the respondents' steamship. But the appellant's claim included all sorts of purported loss including their impecuniosity to replace the damaged

dredger in time. Lord Wright who considered the claim closely observed thus:

*"[T]he appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequences of consequences..... In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellant's financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote."*

That is the view I hold in the present case even if it were proved that the respondents failure to surrender the title document made it impossible for the appellant to include it among the documents requested by the Union Bank. I read in advance the judgment of my learned brother Pats- Acholonu JSC. I agree with him that the appeal lacks merit. I too dismiss it with N10,000.00 costs in favour of the respondent.

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<sup>3</sup> That is