

SUPREME COURT OF NIGERIA
6TH JULY, 2012. SC. 34/2005
CORAM:- F. F. TABAI, J. A. FABIYI, O. O. ADEKEYE,
B. RHODES-VIVOUR, O. ARIWOOLA, JJSC

1. SAIDU H. AHMED
2. LEADING LEATHER
PRODUCTS LTD APPELLANTS
3. SAIDTALL SHOES LTD
AND
CENTRAL BANK OF NIGERIA RESPONDENT

COURTS - Damages - Power to Award - Damages are awarded by trial court - And such power is exercised after judicious estimation of loss to victim - Once breach of contract has been established (H1)

CONTRACTS - Discharge - Means of - Contract may be discharged by performance - Agreement - Frustration - Or by breach (H2)

CONTRACTS - Discharge - By breach - Meaning - This occurs where party acted contrary to terms by non performance - Or performing contrary to terms - Or by wrongful repudiation (H3)

DAMAGES - Award by trial court - Interference - Appellate court will not interfere - Save where inter alia - Exercise of discretion by trial court is perverse (H4)

DAMAGES - Entitlement - Proof - Claimant must prove it was act of respondent that led to his loss - Failure of which will lead to dismissal of his claim (H5)

FACTS

1st plaintiff/appellant applied to defendant/respondent for participation in the debt conversion auction programme of respondent. 1st appellant was the redemptory of the debt conversion programme while 2nd and 3rd plaintiffs/appellants were supposed to be the beneficiaries. 1st appellant applied to respondent for leave to cancel \$10,000,000.00 dollars worth of debt instrument in favour of 2nd

and 3rd appellant companies. After due consideration, respondent approved the application of 1st appellant. 1st appellant later paid into respondent's bank account the sum of \$164, 925.00. This amount was to provide sufficient funds in 1st appellant's account with respondent to deduct charges and commission due to it from 1st appellant for any debts redeemed at the auction. Subsequently, 1st appellant cancelled debts to the tune of \$3, 721,807.81 on behalf of the Federal Government of Nigeria. A commission of \$55, 072.99 was deducted from the un-utilised transaction commission leaving a balance of \$109, 852.01.

However, auctions for debt conversion became irregular. Hence, 1st appellant could no longer produce debt instruments to the tune of \$10, 000,000 as he had earlier represented to respondent. Consequently, 1st appellant stopped participating in the bidding sessions and requested for a refund of the balance of \$109, 852.01. Respondent refused to refund the said amount. This refusal led to the institution of this action by appellants at the Federal High Court Lagos, wherein they claimed inter alia, special damages in the sum of \$109, 852.01, interest on the said sum, amount for 5 years loss of profit and general damages. After hearing in the matter, the court found in favour of appellants. Being dissatisfied, respondent appealed to the Court of Appeal, Lagos. The court partly allowed the appeal by affirming the grant of the special damages, while dismissing the other heads of claims earlier granted by trial court. Appellants were aggrieved and thus filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned justices of the Court of Appeal were right when their lordships set aside part of the decision contained in the judgment of the learned trial judge awarding special damages, in the sum of \$4, 036,372.73 and \$4,034,150 to the 2nd and 3rd appellants respectively.

2. Whether the learned justices of the Court of Appeal were right when their lordships held that it seemed unreasonable to have expected the defendant to contemplate that if it did not pay the \$109,852.01 at a particular time, it would be the probable result of the breach that the 2nd and 3rd plaintiffs would suffer loss of profit in a business which they had not as yet commenced.

HELD (Unanimously dismissing the appeal per
ADEKEYE JSC)

Damages - Power to - Award

1. I have scrutinized the case of the parties as narrated in the Record of Appeal. I have to emphasise that the decisions of this court supported that the award of damages is purely within the precinct of the trial court. The power to award damages by the trial court is exercised in the circumstance of a judicious estimation of the loss to the victim once a breach of contract has been established. (p. 2780 H)

CONTRACTS - Discharge - Means of

2. A contract generally may be discharged through the following, namely -

a. By performance - if both parties have done all that is required of them,

b. By agreement - if both parties have mutually agreed to put an end to their contractual relationship,

c. By frustration - if some event outside the control of the parties take place, making performance impossible,

d. By breach - where the innocent party is relieved and the party in default may be liable for damages. (p. 2781 B)

CONTRACTS - Discharge - By breach - Meaning

3. A contract will be discharged by breach when the party in breach had acted contrary to the terms of the contract either

1. By non performance or

2. By performing the contract not in accordance with its terms or

3. By wrongful repudiation of the contract.

(p. 2781 D)

DAMAGES - Award by trial court - Interference

4. Award of damages is an exercise of discretion by the trial court. An appellate court will not interfere with an award of damages by a trial court unless it is made under certain pecu-

liar circumstances which include-

1. Where the exercise of discretion by the trial court is perverse.

2. Where the court acted under wrong principles of law or

B 3. Where the court acted in disregard of applicable principles or

4. Where the court acted in misapprehension of facts or

C 5. Where the court took into consideration irrelevant matters and disregarded relevant matters whilst considering its award or

6. Where injustice will result if the appellant's court does not act or

D 7. Where the amount awarded is ridiculously low or ridiculously high that it must have been an erroneous estimate of the damages. (p. 2781 G)

DAMAGES - Entitlement - Proof

E 5. The law is that the claimant must prove that it was the action of the respondent that led to the loss for which he is seeking recompense. Failure to link the act of the respondent conclusively to the loss for which damages is being claimed can only lead to a dismissal of the claim for damages. (p. 2783 H)

F NOTABLE POINT OF INTEREST

FABIYI JSC

1. Special Damages - Definition

G Special damages have been defined as those which are the actual, but not necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Such are damages which do not arise from wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury. To be recoverable, they must flow directly and immediately from the breach of contract, and must be reasonably foreseeable. **H** Special damages must be specially pleaded and proved. (p. 2785 D)

REPRESENTATION

Mr. T.O. Ochonogor, for the Appellants
Adetunji Oyeyipo SAN with Mrs. O.O. Soyebo SAN; Oluwakemi Balogun (Miss); Oga Obeya Esq. and Uche Ozoagbo Esq, for the Respondents B

CASES REFERRED TO

A-G Oyo State v. Fair Lakes Hotel (1989) 5 NWLR (pt. 121) 255
Uwa Printers Ltd v. Invest. Trust Ltd (1998) 5 NWLR (pt. 92) 110 C
Arta Industries Nig Ltd v. NBCI (1998) 4 NWLR (pt. 546) 385
Hadley v. Baxendale (1854) 9 Ex 341
Akomolafe v. Guardian Press Ltd. (2010) 3 NWLR (pt. 1181) 388
Adole v. Gwar (2008) 11 NWLR (pt. 1099) 562
CBN v. Ahmed (2004) 15 NWLR (pt. 897) 591 D
Neka BBB Manufacturing Co. Ltd. v. ACB Ltd (2004) 2 NWLR (pt. 858) 554
Iwuoha v. NIPOST Ltd (2003) 8 NWLR (pt. 822) 308
Bhojsons Plc v. Daniel Kaliel (2008) 5 NWLR (pt. 973) 330
Osun State Govt v. Dalami Nig Ltd (2003) 7 NWLR (pt. 818) 72 E
Imana v. Robinson (1979) 3-4 SC 1
Odulaja v. Hadelad (1973) 11 SC 357
Ikuomola v. Oniwaya (1990) 4 NWLR (pt. 146) 619
David-West v. Oduwole (2003) 12 NWLR (pt. 835) 682 F

LEAD JUDGMENT BY ADEKEYE JSC

The 1st appellant, S.H. Ahmed a businessman and an investor is the chief promoter and a majority shareholder in the 2nd appellant's leading Leather Products Limited and the 3rd appellant's Saidtall G Shoes Ltd. The respondent; the Central Bank of Nigeria is a banker and chief financial adviser/regulator of the Federal Government of Nigeria. The functions of the respondent include operation and regulation of the Debt Conversion Auction Programme of the Federal Government through the debt conversion committee. The 2nd and H
3rd appellants were brought in as plaintiffs by the amendment to the Writ of Summons and Statement of Claim with leave of the trial court on the 11th of December 1996 (vide pages 30-41 of the record of appeal). On the 22nd of March 1991, the 1st appellant applied to

the respondent for participation in the debt conversion auction programme of the respondent. The 1st appellant was the redemptory of the debt conversion programme while, the 2nd and 3rd appellants were supposed to be the beneficiaries. The 1st appellant applied to the respondent for leave to cancel \$10,000,000.00 dollars worth of debt instrument in favour of the 2nd and 3rd appellant companies. Part of the condition precedent for the 1st appellant's participation was the production of feasibility study reports for the proposed leather processing and shoe manufacturing company. The respondent found the projects viable based on their feasibility reports. The 1st appellant also had approval and allocation by Nexim of the African Development Bank Export stimulation Loan (ADB/ESL) facility for the sums of \$2, 508,881.25 and \$1,939,877.56 to the 2nd and 3rd appellants. The respondent approved the application of the 1st appellant to participate in the debt conversion programme. The 1st appellant paid into the respondent's account No. 65002557 with Morgan Guaranty Trust company of New York USA the sum of \$164, 925.00 sequel to the 1st appellant's 1st successful bidding in the auction held on the 30th of August 1991. This amount was to provide sufficient funds in the 1st Appellant's account with the respondent to deduct charges and commission due to it from the 1st appellant for any debts redeemed at the auction. The 1st appellant cancelled debts to the tune of \$3, 721,807.81 on behalf of the Federal Government of Nigeria. A commission of \$55, 072.99 was deducted from the un-utilised transaction commission leaving a balance of \$109, 852.01. Auctions for debt conversion became irregular and the 1st appellant could no longer produce debt instruments to the tune of \$10, 000,000 as he had earlier represented to the respondent. The 1st appellant considered same as no longer viable owing to the fluctuating value of the naira, stopped participating in the bidding sessions. The 1st appellant there and then requested the respondent for a refund of the un-utilised balance of the commission; a sum of \$109, 852.01. The respondent refused to refund the amount. The appellants decided to institute this action for the recovery of the amount. The appellants as plaintiff filed an action at the Federal High court Lagos against the respondent. In the Amended writ of summons and statement of claims at pgs. 30-41 of the Record, the 1st appellant claims as follows: -

1. Special damages in the sum of \$109,852.01 being a refund of the un-utilised transaction commission on the \$164,925.00 originally paid by the plaintiff, to the plaintiffs credit with the defendant's accounts with Morgan Guaranty Trust Company New York U.S.A. for the plaintiffs transaction with the defendant in the Debt Conversion Auction programme of the Central Bank of Nigeria. B

2. The 1st plaintiff also claims interest on the aforesaid sum of \$109,852.01 at the rate of 21% per annum with effect from 30th September 1991 still judgment and final payment of all sums due.

General Damages

1. \$100,000.00 (one million Dollars only) for derivation suffered, loss of businesses, loss of leverage and profits the plaintiffs would have earned on the \$109, 852.01 unlawfully held from him by the defendant and financial embarrassments and dislocations in business suffered by the Plaintiffs. C

2. N50,000,000 (fifty million Naira only) for the cancellation of the registration of the 1st plaintiffs company; Mercury Assurance Company Ltd which has resulted in the loss of income, severe embarrassment and bringing to public odium the plaintiff and his standing in the business community as a clear fall out of the defendant's action against the 1st plaintiff. D

Special Damages

1. \$4, 306,372.73 (four million, three hundred and six thousand, three hundred and seventy-two dollars seventy-three cents only) being the five years profit lost by the 2nd plaintiff which it would have earned if it was not jeopardized by the defendant's action as reflected in the feasibility study reports done by Deloitte Haskins & Sells International Limited, a world acclaimed firm of management consultants as contained in page 21 Section 8.1 and page 35 appendix IX of their feasibility report on the plaintiff. F

2. \$4, 034,150 (four million, thirty-four thousand, one hundred and fifty dollars only) being the five years profit lost by the 3rd plaintiff which it would have earned if it was not jeopardized by the defendant's act as reflected in the feasibility study reports done by Deloitte Haskins & Sells International Limited a world acclaimed firm of management consultants as contained in page 19 Section 8.1 and page 31 appendix IX of their feasibility report on the 3rd plaintiff. H

At the trial before the Federal High Court, parties exchanged

pleadings. Oral testimony of witnesses and documents were accepted in support of the case of the parties. The learned trial judge in the judgment delivered on 25/1/2000 found in favour of the appellants and made the under-mentioned findings -

B 1. Respondent to refund the balance of un-utilised transaction commission in the sum of \$109,852.01 together with interest at the rate of 21% per annum with effect from 30 September 1991.

2. The plaintiff is hereby awarded the sum of \$100,000 (one hundred thousand dollars) as general damages.

C 3. A sum of N50, 000,000 (fifty million Naira) as general damages for cancellation of the registration of the 1st plaintiffs insurance company is hereby dismissed.

D 4. The 2nd plaintiff is hereby awarded the sum of \$4,306,372.73 (four million, three hundred and six thousand, three hundred and seventy two dollars, seventy-three cents) as special damages for five years loss of profit.

5. The 3rd plaintiff is hereby awarded the sum of \$4,034,150 (four million, thirty-four thousand, one hundred and fifty dollars).

Vide pages 303-304 of the records.

E Being aggrieved by the judgment of the trial court, the respondent appealed to the Court of Appeal Lagos. In the judgment of the court delivered on 24th February 2003, the Court of Appeal upheld the award of the refund of the un-utilised transaction commission with interest, but set aside the awards of \$ 100,000 general damages F in favour of the 1st appellant and \$4,306,372.73 and \$4,034,150 special damages to the 2nd and 3rd appellants for 5 years loss of profit. The court held that in view of the 21% interest on the un-utilised transaction commission, the amount of \$100,000 general G damages amounted to double compensation which is untenable and wrongful in the law on the award of damages. The award of 5 years loss of profit to the 2nd and 3rd appellants was far too remote.

Vide page 476 of the record.

H The respondents before the court below dissatisfied with the judgment of the Court of Appeal, filed an appeal against that part of the judgment.

At the hearing of the appeal, parties adopted their respective briefs. The brief of the appellant was deemed filed on 24/8/2009. The learned counsel for the appellants adopted and relied on the

brief wherein two issues were distilled from grounds III - VII of the amended notice of appeal as follows -

1. Whether the learned justices of the Court of Appeal were right when their lordships set aside part of the decision contained in the judgment of the learned trial judge awarding special damages, in the sum of \$4, 036,372.73 and \$4,034,150 to the 2nd and 3rd appellants respectively. B

2. Whether the learned justices of the Court of Appeal were right when their lordships held that it seemed unreasonable to have expected the defendant to contemplate that if it did not pay the \$109,852.01 at a particular time, it would be the probable result of the breach that the 2nd and 3rd plaintiffs would suffer loss of profit in a business which they had not as yet commenced. C

The respondent relied on the respondent's brief deemed filed on 23/4/2012 wherein a sole issue was raised for determination in this appeal as follows - D

"Whether the 2nd and 3rd appellants are entitled to special damages in the sums of \$4,036,372.73 and \$4,034,150 respectively being alleged loss of profit for 5 years as a result of the refusal of the respondent to release the un-utilised transaction commission of \$109,852.01 to the 1st appellant in time." E

I intend to rely on the issues raised by the appellant. It is however worthy of note that the two issues overlap or are interwoven - I shall consider them together. The learned counsel for the appellants argued and concluded that there was a valid and enforceable contract between the parties as all the ingredients of a contract are present. F The finding of the lower court that the contract between the parties lacks essential ingredients is incomplete and unenforceable, is perverse and not supported by Record. The court below was not expected to consider that aspect of the contract. The court below therefore erred in law when their lordships set aside part of the decision contained in the judgment of the learned trial judge awarding special damages in the sum of \$4,306,373.73 and \$4,034,150 to the 2nd and 3rd appellants respectively. The learned trial judge admitted that the law is well settled that the award of damages is a matter for the trial court. The learned trial judge in this case gave sufficient reasons for the award of special damages which is borne out by the Records and accords with the principles of the law. He concluded that the G H

lower court ought not to have interfered with the award of special damages by the trial judge. He cited cases as follows in support of the submission - CBN v. Ahmed (2004) 15 NWLR (pt.897) pg.591, Neka BBB Manufacturing Co. Ltd. v. ACB Ltd. (2004) 2 NWLR (pt.858) pg.554, Orient Bank Nig. Plc. v. Bilante International Ltd. (1997) 8 NWLR (pt.515) pg.37, Iwuoha v. NIPOST Ltd. (2003) 8 NWLR (pt.822) pg.308, Bhojsons Plc v. Daniel Kaliel (2008) 5 NWLR (pt.973) pg.330, Osun State Government v. Dalami (Nig.) Ltd. (2003) 7 NWLR (pt.818) pg.72, Imana v. Robinson (1979) 3-4 SC 1, Odulaja v. Hadelad (1973) 11 SC pg.357, Oforlete v. State (2002) 7 SC (pt.1) pg.80, Ikuomola v. Oniwaya (1990) 4 NWLR (pt.146) pg.619, David-West v. Oduwole (2003) 12 NWLR (pt.835) pg.682.

The learned senior counsel for the respondent, Mr. Oyeypipo submitted that the court below put the respective cases of the appellants and the respondent in proper perspective. The court below thereafter determined the issue of special damages by invoking the time tested principle laid down in Hadley v. Baxendale (1854) 9 Ex 341, which laid down the principle of remoteness of damage. The issue of investing the un-utilised transaction commission in the 2nd and 3rd appellants was never in the contemplation of the parties as held by the court below. The respondent could not have contemplated on the alleged loss at the time of the contract. The appellants argued that Exhibits F and G, the feasibility study Reports of the 2nd and 3rd appellants constitute sufficient grounds for awarding the special damages in their favour by the trial court. The learned senior advocate submitted that this honourable court has consistently held that feasibility study reports cannot be the basis for award of special damages as claimed by the appellants. Moreover Exhibits F and G do not make provision for loss of profit of the sum of \$4,306,372.73 and \$4,034,150. He relied on the under-mentioned cases - A-G Oyo State v. Fair Lakes Hotel No.2 (1989) 5 NWLR (pt.121) pg.255, Uwa Printers Ltd v. Investment Trust Ltd. (1998) 5 NWLR (pt.92) pg.110, Arta Industries Nig. Ltd. v. NBCI (1998) 4 NWLR (pt.546) pg.385, Wilfred Omonuwa v. B.A. Wahabi (1976) 4 SC pg.62, Hadley v. Baxendale (1854) 9 Ex 341, Akomolafe v. Guardian Press Ltd. (2010) 3 NWLR (pt.1181) pg.388, Adole v. Gwar (2008) 11 NWLR (pt.1099) pg.562.

I have scrutinized the case of the parties as narrated in

the Record of Appeal. I have to emphasise that the decisions of this court supported that the award of damages is purely within the precinct of the trial court. The power to award damages by the trial court is exercised in the circumstance of a judicious estimation of the loss to the victim once a breach of contract has been established. B

A contract generally may be discharged through the following, namely -

a. By performance - if both parties have done all that is required of them,

b. By agreement - if both parties have mutually agreed to put an end to their contractual relationship, C

c. By frustration - if some event outside the control of the parties take place, making performance impossible,

d. By breach - where the innocent party is relieved and the party in default may be liable for damages. See SBN Plc v. Opawubi (2004) 15 NWLR (pt.896) pg.437, Tsokwa Oil Marketing Co. v. B.O.N. Ltd. (2002) 11 NWLR (pt.777) pg.163. D

A contract will be discharged by breach when the party in breach had acted contrary to the terms of the contract either E

1. By non performance or

2. By performing the contract not in accordance with its terms or

3. By wrongful repudiation of the contract. F

A party who has performed the contract in consonance with its terms cannot be said to have been in breach thereof - Pan Bisbilder (Nig) Ltd. V. First Bank of Nigeria Ltd. (2000) pg.1

Award of damages is an exercise of discretion by the trial court. An appellate court will not interfere with an award of damages by a trial court unless it is made under certain peculiar circumstances which include- G

1. Where the exercise of discretion by the trial court is perverse. H

2. Where the court acted under wrong principles of law or

3. Where the court acted in disregard of applicable principles or

4. Where the court acted in misapprehension of facts or

5. Where the court took into consideration irrelevant matters and disregarded relevant matters whilst considering its award or

6. Where injustice will result if the appellant's court does not act or

7. Where the amount awarded is ridiculously low or ridiculously high that it must have been an erroneous estimate of the damages. See *Zik's Press Ltd. v. Ikoku* (1951) 13 WACA pg.188, *Idahosa v. Oronsaye* (1959) SCNLR pg.407, *Bola v. Bankole* (1986) 3 NWLR (pt.27) pg.141, *Elf v. Sillo* (1994) 6 NWLR (pt.350) pg.258.

Both lower courts agreed that there was a valid contract between the 1st appellant and the respondent. The Court of Appeal D agreed that the contract was made on the 29th of August 1991 when the defendant approved that the 1st plaintiff be allowed to convert \$10,000,000 on the debt conversion programme. Also that at a point in the contract, the 1st appellant decided to opt out of the debt conversion programme-as he was only able to cancel debt instruments E worth about \$3.7 million dollars as against the \$10,000,000 (ten million dollars) he had earlier told the respondent he would cancel. The 1st appellant could not produce debt instruments to the tune of 10 million dollars as he had earlier in the contract represented to the respondent. The 1st appellant stopped participating in the bidding F sessions as the auctions became irregular and the debt cancellation exercise became irregular. The 1st appellant considered the exercise no longer viable-owing to the fluctuating value of the naira. The two lower courts agreed that the 1st appellant shall be paid his balance of G un-utilized transaction commission in the sum of \$109,852.01 together with interest at the rate of 21% per annum with effect from September 30 1991. The awards of \$4, 306,372.13 to the 2nd appellant and \$4,034,150 to the 3rd appellant were cancelled by the Court of Appeal. The court below decided that the awards-were wrong H as the trial judge misconceived the nature of the plaintiffs/appellants case and the defence of the respondent. The issue of the transaction commission did not arise out of a contractual duty on the part of the respondent in the contract. The court went further to hold that even if the issue of the refund of the un-utilized transaction was contractual

in nature, the claim for five years loss of profit by the 2nd and 3rd appellants herein was far too remote and should fail. The lower court is right to hold this view and to set aside the awards. An appellate court can set aside an award of damages where the trial court acted under a misapprehension of the facts of the case. The case of the 1st appellant was predicated on a claim for refund of a sum of \$109,852.01 dollars being the amount of money unlawfully withheld by the respondent and interest thereon. This sum of \$109,852.01 dollars was the balance of the money paid by the 1st appellant into an account specified by the respondent for the deduction of the charges and commission due to the respondent from the 1st appellant for debt redeemed at the auctions without delays. At the time of the demand of the amount by the 1st appellant, it was required to pay up 1st appellant's equity contribution in the ADB/ESL loan scheme to raise funds to establish the 2nd and 3rd appellant factories. The African Development Bank/Export Stimulation Loan facility was to be serviced from the proceeds of the debt conversion programme. Hence the respondent ascertained from Exhibits F and G the feasibility reports on the factories that they were viable. There was no nexus between the un-utilized transaction commission and the funding of the factories. The 2nd and 3rd appellants were nominated by the 1st appellant as beneficiaries of the proceeds of the - debt instruments submitted to the respondent for cancellation at a discount. The fact that the debt conversion programme would not yield enough proceeds to maintain the 2nd and 3rd appellants was surely not within the contemplation of the 1st appellant and the respondent when their contract was concluded on the 29th of August 1991. The lower court was right and in order to hold that it was unreasonable to have expected the respondent to contemplate that if it did not pay the \$109, 852.01 - the un-utilized transaction commission at a particular time, it would be the probable result of the breach as a result of which the 2nd and 3rd appellants would suffer loss of profit for 5 years in a business which they had not yet commenced. ***The law is that the claimant must prove that it was the action of the respondent that led to the loss for which he is seeking recompense. Failure to link the act of the respondent conclusively to the loss for which damages is being claimed can only lead to a dismissal of the claim for damages.*** Acme

Builders Ltd. v. K.S.W.B. & Anor (1992) 2 NWLR (pt. 590) pg.288, Victoria Laundry (Winsor) Ltd. v. Newman Industries & anor (1949) KB 528. In the case of Agbaje v. National Motors Nigeria Ltd (1970) 2 ALR pg.266 at pg.273 lines 19-25 it was held that – *“The damages to be awarded for breach of contract are those damages for the ordinary consequences which follow in the usual course of things from the breach, or for those consequences of a breach which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.”*

In the case of Hadley v. Baxendale (1854) 9 Exchequer 941, it was held that - *“Damages are recoverable by the injured party if the loss may be fairly and reasonably considered to arise naturally. The loss must be reasonably supposed at the time of making the contract, to have been in the contemplation of both parties as the probable consequence of its breach.”*

In this appeal, the issue of un-utilized transaction commission was not within the contemplation of the parties that the amount would be available for investment in the 2nd and 3rd appellants’ companies or that if it was not made available, the 2nd and 3rd appellant companies would suffer colossal loss of profit for five years. Exhibits “F” and “G” relating to the 2nd and 3rd appellants do not make provision for loss of profit for five years. I resolve the issues in favour of the respondent.

In sum, this appeal must fail for lacking in merit, it is accordingly dismissed with N50,000 costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Adekeye, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

The facts relating to this appeal have been clearly set out in the lead judgment. The core issue relates to the propriety or other wise of the award of special damages in the sums of \$4,036,372.73 and \$4, 034,150 to the 2nd and 3rd appellants respectively which the Court of Appeal set aside. The learned counsel for the appellants couched the issues for determination as follows:-

"1. Whether the learned justices of the Court of Appeal were right when their Lordships set aside part of the decision contained in the judgment of the learned trial Judge awarding special damages in the sums of \$4,036,372.73 and \$4, 034,150 to the 2nd and 3rd appellants respectively.

2. Whether the learned justices of the Court of Appeal were right when their Lordships held that it seemed unreasonable to have expected the defendant to contemplate that if it did not pay the \$109,852.01 at a particular time, it would be the probable result of the breach that the 2nd and 3rd plaintiffs would suffer loss of profit in a business which they had not yet commenced."

On behalf of the respondent, the sole issue couched for determination reads as follows:-

"Whether the 2nd and 3rd appellants are entitled to special damages in the sum of \$4,036,373.73 and \$4, 034,150 respectively D being alleged loss of profit for 5 years as a result of the refusal of the respondent to release the un-utilised transaction commission of \$109, 852.01 to the 1st appellant in time."

Special damages have been defined as those which are the actual, but not necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. *Twin Coach Co. V. Chance Vought Aircraft Inc.* 2 Storey 588, 163 A-2d 278, 286- Such are damages which do not arise from wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury. To be recoverable, they must flow directly and immediately from the breach of contract, and must be reasonably foreseeable. Special damages must be specially pleaded and proved. (Black's Law Dictionary, Sixth Edition, page 392). In the old case of *Hadley v. Baxendale*, (1854) 9 Exchequer 341 it was held that special damages are recoverable by the injured party if the loss may be fairly and reasonably considered to arise naturally. The loss must be reasonably supposed at the time of making the contract to have been in the contemplation of both parties as the probable consequence of its breach. In this matter, the Court of Appeal found that special damages of the sums of \$4, 306,372.73 and \$4, 034,150 awarded in favour of 2nd and 3rd appellants were not deserving or appropriate and that knowledge of such loss was never in contem-

plation of the parties. I seriously feel that the Court of Appeal was right. It is incomprehensible to me how the respondent could contemplate that if it did not pay the un-utilised transaction commission of \$109,852.01 at a particular time, it would be the probable result of the breach that the 2nd and 3rd appellants would suffer loss of profit in a business which they had not, as yet, commenced. They are not reasonably foreseeable. They do not flow directly and immediately from the breach of contract. The loss was not reasonably supposed at the time of making the contract to have been in contemplation of both parties as a probable consequence of its breach. To say the least, they are far remote. See *Omonuwa v. B. A. Wahabi* (1976) 4 SC 62. It is basic that special damages must be specially pleaded and proved. The appellants herein, in a bid to prove the alleged special damages, banked on Exhibits F and G - Feasibility Study Reports which cannot form basis for the awards dished out to the 2nd and 3rd appellants as special damages. This is as pronounced by this court in *Attorney-General Oyo State v. Fairlakes Hotels No 2* (1989) 5 NWLR (Pt. 121) 255. This clinches the arguments of the appellant to the contrary as the awards rest on nothing tangible. The decision of the Court of Appeal is right. I do not see how I can fault same. My learned brother said it all.

For the above reasons and the more elaborate ones adumbrated in the lead judgment, I too feel that the appeal is devoid of merit and it is hereby dismissed. I endorse the order relating to costs in the lead judgment.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment of my learned brother Adekeye, JSC. I intend to add a few observations. Special damages must be strictly proved. That is to say, anyone claiming special damages must show by credible evidence that he is indeed entitled to the award of special damages. See *Oshinjinrin & ors v. Elias & ors* 1970 1 ALL NLR p. 153, *Odulaja v. Haddad* 1973 1 ALL NLR p.191, *Oladehin v. CTML* 1978 2 SC p. 23. The 2nd and 3rd appellants (2nd and 3rd plaintiffs) claimed \$4,306,373.73 and \$4,034,150 and relied on exhibits F and G. Their feasibility study reports. The said sums according to the 2nd and 3rd

appellants are sums they would have made in five years. That is loss of five years profit. The trial court awarded the sums. The Court of Appeal set aside the award made by the trial court. I agree with the Court of Appeal. The appellants were unable to show that it was an act/omission of the respondent that led to the loss which they anticipate. The failure to link the act of the respondent by credible evidence to the loss renders the claim futile. B

Furthermore exhibits F and G, the feasibility study reports of the 2nd and 3rd appellants cannot be the basis for special damages more so as the loss projected therein cannot be attributed to the respondent. Loss of profit is the nature of special damages and it is so clear that there was no proof to justify the award. C

For the reasons given above and more particularly, those given by my learned brother, Adekeye, JSC the appeal is hereby dismissed with costs of N50, 000.00. D

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