

SUPREME COURT OF NIGERIA
FRIDAY 7TH DECEMBER, 2012. SC. 270/2012
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, N. S. NGWUTA,
S. S. ALAGO, JJSC**

1. MARINE MANAGEMENT
ASSOCIATES INC APPELLANTS
2. KAMINE MARINE CONSULTANCY
AND
NATIONAL MARITIME AUTHORITY RESPONDENT

APPEALS - Grounds of law - Leave - Since appellants' three grounds are of law - Leave of Court of Appeal or Supreme Court - Is not required (H1)

COURTS - Appeals - Issues - Determination - Court must consider all issues that have been joined by parties - And raised before it for determination (H2)

DAMAGES - Special damages - Pleading - Particulars of appellants' loss were pleaded - By reference to report prepared by Ajibola Ogunsola (H3)

DAMAGES - Special damages - Pleadings - Purpose - Particulars of such damages are given - In order to allow the other party know the case against it - So as to eliminate any element of surprise (H4)

TECHNICALITIES - Rules of court - By O. 26 r. 5 FHC Rules - Failure to comply with the rules - Is irregularity which would not nullify proceedings or judgment (H5)

CONTRACTS - Damages - Determination - Measure of damages in breach of contract - Is the loss flowing naturally from the breach - And is incurred in direct consequence of the violation (H6)

DAMAGES - Exemplary damages - Proof - To justify award of such damages - It must be shown that the wrongful acts were high handed

- Or in disregard of every decent conduct of civilized men (H7)

ACTIONS - Crime - Proof - Criminal act of cross respondent is mere allegation - And under s. 465 Criminal Code - It must be proved beyond reasonable doubt - That exhibit A was forged (H8)

FACTS

Plaintiffs/appellants and defendant/respondent entered into a marine contract of vetting/suspension of vessels to ascertain the degree of compliance of such vessels with international maritime regulations. Appellants alleged that respondent was in breach of the contract by suspending same. Hence, appellants commenced this action at the Federal High Court Lagos, claiming inter alia, a declaration that the said contract remains binding and several heads of damages for losses incurred by appellants. Appellants claimed among other sums of money, the sum of U\$4, 875, 333.25 by reference to the report prepared by Actuarial firm of Ajibola Ogunsola & Co.

At the hearing, appellants called two witnesses and tendered exhibits A-H, while respondent called four witnesses and tendered exhibits K-N. At the end of trial, the court held that respondent was in breach of the contract. Hence, it awarded the sum of U\$4, 298, 066 to appellants. Respondent felt dissatisfied and thus filed appeal in Supreme Court. In its judgment, the court held that the award of U\$4, 298, 066 was wrongful because the particulars of same were not pleaded in appellants' statement of claim. The court thus set aside the award. Aggrieved, appellants appealed to Supreme Court, while respondent cross-appealed.

ISSUES FOR DETERMINATION

MAIN APPEAL

1. Did the Appellants plead and particularize special damage.
2. Even if the Appellants did not plead and/or particularize special damage, (which was denied) was this failure fatal to the claim?

CROSS-APPEAL

"1 Whether the lower court was right in upholding the award of US \$50,000 "aggravated general damages" in favour of the Cross-Respondents (This issue flows from Ground 1 of the Notice of Cross Appeal.)

2. *Was the lower court right in affirming the decision of the*

court of first instance that Exhibit TV was the agreement binding the parties herein.

HELD (Unanimously allowing the appeal per GALADIMA JSC)

APPEALS - Grounds of law - Leave

1. Before proceeding further with ‘the main appeal and the Cross-appeal, there is need to look into the preliminary objection raised by the Respondent/Cross-Appellant. I shall address the grounds of objection seriatim. First that grounds of Appeal are grounds of mixed Law and fact. With due respect to the objection taken by the Respondent on this issue, I must say that the three grounds of Appeal on the Appellants’ Notice of Appeal are grounds of Law therefore the leave of the court below or this Court is not required. (p. 3876 C)

Appeals - Issues - Determination

2. The issue of surprise affecting the admissibility of Exhibit ‘H’ was raised for the first time by the Respondent at the Court of Appeal, and it was in that Court the Appellants had the first opportunity to respond to the said issue. An issue arising from arguments of counsel arising from the Ground of Appeal, in this case, the admissibility of Exhibit ‘H’ upon which the Court below has taken a decision, is relevant and cannot be regarded as mere obiter dictum. The court was bound and obliged to pronounce on it. It is the duty of the court whether at first instance and appellate court to consider all the issues that have been joined by the parties and raised before it for determination. (p. 3879 A)

Special damages - Pleading

3. I have reproduced paragraphs 18 and 19 of the Amended Statement of Claim most relevant to the resolution of this appeal. The contention of the Respondent is that the particulars were not specially pleaded. I hold the contrary view. I agree with the Appellants that the particulars were pleaded

by reference to the Report prepared by Actuarial Firm of Ajibola Ogunsola & Co. The court below erred in its decision to set aside the award of special damages on the ground that the particulars were not pleaded. The quantum of the Appellants' loss is expressly pleaded as U\$ 4,875,333.15 and the
B **particulars of loss were incorporated into the pleading by reference.**

Applying these decisions above, it becomes clear that the Appellants in this case, having pleaded their great financial loss in paragraph 18 of the Statement of claim that they would
C **be relying on the Report of Ajibola Ogunsola & Co and then in paragraph 19 of the said Statement of Claim for the sum of US \$ 4,875,333.15 being financial loss and damages accruing by reason of the Defendants' breach, particulars, which**
D **are specified in the said Report, to my mind, they have fulfilled the requirement of pleading the particulars of the special damage.**(pp. 3883 B/3884 C)

Special damages - Pleadings - Purpose

E **4. The basis for the law requiring the giving of particulars, of special damage is to allow the other party know the case against it so as to eliminate any element of surprise.**
(p. 3886 C)

F *TECHNICALITIES - Rules of court*

5. I agree with the Appellants in the instant case that failure to produce the particulars on the face of the pleading is a mere irregularity that does not vitiate the Appellants' claim.
G **The combine effect of the above provisions of the Rules of the Federal High Court is that failure to comply with Order 26 r. 5 is an irregularity which would not nullify the proceedings or Judgment or Order of the Court.**

The question therefore is even if the Report of Ajibola
H **Ogunsola & Co. had not been incorporated by reference, which I had opined it was, did this result in any miscarriage of justice on the part of the Respondent?**

In other words did the Respondent suffer any miscarriage of justice that is fatal to the claim of the Appellants. The

Respondent did not suffer any miscarriage of justice by the failure to plead the particulars. The Judgment of the Court below translates to using technicalities to defeat the ends of justice by finding that there were no particulars when the particulars have been clearly incorporated by reference. This Court is more interested in substance than technicalities that leads to injustice. Justice can only be done if substance of the matter is carefully examined. B

In sum I find that the Appellants pleaded particulars of special damage by reference to the Report prepared by Ajibola Ogunsola & Co. Even if the appellants did not plead and/or particularize special damage (which is not the case) this failure was not fatal to the claim of the Appellants. C
(pp. 3887 F/3888 A)

Damages - Determination D

6. The measure of damages in a breach of contract is the loss flowing naturally from the breach and is incurred in direct consequence of the violation. In this case although the trial court awarded the sum of US \$4,298,066.00 to the Cross-Respondents as special damages for loss of profit, it also awarded an additional sum of US \$50,000.00 as “aggravated general damages” in favour of the Cross-Respondents. E
(p. 3890 F)

Exemplary damages - Proof F

7. In order to justify an award of exemplary or aggravated damages it is not sufficient to show simply that the Respondent/Cross-Appellant has committed the wrongful act complained of. It must be shown that their conduct was either high handed, outrageous, insolent, vindictive, oppressive or malicious and showing contempt of the Respondents’ rights or in disregard of every decent conduct of civilized men. G
In HALSBURY LAWS OF ENGLAND, 3rd Ed. Vol. II paragraph 471 - 472 page 285 the learned Authors stated that, as a general rule aggravated damages are not payable in contract since in action of breach of contract, the motive and conduct of the Defendant are not taken into consideration, but there are exception where the breach of contract is injurious to H

credit or repudiation. Applying this statement then the Cross-Respondents are entitled to the aggravated damages because of the injury done to the credit and reputation of the Cross-Respondents in the International Maritime Circles. This is particularly so because the Cross-Appellant issued Exh. J1 despite the Court Order granting among others a mandatory interim relief to wit.

The Court may take into account the Defendants motives conduct and manner, and where they have aggravated the Plaintiff damages may be awarded. The Defendant may have acted with malevolence or spite or behaved in a high handed, malicious insulting, aggressive manner. Aggravated damages are designed to compensate the plaintiff for his wounded feelings.
(pp. 3890 G/3892 A)

D
ACTIONS - Crime - Proof

8. “It was pleaded by the Cross-Appellant that “Further to paragraph, above the Defendant contends and shall prove at the trial of this action that the Plaintiffs (Cross-Respondents) fraudulently altered the provisions of the agreement to suit their ulterior motives...”

This criminal act of the Cross-Respondents is a mere allegation, and under S.465 of the Criminal Code it requires proof beyond reasonable doubt that Exhibit ‘A’ was forged or altered. The purport of Section 138 (1) of the Evidence Act is that:

“If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt” (p. 3894 C)

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Categories of grounds of law

H When is a ground of appeal that of law? Five particular classes of errors of law, which when addressed by the Grounds can be categorized as Grounds of law have been set out in the decision of this Court in COMEX LTD Vs. NAB LTD (1997) 3 NWLR (Pt. 643) at

656-657, while affirming the dictum of Nnaemeka Agu JSC of blessed memory) in NWADIKE V. IBEKWE (1987) 4 NWLR (part 67) 718 at 744 - 745, to wit:

"1. It is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or; if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors.

2. Several issues that can be raised on legal interpretation' deeds, documents, terms of art, words or phrases inferences drawn therefrom are grounds of Law:

3. Where a ground -deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of Law; provided it is limited to admitted or proved and accepted facts.

For many years, it has been recognized that inferences to be drawn from a set of proved or undisputed facts, as distinct from primary facts, are matters upon which an Appellate Court is as competent as the Court of trial:

4. Where a tribunal states the law on a point wrongly, it commits an error in Law...

5. Lastly I should mention one class of grounds of Law which lead the deceptive appearance of grounds of fact id est where the complaint is that there was no evidence upon which a finding or decision was based."

This is regarded as a ground of Law, on the premises that in a jury trial there would have been no evidence to go to the jury. Before a Judge sitting with a jury could have left a case to the jury there ought to have been more than a scintilla of evidence. So, for this rather historical reason, a ground of appeal complaining that there was no evidence, or no admissible evidence upon which a decision or finding was based has always been regarded as a ground of Law. (p. 3876 E)

REPRESENTATION

I. O. OJOMO ESQ, for the Appellants/Cross-Respondents
A. A. ADENIRAN ESQ., for the Respondent/Cross-Appellant

CASES REFERRED TO

Comex Ltd v. NAB Ltd (1997) 3 NWLR (Pt. 643) 656

- Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718
Opuiyo v. Omoniware (2007) 16 NWLR (Pt. 1060) 415
Maigoro v. Garba (1999) 10 NWLR (Pt. 624) 555
Dairo v. UBN Plc (2007) 16 NWLR (Pt. 1059) 99
Nwanji v. Coastal Services Nig Ltd (2004) 11 NWLR (Pt. 885) 552
B Ehalor v. Idahosa (1992) 2 NWLR (Pt. 223) 323
A-G Bendel State v. Aideyan (1989) 4 NWLR (Pt. 118) 646
Eliochin Nig Ltd. v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47
Williams v. Daily Times of Nig. Ltd (1990) 1 NWLR (Pt. 124) 1
C Odiba v. Azege (1998) 9 NWLR (Pt. 566) 370
Kuno v. Chiekwe (1991) 2 NWLR (Pt. 173) 316
Kate Ent. Ltd v. Daewoo Nig Ltd (1985) 2 NWLR (Pt. 5) 116
Amadi v. Nwosu (1992) 5 NWLR (Pt. 241) 273

D STATUTES & RULES REFERRED TO

- Constitution of Federal Republic of Nigeria 1999 (as amended), s. 233(3)
Evidence Act, s. 138(1)
Federal High Court (Civil Procedure) Rules 2004, O. 3 r. 1 (1), O. 26
E r. 5

BOOKS REFERRED TO

- Odgers: Pleading and Practice 20th Ed. p. 375
F Bullen & Leake & Jacobs: Precedents of Pleadings 12th Ed. p. 379
Halsbury Laws of England 3rd Ed. Vol. II para. 471

LEAD JUDGMENT BY GALADIMA JSC

- This is an appeal against the decision of the Court of Appeal
G Lagos Division delivered on the 18th of July, 2008. In setting aside the award of U\$4,298,066 to the Appellants, representing Special Damages for breach of contract, the court held that the documentary evidence or loss of profit was wrongly admitted not having been specifically pleaded and particularized.
H The Appellants who were the Plaintiffs commenced the suit against the Respondent by Writ of Summons issued out on 24th December 1999. They have claimed particularly as per paragraphs 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 in their Amended Statement of Claim filed on 3rd March 2005 as follows:

“3. Sometime in 1995, the Plaintiffs carrying on business (respectively in the U.S.A. and Nigeria) of inspection and vetting of Marine vessels to ascertain the degree of compliance of such vessels with “International Maritime Industry recommendations and operational procedures” and their compliance in general with International Maritime Regulations entered into negotiations with the Nigeria “NATIONAL MARITIME AUTHORITY” the “N.M.A.” with a view to having the Plaintiffs in the transportation of chemical, petroleum and or petroleum products” within Nigeria waters as “Exclusive Manager(s)” and “Sole Agents(s)”.

4. These negotiations culminated on an agreement being reached such that on the 31st January, 1996, the Defendant, by letter, notified the Plaintiffs of their appointment as “Exclusive Manager” and “Sole Agent” as set out above to commence on the 1st March, 1996 with a directive therein for the Plaintiffs to “conclude all organization and arrangements” to commence the services contracted for.

5. Predicated on this, and particularly since the scope of the Contract involved the inspection of ships all over the world at the Plaintiffs expenses the Plaintiffs incurred considerable expenses to set up inspection points at inter alia, Europe, the Americas (North and South), Canada, Japan, Singapore and even in Nigeria.

6. To achieve this, the plaintiffs had to, inter alia, employ One Hundred and Forty Seven (147) qualified and approved Marine Inspectors assigning Eighteen (18) of the same permanently to cover Nigerian Petroleum Terminals and “establish” and have “certified” Forty-nine (49) Inspection Agencies at the “major” loading/discharging Petroleum Terminals around the World, all at great expense. These facts are established by the report accepted by the N.M.A. from the Plaintiffs for the year 1996 – 7 and 1998.

7. The terms of the Agreement reached were duly engrossed and executed as a deed by all parties thereto.

8. By the terms of the said Contract the Plaintiffs were to bear all the expenses of the inspections but were to remit forty percent (40%) of all fees received on account of the same to the N.M.A. which same conditions the plaintiffs have faithfully adhered to such that by the conclusion of the accounts for 1998, the Plaintiffs had remitted sums in excess of two (2) million United States Dollars to the

N.M.A. as contained in the reports for the years 1996 - 2998.

9. Under the terms and conditions of the aforesaid contract, it was also agreed that:

(a) The Plaintiffs were to be the exclusive manager and sole agent for World Wide Management of the Inspection and Vetting of
B all vessels engaged in the transportation of chemicals, petroleum and or petroleum products that trade within Nigeria territorial waters.

(b) The purpose of the inspection and vetting is to ascertain that each and every vessel complies with the regulations of Interna-
C tional Maritime Organisation. Therefore, each and every vessel calling Nigeria's territorial waters shall be classed by a recognized marine classification society and that all statutory certificates are valid.

(c) That the agreement shall remain in force for an initial period often (10) years commencing on the signing of the agree-
D ment.

(d) Cause 5 of the Agreement states that as consideration for the performance of the duties, services, obligations, responsibilities and covenants therein contained on the part of the Plaintiffs, the Defendant appoints the Plaintiffs to collect from vessel owners on
E behalf of the Defendants predetermined fees plus Inspectors Incidental expenses per vessel for full certification, or temporary certificate fee. The Plaintiff shall upon receipt of payments transfer to the Defendant's bank account's 40% of the predetermined fees per ves-
F sel for full or temporary certification quarterly.

(10). The Plaintiffs aver that they have at all times performed their responsibilities under the terms of the said Agreement

(11). This state of affairs continued without any demur by the N.M.A. until suddenly without any reason adduced therefore,
G the Plaintiffs sometime in December 1999 received a letter purportedly emanating from N.M.A. by which they were informed of the "Suspension" of the "Vetting/Inspection Services" apparently referring to the Inspection/Vetting Agreement.

(12) Upon receipt of the above, in extreme distress, given
H the magnitude of their investments in order to ensure the prompt and satisfactory discharge of their duties under the aforesaid Agreement, Plaintiffs promptly attempted to contact any responsible officer of the N.M.A. to elicit an explanation for the said letter but without any success. The N.M.A. chose to remain incommunicado but

rather caused threatening phone calls to be made to the Plaintiffs, its customers and associates both within and outside Nigeria threatening all manner of dire consequences if the Plaintiffs did not desist forthwith from continuing with the Contract.

(13) Nowhere in the Contract is any such “right” to “suspend” the “Contract” or “service” thereunder granted to the N.M.A. B and the Plaintiff avers that the act of “suspending” the Contract not being provided for therein, is in breach of the Contract itself.

(14) The Plaintiffs aver that the Contract constitutes the only valid, binding and effectual documentation of the terms agreed on by the parties and cannot be unilaterally varied or discharged by any party thereto and in event, no “right” for “suspension” having been “reserved” for the Director General of the N.M.A, the “D-G” at whose behest the said letter of “suspension” was purportedly issued any such “suspension” is in breach of contract. C D

(15) The Plaintiffs further aver that the tenor of the contract having been expressed in paragraph 9a thereof as Ten (10) years cannot be unilaterally varied prior to the effluxion of this time and therefore in the premises the aforesaid letter of “suspension” is in breach of the contracts. E

(16) This “Suspension” which is even at present being used to harass and threaten the Plaintiffs and its associates is causing enormous unjustifiable harm to the Plaintiffs reputation, goodwill and business interests worldwide. F

(17) The Plaintiffs have accepted the Defendants breach as being repudiatory of the contracts.

(18) The Plaintiffs aver that defendants have by the said breach caused great financial loss and damage to the Plaintiffs. The Plaintiffs would at the trial rely on the report of computation of financial loss prepared by the Actuarial firm of Ajibola Ogunsola & Co. G

Whereof the Plaintiffs claim against the Defendant for:

a. A DECLARATION that the

“INSPECTION/VETTING AGREEMENT” made between the Nigerian “NATIONAL MARITIME AUTHORITY” and the Plaintiff with effect from 1st of March 1996 for a period of Ten (10) years remains valid, binding and enforceable as between the parties thereto. H

b. A DECLARATION that the purported “SUSPENSION” of the contract for Vetting/Inspection service by the Defendants herein -

the Nigeria "NATIONAL MARITIME AUTHORITY" by letter dated 10th December 1999 is ultra vires the said contract and the National Maritime Authority itself, and is thereby invalid, null, void and of no legal effect whatsoever.

B *c. The sum of U.S. \$ 4,875, 333.15 (Four Million eight hundred and Seventy five thousand three hundred and thirty three dollars fifteen cents) or its Naira equivalent at the prevailing rate) being the financial loss and damage accruing by reason of the Defendant's breach of the Inspection/Vetting Agreement, particulars of which are*
C *specified in the Report of Ajibola Ogunsola & Co.*

d. COSTS, EXPENSES AND LEGAL FEES for the prosecution of this Cause in the sum of \$500,000.00 (Five Hundred Thousand United States Dollars) only.

EXEMPLARY AND AGGRAVATED GENERAL DAMAGES in the
D *sum of five Million United States Dollars (US \$ 5,000,000)".*

The Respondent filed their Amended Statement of Defence' 28th April, 2005.

Hearing commenced with the Appellants calling 2 witnesses and tendering Exhibits A - H, while the Respondent called 4 witnesses and tendered Exhibits K - N.

At the end of the trial, the learned judge found and held that from the totality of the evidence before the Court Exhibit 'A' is an agreement which had a duration of 10 years and this was the authentic agreement, and awarded damages for the breach occasioned
F by the wrongful suspension as computed in Exh. 'H'. As I have observed, the Court below among other things, held that the award of the sum of US \$4,298, 066 by trial court was wrongful because the particulars of same were not pleaded in the Statement of Claim, and
G accordingly set aside the award. The Appeal in this Court is in respect of this finding of the Court below vide the Appellants' Notice of Appeal dated 7th August 2008 with 3 Grounds of Appeal, while the Respondent Cross-Appealed and filed a Notice of Cross-Appeal on 16th October 2008 containing one Ground of Appeal.

H It is noteworthy that apart from the initial Notice of Cross-Appeal of 16th October 2008, the Court granted leave to the Cross-Appellant to file an additional ground of appeal on 20th October 2009. Thus, the Respondent/Cross-Appellant has filed two grounds of appeal in respect of its Cross-Appellant. It should be further noted that

the Respondent's Brief of Argument includes the argument in respect of the main and the Respondent's Cross-Appeal.

Appellants submitted two issues for determination as follows:

1. Did the Appellants plead and particularize special damage Grounds (i and ii)

2. Even if the Appellants did not plead and/or particularize special damage, (which was denied) was this failure fatal to the claim? (Ground iii).

On the other hand the Respondent in its brief identified also two issues for determination as follows:

(i) Whether in the circumstance reference to an Actuaries Expert Report (Exhibit 'H') in the Appellants' Amended Statement of Claim amounts to pleading particulars of special damages (Grounds (i) and (ii) of the Appellant's Grounds of Appeal

(ii) Was the lower court right in holding that the Respondent (as Defendant) was prejudiced when the court of first instance allowed the Appellants (as Plaintiffs) to rely on Exhibit 'H' in proof of their claim for special damages? (Ground (iii) of the Grounds of Appeal).

The Respondent/Cross-Appellant also submitted the issues relevant to the determination of its Cross-Appeal as follows:

"1. Whether the lower court was right in upholding the award of US \$50,000, "aggravated general damages" in favour of the Cross-Respondents. This issue flows from Ground (1) of the Notice of Cross-Appeal.

2. Was the lower court right in affirming the decision of the Court of first instance, that exhibit 'A' was the agreement binding the parties herein? (This issue flows from Ground (2) of the Additional Ground of Cross-Appeal).

On 9/10/2012, we took this appeal. Learned Counsel having identified the Appellants' Brief of Argument filed 20/10/2008 and Reply/Cross-Respondents' brief filed on 14/7/2010. On his part the learned Counsel for the Respondent identified Respondent's Cross-Appellants' Brief filed on 02/11/2001 and Cross-Appellant's brief filed on 12/01/2011. It is on the foregoing processes this appeal will be determined.

It is noteworthy however, that the Respondent in its Brief of Argument raised preliminary objections: Firstly to the competence of

the appeal on the ground that all the Appellants' Grounds of Appeal are grounds of fact or, at best, mixed law and fact requiring the leave of the lower court or that of this Court by virtue of Section 233 (3) of the 1999 Constitution (as amended). Secondly that Ground (iii) of the Appellants' Grounds of Appeal is against an obiter dictum of the lower court, which cannot be the basis of an appeal. Thirdly that issue 2, as formulated by the Appellants is not based on any of the Appellants' Grounds of Appeal. Fourthly, that the argument canvassed under issue No. 2 in the Appellants' brief of Argument were not in respect of the said issue but based on Grounds (iii) of the Appellants' Grounds of Appeal.

Before proceeding further with the main appeal and the Cross-appeal, there is need to look into the preliminary objection raised by the Respondent/Cross-Appellant. I shall address the grounds of objection seriatim. First that grounds of Appeal are grounds of mixed Law and fact. With due respect to the objection taken by the Respondent on this issue, I must say that the three grounds of Appeal on the Appellants' Notice of Appeal are grounds of Law therefore the leave of the court below or this Court is not required. When is a ground of appeal that of law? Five particular classes of errors of law, which when addressed by the Grounds can be categorized as Grounds of law have been set out in the decision of this Court in COMEX LTD Vs. NAB LTD (1997) 3 NWLR (Pt. 643) at 656-657, while affirming the dictum of Nnaemeka Agu JSC of blessed memory) in NWADIKE V. IBEKWE (1987) 4 NWLR (part 67) 718 at 744 - 745, to wit:

"1. It is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or; if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors, see O'Kelly Vs Trusthouse Forte Plc (1983) 3 A.H.E.R. at page 456.

2. Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases inferences drawn therefrom are grounds of Law: Ogbechie Vs Onochie (No. 1) Supra at pp. 491 - 492.

3. Where a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of Law; provided it is limited to admitted or proved and accepted facts.

Edwards Vs Bairstow (Supra) at p. 55. *H.L.* For many years, it has been recognized that inferences to be drawn from a set of proved or undisputed facts, as distinct from primary facts, are matters upon which an Appellate Court is as competent as the Court of trial: See *Benmax Vs Austin Motor Co. Ltd.* 1949 All E.R. 326, at p. 327.

4. Where a tribunal states the law on a point wrongly, it commits an error in Law... B

5. Lastly I should mention one class of grounds of Law which lead the deceptive appearance of grounds of fact *id est* where the complaint is that there was no evidence upon which a finding or decision was based. C

This is regarded as a ground of Law, on the premises that in a jury trial there would have been no evidence to go to the jury. Before a Judge sitting with a jury could have left a case to the jury there ought to have been more than a scintilla of evidence. So, for this rather historical reason, a ground of appeal complaining that there was no evidence, or no admissible evidence upon which a decision or finding was based has always been regarded as a ground of Law. See Odgers: On Pleading and Practice (20th Edn) p. 375, also the decision of the House of Lords in *Edwards (Inspector of Taxes) Vs. Bairstow (Supra)* at p. 491 paragraph 14. My Lord, Eso J.S.C. citing with approval an article by C.T. Emery in Vol. 100 L.Q.R. held: D

“If the tribunal purports to find that a particular event occurred although it is seized of no admissible evidence that the event did in fact occur, it is a question of Law” F

Now to the consideration of the Grounds of Appeal. As I have already noted above, the learned counsel for the Respondent has submitted that a close look at Grounds (i) and (ii) of the Appellants’ Notice of Appeal and the particulars stated thereunder would reveal that the Appellants are complaining about the lower court’s evaluation of evidence, as it relates to the interpretation (or misinterpretation) and purport of Exhibit ‘H’ which is the Actuaries Expert Report tendered by the Appellants at the trial. It also argued that Ground (iii) deals with the evaluation of evidence because the complaint in this ground relates to whether or not the lower court was right in holding that the Respondent was surprised or prejudiced due to absence of the requisite particulars of special damages claimed by the Appellants or whether there were evidence before the lower court H

that the Respondent was so surprised and/or prejudiced. It is further submitted that a ground of appeal which deals with evaluation of evidence or one that invites the court to investigate the existence or otherwise of certain facts upon which the judgment of the court was based is a ground of fact or at best of mixed law and fact. Reliance
 B was placed on the cases of *OPUIYO OMONIWARI* (2007) 16 NWLR (Pt. 1060) 415 at 430, *MAIGORO V. GARBA* (1999) 10 NWLR (Pt. 624) 555 at 568 and *DAIRO V. UBN PLC.* (2007) 16 NWLR (Pt. 1059) 99 at 130.

C Having been guided by the principles in the case of *COMEX LTD. V. NAB LTD* (supra) and earlier decision of this Court in *NWADIKE V. IBEKWE* (supra), on the classification of recognized errors of Law, I am of the opinion that contrary to the submissions of the Respondents above, Ground 1 has nothing to do with the evaluation of evidence, it simply asks question whether the Actuaries Export Report (which was latter admitted as Exhibit 'H') forms part of the pleading of the appellant whether or not a document is pleaded is a matter of legal interpretation and, no doubt, an issue of Law. This falls under item 2 of the above classification.

E Similarly Ground (ii), has nothing to do with evaluation of evidence. This ground complains that the court below misinterpreted the pleadings and took into account the wrong criteria in ruling on the admissibility of Exhibit 'H'. Again See item (i) of the above formulation. Ground (iii) is a complaint that there was no admissible
 F evidence upon which the court below could have resolved that the Respondent was taken by surprise. See item (v) of the classification. This is, in effect, a ground of law.

The complaint of the Respondent, that Ground (iii) of the
 G Notice of Appeal is incompetent because it is based on an obiter dictum, is misconceived. In their Brief before the Court of Appeal paragraphs 5.11 to 5.17 found on pp 556 - 557 of the Records, reproduced in the Appellants' Reply Brief of argument, they have argued that the Respondent herein has not shown that he was surprised at the trial by the computation of the financial loss prepared
 H by the Firm of Ajibola Ogunsola & Co. The Respondent in its Reply brief in the Court of Appeal did not adduce any argument to contradict the Appellants' arguments before that Court in the said paragraphs 5.11 to 5.17. The reason the Respondent has contended that

Ground (iii) is an appeal against an obiter dictum is because it relates to an issue which was neither raised by the Court of Appeal nor in the High Court. ***The issue of surprise affecting the admissibility of Exhibit 'H' was raised for the first time by the Respondent at the Court of Appeal, and it was in that Court the Appellants had the first opportunity to respond to the said issue. An issue arising from arguments of counsel arising from the Ground of Appeal, in this case, the admissibility of Exhibit 'H' upon which the Court below has taken a decision, is relevant and cannot be regarded as mere obiter dictum. The court was bound and obliged to pronounce on it. It is the duty of the court whether at first instance and appellate court to consider all the issues that have been joined by the parties and raised before it for determination.***

On the complaint of the Respondent that issue 2, as formulated by the Appellants in their brief, was not based on any Ground of Appeal The Argument of the Respondent rests on the Appellants' formulation of issue 2 based on Ground (iii) of the Notice of Appeal. Ground (iii) which reads thus:

"The Learned Justices of the Court of Appeal having properly directed themselves as to the underlying basis for inclusion of particulars in pleadings namely to avoid surprise to the other party erred in Law by resolving the issue of surprise and prejudice against the Appellants."

The following are the particulars of that Ground

"(i) There was no scintilla of evidence touching upon the issue of surprise or prejudice

(ii) The Appellants witness was subjected to cross-examination upon "Exhibit H" without objection by the Respondent

(iii) No issue as to any lack of opportunity of pretrial access to "Exhibit H" was raised by the Respondent.

(iv) No miscarriage of justice had been occasioned."

Issue 2 that was distilled from the above stated Ground (iii) reads as follows:

"Even if the Appellants did not plead and/or particularize special damage (which was denied) was this failure fatal to the claim?"

In other words the issue is how could the failure to plead or particularize special damage be fatal to the claim of the Appellants if it

did not occasion surprise or prejudice or a miscarriage of Justice? I agree with the learned counsel for the Appellants that this issue accentuates Ground (iii) of the Notice of Appeal.

In sum, I am of the view that the objection of the Respondent/Cross-Appellant lacks merit and same is accordingly overruled. The Notice and Grounds of Appeal of the Appellants are competent. Issue 2 as formulated by the Appellants is based on Ground (iii) of the Ground of Appeal and therefore competent. Consequently the argument canvassed under issue No. 2 of the Appellants brief of argument is competent and the appeal is to be considered on the issues raised.

Now to the Consideration of the issues distilled by the Appellants for determination in this appeal.

ISSUE 1

“Did the Appellants plead and particularize special damage. (Grounds (i) and (ii))”

This issue is said to have arisen from Ground (i) and (ii) of Appellant’s Grounds of Appeal challenging the finding of the court below to the effect that the documentary evidence on loss of profit by the Appellants was wrongly admitted not having been specifically pleaded and/or particularized. The appellants have contended that the particulars were pleaded by reference to the Report prepared by the Actuarial Firm of Ajibola Ogunsola & Co. It is submitted by the Appellants that the quantum of the Appellant’s loss is expressly pleaded as US\$4,875,333.15 and the particular of loss were incorporated into the pleading by reference. Reliance was placed on the case of DAY V. WILLIAM HILL (PARKLAND) (1949) 1 KB 632 (which was cited with approval by the Supreme Court) in DANQUE GENEVOISE DE COMMERCE ET. DE CREDIT V. CIA MAR D’ ISOLA SPETSAI LIMITED (1962) All NLR 565.

Applying, the above decisions the Appellants contended that having pleaded their great financial loss in paragraph 18 of the Statement of Claim and that they would be relying on the Report of Ajibola Ogunsola & Co., and then in paragraph 19 making a specific claim for the sum of U\$ 875,333.15 “being financial loss and damage accruing by reason of the Defendants’ breach, particulars of which are specified in the report. This fulfilled the requirement of pleading the particulars of the special damage that occasioned. It is submitted that

the decision of this Court in *NWANJI V. COASTAL SERVICES (NIG.) LTD.* (2004) 11 NWLR (Pt. 885) 552 is clearly inapplicable to this case and it is distinguishable. In the case at hand the Appellants pleaded the computation of financial loss and pleaded the particulars in a document which was referred to in the pleadings. On a review of the document which was admitted as Exhibit "H", the computation of the financial loss was explicitly stated. The court is therefore urged to find and hold that the Appellants pleaded the particulars by reference to the report prepared by Ajibola Ogunsola & Co. B

In their response to issue No. 1 the contention of the Respondent is that the particulars were not specifically pleaded. Paragraphs 18 and 19 of the Appellants' Amended Statement of Claim reproduced above was relied upon. The Respondents' contention is borne out of the principle of law and plethora of authorities regarding claims for special damages. These cases are: *X.S. (NIG) LTD V. TAISEI (W.A.) LTD* (2006) 15 NWLR (Pt. 1003) 533 at 552 *NWANJI V. COASTAL SERVICES (NIG) LTD* (2004) 11 NWLR (Pt. 885) 552 at 567, *ATTORNEY-GENERAL OF ANAMBRA STATE V. ONUSELOGU ENTERPRISES LTD* (1987) Reliance was also placed on the Learned Authors of *BULLEN & LEAKE AND JACOB'S PRECEDENTS OF PLEADINGS* 12th Edition 379, where it was stated that a claim for special damages must be explicitly claimed in the pleading. It is therefore submitted that the Appellants did not plead special damages in conformity with the well laid down legal principles regarding same. Therefore paragraphs 18 and 19 of the Amended Statement of Claim cannot constitute a plea of special damages. C
D
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The Respondent has further contended that this Court in the case of *BANQUE GENE VOISE. DE COMMENCE Et DE CREDIT V. CIA MAB D' ISOLA SPETSAI LTD* (supra), also relied by the Appellants did not state that material facts such as particulars of special damages should be waived once it is contained in a document pleaded in the Statement of Claim. That in that case what the court was concerned with was whether or not the relevant document in contention was pleaded at all, and not whether special damage or its particulars could be deemed as having been pleaded by reference to a document, it is argued that in *SPETSAI PATRIOT* case (supra) the Defendant in that case expressly and specifically set out the relevant terms of the agreement dated 26th October 1996 which was in controversy G
H

unlike the instant case in which the Appellants merely referred to a report (Exhibit ‘H’.) without setting out any items of loss assessed by the report in the Amended Statement of Claim. Notwithstanding the foregoing submissions, the Respondents has contended that there is no specific appeal against the decision of the lower court expunging Exhibit ‘H’, from the records. It is urged on this Court to hold that at the moment, Exhibit ‘H’ does not exist and cannot be relied upon by the Appellants in this Court in proof of claim for special damages. This Court is urged to affirm the decision of the lower court that the Appellant did not plead special damages.

In their Reply brief to the Respondent's brief, the Appellants replied to a number of issues raised therein. As for the case of *ATTORNEY-GENERAL ANAMBRA V. ONUSELOGU ENT. LTD.* (Supra) relied upon by the Respondent, the Appellants contended that the case actually supports their position. That this Court found a sufficient plea and particularization of special Damage in the averment of the sum total of the Damage claimed together with an intended reliance on an Export's Report at page 558 of the Law Report. This form of pleading is what is relied upon by the Appellants in the instant appeal.

The other point which attracts Appellants' reply is in the reliance of the Respondent on the case of *CHINDA V. AMADI* (supra) which decides that pleading special damages in the section of the Statement of Claim where reliefs are claimed is not tantamount to a plea of special Damage. It is submitted that this decision is not binding on this Court as it runs contrary to settled law that the entire Statement of Claim constitutes the pleading including relief claimed. The Respondent did not respond to the Appellants' argument that “Exhibit ‘H’ forms part of the pleading having been incorporated by reference.

On the issue alleging that there is no specific appeal against the decision of the Lower Court, expunging Exhibit ‘H’. from the Records, the Appellants submit that Exhibit ‘H’ was expunged because the lower court found that it was not pleaded. That the gravamen of Ground i and ii of the Appellants' Notice of Appeal is that the court wrongly interpreted the Appellants' pleading in deciding that Exhibit ‘H’ was not pleaded. That if this issue is decided in favour of the appellant, the sum effect of it would be to reinstate Exhibit ‘H’.

The exclusion of Exhibit 'H' was a consequential Order which will stand or fall with a determination on whether Exhibit H was pleaded.

A resolution of this issue turns on whether pleading particulars of special damage by mention of another document incorporates that document by reference and in so doing satisfies the legal requirement of including the particulars of special damage in a pleading. B

I have reproduced paragraphs 18 and 19 of the Amended Statement of Claim most relevant to the resolution of this appeal. The contention of the Respondent is that the particulars were not specially pleaded. I hold the contrary view. I agree with the Appellants that the particulars were pleaded by reference to the Report prepared by Actuarial Firm of Ajibola Ogunsola & Co. The court below erred in its decision to set aside the award of special damages on the ground that the particulars were not pleaded. The quantum of the Appellants' loss is expressly pleaded as U\$4,875,333.15 and the particulars of loss were incorporated into the pleading by reference. The case of DAY V. WILLIAM HILL (PARK LANE) (1949) 1 K.B. 632 was cited with approval by the Supreme Court in BANQUE GENEVOISE DE COMMERCE et DE CREDIT V. CIA MAR PI SOLA SPETSAI LIMITED (supra). The Court affirmed that a reference to a document in a pleading makes the document part of the pleading. BRETT F.J. said at page 74 thus- D

"As the agreement of 26th October 1961 was in writing the reference to it makes it part of the pleading; DAY V. WILLIAM (Park Lane 1949 1 KB. 632, and it was produced in evidence. The essential part of this pleading is the statement in paragraph 4 that since the agreement was entered into the relationship between the parties has been governed by it. This was enough to make it clear to the plaintiffs that the Defendants are relying on the agreement as debarring them from enforcing the mortgage, and in my view it is open to the court to give the agreement its true legal effect....." F

It is noteworthy that this decision was applied by the Court in the case of EHAIOR V. IDAHOSA (1992) 2 NWLR (Pt. 223) 323 where it was held at pages 334 - 335 thus: H

"Special damages were items of loss which the plaintiff, has to particularize in his pleadings to enable him to give evidence

thereto and to recover thereonIn my view, paragraph 10 of the Amended Statement of Claim give (sic) sufficient particulars of the basis of the claim for special damages. If the Appellant wanted more particulars he ought to have demanded for them. The legal implication paragraph 11 of the Amended Statement of claim in which
 B the Respondent averred that he would found on the valuers report prepared by the Estate Surveyors in proof of 'the special damage at the trial, was that the report became part of the pleading and it is open to the Court to give the document its true legal effect. See the Patriots case (1962) 1 All NLR 570"

C **Applying these decisions above, it becomes clear that the Appellants in this case, having pleaded their great financial loss in paragraph 18 of the Statement of claim that they would be relying on the Report of Ajibola Ogunsola & Co and
 D then in paragraph 19 of the said Statement of Claim for the sum of US \$ 4,875,333.15 being financial loss and damages accruing by reason of the Defendants' breach, particulars, which are specified in the said Report, to my mind, they have fulfilled the requirement of pleading the particulars of the special damage.**
 E

I have read the case of NWANJI V. COASTAL SERVICES (NIG.) LTD (supra) It is inapplicable and distinguishable, in that case the Respondent who was engaged in the business of shipping, warehousing, clearing, and forwarding of goods entered into a contract
 F with the appellant, a transporter of goods, for the appellant to transport some iron rods and bags of cement from Warri Port to be delivered to Fougerolle (Nig.) Ltd. in Ajaokuta, Kogi State. It was alleged by the Respondent that the goods were not delivered. Thereupon
 G the respondent claimed against the appellant, among others, the sum of N74,254.60 as costs of the goods, other items of special damages. The respondent however did not give particulars of items of special damages as regards number and quantity. On his part, the appellant contended that it delivered the goods and counter-claimed against
 H the respondent. At the conclusion of hearing, the trial High Court of Delta State Warri granted the respondent's claim and dismissed the appellant's counter-claim. The Appellants' appeal to the Court of Appeal having been dismissed, he appealed further to this Court. This Court disallowed the appellant's claim as woefully inadequate

and lacking in specificity as there was no indication as to how many bags of cement and iron rods in one truck; likewise the unit value of each of the items. In other words, there was no evidence as to how the Appellant arrived at the sum of N74,254.60 he claimed.

In the case at hand, the Appellants pleaded the computation of financial loss and pleaded the particulars in a document referred to in the pleadings. This document which was admitted as Exhibit 'H' contained the computation of the financial loss explicitly stated. This will be further considered in the second issue formulated by the respective parties for determination of the appeal. Besides this finding it is necessary to comment briefly on a few cases relied upon by the respondent. Isolated and general principles of law cannot be relied solely to determine an issue in a case without looking at the circumstances, facts and merits of each case. In the case of ATTORNEY-GENERAL ANAMBRA V. ONUSELOGU ENT. LTD. (supra) relied upon by the Respondent, this Court actually found at page 558 of the case, as sufficient plea and particularization of special Damage in the averment of the sum total of the damages claimed together with an intended reliance on an Exports Report therein. Belgore JSC (as he then was) had this to say at page 558.

"...where there is evidence to support a pleading of special damages suffered in a matter of contract and the evidence is convincing, that is to say without contradiction, and the trial court accepts the evidence, the appellate Court will not interfere with any award on that claim. To submit that there is no sufficient particularization of the special damage in this case cannot but be an error of application. What is strict proof depends on circumstance of each case..."

Relying on the Court of Appeal decision in the case of CHINDA V. AMADI (supra) the Respondent has contended that pleading special damages in the Section of the Statement of Claim where reliefs are claimed, is not tantamount to a plea of Special Damage. Besides the fact that this is a decision of the lower court which is not binding on this Court; the entire decision runs contrary to settled law that the entire statement of claim constitutes the pleading including the Reliefs being claimed.

I think the misconception in this case is simply about the way and manner the particulars of special damages were presented but

definitely not a case of absolute absence of the particulars.

In view of the foregoing I hold the view and find that the Appellants pleaded the particulars of special damage by reference to the report prepared by the Firm of AJIBOLA OGUNSOLA & CO. Accordingly this issue is resolved in favour of the Appellants.

B ISSUE NO. 2

“Even if the Appellant did not plead and/or particularize special damage (which is denied) was this failure fatal to the claim.”

C Put simply, assuming that the said report of the Firm of Ajibola Ogunsola had not been incorporated by reference which I found it was, did this not amount to a mere irregularity and did not occasion any miscarriage of justice.

The basis for the law requiring the giving of particulars, of special damage is to allow the other party know the case against it so as to eliminate any element of surprise.

D In the case of B.E.O.O. Ind. (NIG) LTD. V. MADUKOH (1975) 12 S.G. 91 at P. 108, this Court approved Lord Donovan’s observations in PERESTRELLO V. UNITED PAINT (1969) 1 WLR 570 thus:

E *“The obligation to particularize arise not because the nature of the loss is necessarily unusual but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the Defendant access to facts which make such calculation possible”.*

F Similarly, this observation was re-echoed by this Court in the case of ATTORNEY-GENERAL BENDEL STATE V. AIDEYAN (1989) 4 NWLR (Pt. 118) 646, when Nnaemeka-Agu JSC (of Blessed memory) had this to say at P. 678:

G *“I must note that the main function of particulars is to give to the other party notice of all necessary particulars in the claim or defence so as to avoid taking the other party by surprise. It may assume one of the three forms namely:*

(i) Better particulars of any claim, defence or other matter pleaded;

H *(ii) A statement of the nature of the case relied upon; or*

(iii) Both such particulars and statement.

At the root of it all is the fairness of the trial and the need to enable the other side prepare his case and evidence at the trial. See Thorpe V Holdworth (1876) 3 Ch. D. 639, SPEEDING V. FITZ PATRICK

(1888) 38 CHD. 413 at p. 414".

The obvious question now is whether the Respondent was surprised at the trial by the computation of the financial loss prepared by AJIBOLA OGUNSOLA & CO. I do not think so. The said Report was tendered and admitted as Exh. 'H'. The relevant passage of the testimony of PW1 transcribed in the proceedings of 11/7/2006 of the trial court at page 398 - 399 of the Records reads:

"PW1... In trying to computing (sic) my losses I found it as Herculean task and I had to bring in an expert in Actuarial science to help me out. He carried out the assignment and submitted the report. I will be able to identify the report if I see it. This is the Report.

Plaintiff counsel: I seek to tender it.

Defendant Counsel: My impression is that they are calling the expert who prepared the document. We have no objection.

Court: Document titled "Marine Maritime Association computation of the value of claim is Exhibit 'H'."

This Computation of the value of claims on the contract as 31/12/2003 is found on pp. 718 - 732 of the Records of appeal. Respondent later at the trial Cross-examined the Expert on the Report on pp 420 - 421 of the Records.

The contention of the Respondent is therefore not that the computation of damages came as a surprise to it but that the Appellants did not reproduce the whole 13 pages of the report in the Statement of Claim.

I agree with the Appellants in the instant case that failure to produce the particulars on the face of the pleading is a mere irregularity that does not vitiate the Appellants' claim.

Order 26 R. 5 of the Federal High Court (Civil Procedure) Rules 2004 provides:

"In all cases in which the party pleading relies on any misrepresentation, from a breach of trust, willful default or undue influence, and in other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be stated in the pleadings."

But Order 3 R. 1 (1) of the said Rules 4 further provides:

"Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceeding, there has, by reason of anything done or left undone being a failure to comply with the requirements of these Rules whether in respect of

time, place, manner, form or content or in any other respect the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document judgment or order therein”.

The combine effect of the above provisions of the Rules of the Federal High Court is that failure to comply with Order 26 r. 5 is an irregularity which would not nullify the proceedings or Judgment or Order of the Court.

The question therefore is even if the Report of Ajibola Ogunsola & Co. had not been incorporated by reference, which I had opined it was, did this result in any miscarriage of justice on the part of the Respondent?

In other words did the Respondent suffer any miscarriage of justice that is fatal to the claim of the Appellants. The Respondent did not suffer any miscarriage of justice by the failure to plead the particulars. The Judgment of the Court below translates to using technicalities to defeat the ends of justice by finding that there were no particulars when the particulars have been clearly incorporated by reference. This Court is more interested in substance than technicalities that leads to injustice. Justice can only be done if substance of the matter is carefully examined.

In sum I find that the Appellants pleaded particulars of special damage by reference to the Report prepared by Ajibola Ogunsola & Co. Even if the appellants did not plead and/or particularize special damage (which is not the case) this failure was not fatal to the claim of the Appellants.

THE CROSS-APPEAL

The Respondent to the main appeal filed a Notice of Cross-Appeal on 16/10/2008 and additional ground of Cross-Appeal by leave of this Court granted on 20/10/2009. Therefore two grounds of Appeal were filed by the Respondent as Cross-Appellant. Two issues were distilled therefrom as follows:

“1 Whether the lower court was right in upholding the award of US \$50,000 “aggravated general damages” in favour of the Cross-Respondents (This issue flows from Ground 1 of the Notice of Cross Appeal.)

2. Was the lower court right in affirming the decision of the court of first instance that Exhibit TV was the agreement binding the

parties herein. (This issue flows from Ground (2) of the Additional Ground of Cross-Appeal.)”

On the other hand the Appellant/Cross-Respondents in their brief of argument raised two issues for determination thus:

“1. Whether the award of the aggravated damages was permissible even though the Cross-Respondent’s claim was founded in contract and not Tort or was the award justified on the evidence. B

2. Is there any acceptable basis for over turning the concurrent findings of the two lower courts that Exhibit ‘A’ governed relationship between the contending parties” C

ISSUE 1 OF THE CROSS APPEAL:

It is contended by the Cross-Appellant that the decision of the lower court to uphold the award of aggravated damages was borne out of sympathy and no basis in law. Reliance was placed on the case of ELIOCHIN (NIG) LTD. V. MBADIWE (1986) 1 NWLR D (Pt. 14) 47 and WILLIAMS V. DAILY TIMES OF NIGERIA LTD. (1990) 1 NWLR (Pt. 124) 1.

It is submitted that from the above judicial authorities, it is clear that an award of aggravated damages is inappropriate in cases relating to breach of contract. Cross-Appellant further submitted that in order to justify an award of exemplary or aggravated damages, it is not sufficient to show simply that the defendant has committed the wrongful act complained of. The conduct of the Defendant must be high-handed, outrageous, insolent, vindictive, oppressive or malicious and showing contempt of the plaintiffs’ rights or in disregard of every principle which awakes the conduct of Civilized socially. Reference ODIBA V. AZEGE (1998) 9 NWLR (Pt. 566) 370. It is therefore urged on this Court to set aside the award of the sum of US \$50,000, aggravated general damages in favour of the Cross-Respondent. G

The Cross-Respondents on issue No. 1, have submitted that the aggravated damages were granted them for injury and reputation arising from “Exhibits J1, J2 and J3 and after the flagrant refusal to retract Exhibit J1 despite the Order of Court. It is contended that the aggravated damages were an award for injury to the Cross-Respondents’ credit and reputation flowing from the breach of contract. Reliance was placed on paragraph 16 of the Amended Statement of Claim, and the restated law on the issue in HALSBURY LAWS OF ENGLAND 3rd Edition Vol. II paragraph 471 - 472. H

The Respondent/Cross-Appellant filed a Reply to the Appellant/Cross-Respondent's brief in response to the issues raised by the Cross-Respondents. It is submitted that whilst it may be correct that the said aggravated damages was awarded in favour of the Cross-Respondents by the trial judge for alleged injury to the credit and reputation of the Cross-Respondents which award was erroneously affirmed by the Court of Appeal, no shred of evidence was adduced in the trial Court to their credit and reputation due to the breach of contract by the Cross-appellant.

That although the alleged injury to the credit and reputation of the Appellants/Cross-Respondents were pleaded, the evidence led by the witness called by Cross-Respondents was as to the injuries suffered by him (PW1) to his credit and reputation as a maritime practitioner. There was no gainsaying that the losses suffered by the said PW personally cannot be regarded or deemed to be that of the Cross-Respondents who are separate and distinct entities in law.

The court is urged to hold that all the authorities cited by the Cross-Respondents in support of the contentions under this issue are not relevant helpful or direct authorities for the contention that the award of aggravated damages in favour of the Cross-Respondents was justifiable.

In sum this Court was urged to hold that since the Cross-Respondents did not discharge the onus of proof on them, the concurrent findings of the trial court and the lower court that Exhibit 'A' was the binding agreement between the parties was perverse and that finding ought to be set aside.

The measure of damages in a breach of contract is the loss flowing naturally from the breach and is incurred in direct consequence of the violation. In this case although the trial court awarded the sum of US \$4,298,066.00 to the Cross-Respondents as special damages for loss of profit, it also awarded an additional sum of US \$50,000.00 as "aggravated general damages" in favour of the Cross-Respondents. In order to justify an award of exemplary or aggravated damages it is not sufficient to show simply that the Respondent/Cross-Appellant has committed the wrongful act complained of. It must be shown that their conduct was either high handed, outrageous, insolent, vindictive, oppressive or malicious and show-

ing contempt of the Respondents' rights or in disregard of every decent conduct of civilized men. ODIBA V. AZEGE (supra).

In the instant case, apart from the fact that the claim of the Cross-Respondent was based on contract, was there such conduct on the part of the Cross-Appellant to warrant upholding the award of "aggravated general damages" by the lower court? B

The aggravated damages were granted the Cross-Respondent for injury credit and reputation from Exhibit J1, J2 and J3 and the flagrant refusal to retract Exhibit J.1, despite the order of Court. Paragraph 16 of the Amended Statement of claim, has been reproduced earlier above. From that pleading coupled with the uncontradicted evidence of PW1 relating thereto and the contents of Exhibits J1, J2 and J3 the claim for aggravated damages was for injury to credit and reputation arising from a breach of contract. C

In HALSBURY LAWS OF ENGLAND, 3rd Ed. Vol. II paragraph 471 - 472 page 285 the learned Authors stated that, as a general rule aggravated damages are not payable in contract since in action of breach of contract, the motive and conduct of the Defendant are not taken into consideration, but there are exception where the breach of contract is injurious to credit or repudiation. Applying this statement then the Cross-Respondents are entitled to the aggravated damages because of the injury done to the credit and reputation of the Cross-Respondents in the International Maritime Circles. This is particularly so because the Cross-Appellant issued Exh. J1 despite the Court Order granting among others a mandatory interim relief to wit. D E F

"That the Defendant whether by itself, its servant agents or otherwise howsoever are hereby restrained from suspending breaching G or in any way interfering with the performance or continuance of the "Inspection Vetting Agreement" between the Plaintiffs/Applicants and the Defendant/Respondent.

That the Defendant whether by itself or its servants or agents or otherwise however are hereby compelled to honour the terms of H the aforesaid contract for the provision of Ship Inspector/Vetting Services of reinstating the same and performing its obligations thereunder pending the determination of the Motion on Notice filed in this cause..."

The Court may take into account the Defendants motives conduct and manner, and where they have aggravated the Plaintiff damages may be awarded. The Defendant may have acted with malevolence or spite or behaved in a high handed, malicious insulting, aggressive manner. Aggravated damages are designed to compensate the plaintiff for his wounded feelings. See para. 1189 of Halsbury Laws of England 4th Ed. Vol. 12 and the case of KUNO V. CHIEKWE (1991) 2 NWLR (Pt 173) 316.

In Exhibit J1, which is the Marine Shipping Notice M11/99 issued by one Capt. I.N. Ntiadem for the Director-General of the Cross-Appellant all Ship Owners, Operators, Shipping Companies, Shipping Agencies, Oil Terminal Operators and Ship Masters were notified that the Vetting/Inspection of Tankers by the Cross-Respondents have been “suspended.” The Cross-Appellant disdainfully failed or refused to retract this letter despite the Order of Court restraining the suspension. I am of the view that the conduct of the Cross-Appellant was high handed, spiteful and oppressive. It is for this reason the two courts below rightly awarded aggravated damages in favour of the Cross-Respondent even though it was a claim founded in contract. The award was justified by uncontradicted evidence on Record and permissible by law.

Learned counsel for the Cross-Appellant has submitted that the Cross-Respondents abandoned their pleadings on the loss of credit and reputation since PW1 who gave evidence used the expression “T” “MY” “ME”, which did not relate to the Cross-Respondents. I do not share the view. PW1 gave evidence as the Managing Director of the 1st and 2nd Cross-Respondents. 1st and 2nd Cross-Respondents are joint Venture Companies formed for the execution of the agreement in dispute. A company is only a juristic person, it can act through an alter ego, either its agents or servants. Evidence of PW1 is given in that capacity. See KATE ENT. LTD. VS. DAEWOO NIGERIA LTD (1985) 2 NWLR (Pt. 5) 116 on what a legal status of a Company is. This Court held in that case that:

“4.1.14 ...At Common Law such company is a *persona ficta* and can only act through its agents or servants”. See Lennards Carrying Co. Vs Asiatic Petroleum Co. Ltd. 1915 AC 705 per Viscount Haldane L.C. at pp. 713-714 and Bolton (Engineering) Co. Ltd. Vs Graham & Sons Ltd. (Supra) at p. 172 per Denning L J who

observed that;

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, these managers are the state of mind of the company and are treated by the law as such”

As explained, PW1 is the Managing Director of the 2nd Cross-Respondent and the Joint Venture Company of the Cross-Respondent. This being so, he is not only “the directing mind and will of the Cross-Respondents but he is “the state of the mind” of the Cross-Respondents. Therefore his use of the pronouns “I”, “My” “Me”, in his evidence, understandably, was made on behalf of the Cross-Respondents.

ISSUE 2 OF THE CROSS-APPEAL

“Was the lower court right in affirming the decision of the court of first instance, that Exhibit ‘A’ was the agreement binding the parties herein (Ground 2 of the Additional Ground of Cross-Appeal)”

While the Cross-Appellant contended that Exhibit ‘L’ expressly stated that the agreement was between the parties, the Cross-Respondents asserted that Exhibit ‘A’ was the authentic or genuine Inspection/Vetting agreement between the parties. It is contended by the Cross-Appellant that whilst Exhibit ‘A’ did not state any commencement date (although evidence was led to establish that it was meant to commence sometime in 1966); Exhibit expressly stated that the agreement shall come into effect on 1/4/1996.

Based on the foregoing, there was a fundamental dispute between parties as to whether the duration of the said agreement was ten years, as reflected in Exhibit ‘A’ tendered by the Cross-Respondents or three years as reflected in Exhibit ‘L’ which was, tendered and relied upon by the Cross-Appellant.

The trial court and the court below in their concurrent findings held that the authentic agreement binding the parties was Exhibit ‘A’ and not Exhibit ‘L’.

The law is well settled that it is only in exceptional circum-

stances that this Court will interfere with the concurrent findings by the courts below. In other words this Court will not disturb the findings of fact of two courts below unless there is a manifest error which leads to some miscarriage of justice or a violation of some principle of law or procedure. See AMADI V. NWOSU (1992) 5 NWLR (Pt. 241) 273 and IWUEGO V. EZEUGO (1992) 6 NWLR (Pt. 249) 561.

The Cross-Appellant has not shown that the findings of the two courts below are perverse or not supported by evidence. In paragraph 7, of their Amended Statement of Claim the Cross-Respondents pleaded thus:

“The terms of the Agreement reached were duly engrossed and executed by all parties thereto”

“It was pleaded by the Cross-Appellant that “Further to paragraph, above the Defendant contends and shall prove at the trial of this action that the Plaintiffs (Cross-Respondents) fraudulently altered the provisions of the agreement to suit their ulterior motives...”

This criminal act of the Cross-Respondents is a mere allegation, and under S.465 of the Criminal Code it requires proof beyond reasonable doubt that Exhibit ‘A’ was forged or altered. The purport of Section 138 (1) of the Evidence Act is that:

“If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt”

The Cross-Appellant failed to lead any admissible or credible evidence on the forgery of Exhibit ‘A’. The only evidence led by the Cross-Appellant, which the Court disregarded as not credible were Exhibits M & N, written by the erstwhile Direct-General and Director Legal Services respectively of the Cross-Appellant during the pendency of the suit. The Court of Appeal in agreeing with the learned trial Judge held as follows:

“The substance of the reasoning of the Learned Trial Judge is that if truly Mrs. Chijioke wrote a letter to Respondent for such changes, the said letter was crucial to the defence and same was never placed before the Court. That Exhibit C which was the original agreement executed by the parties carries alterations in Mrs. Chijioke’s writing which changes are the feature of Exhibit ‘L’

Thirdly, if it is true that the contract entered into was in terms of Exhibit L, for a duration of three years, there would be no need to suspend it after the expiration of the three year term. Exhibit L was with effect from 1st April 1996.

By 10th December, 1999 when it was purportedly suspended it has expired by effluxion of time. B

There would, therefore, be no life span left to suspend. The Act of suspending the agreement betrays the Appellant's panic measure. The only irresistible inference that can be drawn from this desperate measure is that the duration of the contract was running. In other words, Exhibit 'A' was subsisting..." C

There is no basis for overturning the concurrent findings of the two lower courts that Exhibit 'A' governed the relationship between the contending parties. Accordingly the Cross-Appeal is lacking in merit, it is dismissed. D

In the final analysis, the main Appeal has merits and it is allowed. The Judgment of the Court of appeal setting aside the decision of the trial court which awarded US\$4,298,066 to the Appellant as special damages is accordingly set aside. Consequently the Judgment of the trial court awarding the sum of U\$4,298.066 is restored and affirmed. The Cross-appeal is lacking in merit, it is dismissed. The part of decision of the Court of appeal upholding the part of decision of the trial court awarding the sum of US \$50,000 as aggravated general damages is affirmed. No order as to costs. Parties shall bear their respective costs. E F

MOHAMMED JSC

My learned brother Galadima JSC had permitted me before G today to read his lead judgment in draft in this appeal in which after considering the issues arising for the determination of the appeal and the cross-appeal, came to the conclusion that the appeal is meritorious and ought to be allowed while the cross-appeal is devoid of merit thereby deserving the obvious order of dismissal. I entirely agree with H my learned brother in the manner he treated and resolved all the issues in the appeal and the cross-appeal resulting in allowing the appeal and dismissing the cross-appeal.

The dispute between the parties arose from the Inspection/

Vetting Service Contract Agreement entered into between the Appellants/Cross-Respondents and the Respondent/Cross-Appellant on 1st March, 1996. The main issue in the Appeal is whether the Appellants which were the Plaintiffs at the trial Court had pleaded and particularized Special Damages claimed for breach of contract by the Respondent. The resolution of this issue, in my view, require close examination of the relevant paragraphs of the statement of the claim of the plaintiffs now Appellants namely, paragraphs 18 and 19 and the response to those paragraphs by the Defendant now Respondent in the statement of Defence. Paragraphs 18 and 19 of the Amended Statement of claim at page 367 of the record of appeal, state as follows -

“18. The Plaintiffs aver that the Defendant has by the said breach caused great financial loss and damage to the Plaintiffs. The Plaintiffs would at the trial rely on the report of computation of financial loss prepared by the Actuarial firm of Ajibola Ogunsola & Co. Where of the plaintiffs claim against the Defendant -

19a. A Declaration that the “Inspection/Vetting Agreement made between the Nigerian National Maritime Authority and the Plaintiffs with effect from 1st March, 1996 for a period of ten (10) years remains valid, binding and enforceable as between the parties thereto.

b. A declaration that the purported “suspension” of the contract for vetting/inspection service by the Defendant herein - The Nigerian National Maritime Authority by letter dated 10th December, 1999 is ultra vires the said contract and the National Maritime Authority itself, and is no legal effect whatsoever.

c. The sum of US\$4,875,333.15 (Four Million, Eight Hundred and Seventy Five Thousand, Three Hundred and Thirty Three 4 dollars Fifteen Cents) or its Naira equivalent at the prevailing rate) being the financial loss and damage accruing by reason of the Defendants breach of the Inspection/Vetting Agreement particulars of

28. The Defendant denies paragraph 19a - f of the statement of claim and puts the Plaintiffs to strictest proof of the allegations therein contained.”

It is quite clear from the relevant paragraphs of the pleadings of the parties quoted above that the sum of \$4,875,333.15 claimed by the Plaintiffs was not in fact claimed as “Special Damages” as re-

flected in the grounds of appeal and issues for determination in this appeal. The amount was claimed as the financial loss and damage accruing by reason of the Defendant breach of the Inspection/Vetting Agreement particulars of which are specified in the Report of Ajibola Ogunsola & Co. In other words the amount was simply claimed as damages for breach of contract and it is significant to observe that at the trial Court there was no complain at all by the Defendant that particulars of special damages were not pleaded by the Plaintiff in paragraphs 18 and 19 of the Amended Statement of claim. The law is indeed well settled that in a case of breach of contract, which is what the present case is, the assessment of damages is calculated on the basis of the loss sustained by the injured party which loss was either in the contemplation of the contract or is an unavoidable consequence of the breach. See *Shell B.P v. Jammal Engineering Ltd.* (1974) 4 S.C. 33; *All N.L.R. (Pt. 1) 542* and *Ijebu Ode LG. v. Adedeji Balogun & Co.* (1991) 22 N.S.C.C. (Pt. 1) 1 at 18 also in (1991) 1 NWLR. (Pt. 166) 136 at 158. The fact that the damages, as in the present case are difficult to assess does not disentitle a Plaintiff to compensation for loss sustained from a Defendant's conduct of breach of contract. Also the fact that the amount of such loss cannot be precisely ascertained, does not deprive a Plaintiff of all remedy as stated by this Court in *Nzeribe v. Dave Engineering Co. Ltd.* (1994) 8 NWLR. (Pt. 361) 124 at 147.

It is in line with these decisions that I see the method adopted by the Appellants as Plaintiffs in relying on the report of Ajibola Ogunsola & Co. to ascertain the loss suffered by them following the suspension or breach of the Inspection/Vetting Service contract between them and the Defendant, is squarely within the law. The report as pleaded by reference in paragraph 18 of the statement of claim as outlining the amount of loss suffered as damage for the breach of contract became part of the statement of claim as affirmed by this Court in *Banque Genevoise De Commerce ET De Credit v. CIA. MARD ISOLA SPETSAI, Limited* (1962) All N.L.R.. 565 at 572 which applied with approval the English case decision in *Day v. William Hill (Park Lane)* 1949 1. K.B. 632. In this respect, the Ajibola Ogunsola & Co. Report pleaded in paragraph 18 of the statement of claim of the Appellants/Plaintiffs, therefore formed part of that statement of claim by reference to satisfy the required pleading of particulars of

loss and damage suffered by the Appellants, most especially when that document was also in evidence as Exhibit 'H' having been admitted in the course of the hearing of the case. The complaint of the Respondent at the Court below and in this Court that particulars of the loss/damages suffered by the Plaintiffs/Appellants were not pleaded, B has no basis whatsoever.

For the foregoing reasons and fuller reasons contained in the judgment of my learned brother Galadima JSC that I also allow this appeal, dismiss the Cross-Appeal and abide by all the orders made in C the lead judgment including the order on costs.

MUNTAKA-COOMASSIE JSC

This is an appeal against the judgment of the Court of Appeal D Lagos Division delivered on 18/7/2008. That court set aside the award of US\$4,298,066 to the appellants Vis-a-vis special damages for breach of contract. The appellants were the plaintiffs before the trial court. The appellants amended their statement of claim. The defendants now respondents also have their amended statement of E defence.

After hearing evidence and receiving certain documents as exhibits and after the learned counsel for the parties addressed the trial court, judgment was delivered in favour of the plaintiffs. The F defendants were aggrieved and they successfully appealed to the Court of Appeal hereafter called lower court.

The plaintiffs/Appellants were not happy with the decision of the lower court and lodged an appeal before us. Parties then filed their respective briefs of argument.

G I have gone through the lead judgment of my learned brother, Galadima JSC, and I entirely agree with the reasons and conclusions reached thereat. I have nothing more to add other than to allow the appeal as it has tremendous merit. I therefore allow the appeal.

I dismissed the cross-appeal as it is devoid of any merit. I H abide by the consequential orders made by my learned brother Galadima JSC. No order as to costs.

NGWUTA JSC

I had the privilege of reading in draft the lead judgment of my Lord, Galadima, JSC. I agree with the reasoning and conclusion therein.

The claim in the trial Court was based on a breach of contract for which the plaintiff claimed the sum of \$4,875,333.15 as damages arising thereof. The damages claimed here are meant to put the plaintiff in the position he would have been if the contract had not been breached. See *Chitex Industries Ltd v. O.B. (Nig) Ltd* (2005) 14 NWLR (Pt. 945) 392.

The claim is for damage *ex contractu* and not damage *ex delicto*. Of the two, the former flows from a breach of a special obligation while the latter arises from the violation of a general duty. See *State v. Fourchy*, 31 Scnth, 325, 331: 106 La 743. Special damages in the grounds of appeal and issues for determination do not relate to, and must be distinguished from, damages for breach of contract.

Based on the above and the fuller reasons in the lead judgment, I also allow the appeal and dismiss the cross-appeal, I abide by orders made in the lead judgment, including the order on costs.

ALAGOA JSC

I read before now in draft the lead judgment of my brother Suleiman Galadima, JSC and I agree with his reasoning and conclusion reached and I wish to chip in this little bit of mine as contribution to a detailed and well laid out judgment. The appeal is against the judgment of the Court of Appeal Lagos Division delivered on the 18th July, 2008. The subject matter of the suit at the High Court was a contract details of which have already been supplied in the lead judgment. The Court of Appeal (the lower court) had set aside the award of U\$4,298,066 to the Appellants (Plaintiffs at the High Court) which represented special damages for breach of contract on the ground that evidence of loss of profit could have been but was not specifically pleaded and particularized in the Statement of Claim. Paragraph 19 of the Appellants statement of claim at the High Court reads *inter alia* as follows:-

“19(c) Whereof the Plaintiffs claim against the defendant for the sum of U\$4,875,333.15 (Four Million Eight Hundred and Sev-

enty Five Thousand Three Hundred and Thirty Three Dollars Fifteen Cents) or its Naira equivalent (at the prevailing rate) being the financial loss and damage accruing by reason of the Defendant's breach of the Inspection/Vetting Agreement, particulars of which are specified in the report of Ajibola Ogunsola & Co."

B The Appellants contended that documentary evidence of loss of profit by the Appellants was specifically pleaded by reference to the report prepared by the actuarial firm of Ajibola Ogunsola & Co. They relied on DAY V. WILLIAM HILL (PARKLAND) 1949 1 K.B. 632 which the Supreme Court cited with approval in DANQUE GENOVOISE DE COMMERCE ET. DE CREDIT V. CIA MAR DI ISOLA SPETSAI LIMITED (1962) ALL NLR 565. In this case the Court affirmed that reference to a document in a pleading makes the document part of the pleading. It is noteworthy that the Appellants D stated in paragraph 18 of their Amended statement of claim that they would be relying on the report of the Actuarial firm of Ajibola Ogunsola & Co. before making a specific claim in paragraph 19 of their statement of claim. That way they have fulfilled the requirement of pleading the particulars of special damage. The judgment of the E court below amounted to the use of technicalities to defect the ends of justice because the particulars of special damage were clearly incorporated in the Statement of Claim by reference. It is for these reasons and the fuller reasons given by my learned brother Suleiman F Galadima, JSC in the leading judgment that I too find merit in the appeal and allow same. Accordingly the judgment of the lower court which set aside the decision of the trial court awarding U\$4,298,066 to the Appellant as special damages is hereby set aside. I too find no merit in the Cross Appeal and dismiss same while abiding by all other G order/s contained in the said lead judgment including order made as to costs.

H