CIV.APP.62/95 & 30/96

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:-

SEABOARD WEST AFRICA LIMITED - APPELLANTS

Vs

ERIC JAMES (CARRYING ON BUSINESS AS JAMES INTERNATIONAL ENTERPRISES) - RESPONDENTS

CORAM:

HON. MRS JUSTICE V.A.D. WRIGHT - J.A.
HON. MR. JUSTICE N.D. ALHADI - J.A.
HON. MR. JUSTICE M.E. TOLLA THOMPSON - J.A.

A.F. SERRY-KAMAL, ESQ., FOR THE PLAINTIFFS/RESPONDENTS
A.O.B. TEJAN-COLE, ESQ., FOR THE DEFENDANTS/APPELLANT

JUDGMENT DELIVERED THIS 22ND DAY OF JANUARY, 2001

ALHADI, J.A.

This Appeal arose out of the decision of Gbow, J (as he then was) in an Action in which the Plaintiffs (now Respondents) claimed the following:-

STATEMENT OF CLAIM

The Plaintiffs' claim against the defendants is for damages for breach of contract, an account of all commissions due to the Plaintiffs' from the defendants from the day of September, 1992 until payment; and interest on the aforesaid amount 65% from that date until payment and alternatively specific performance of the said contract, an account as aforesaid and a perpectual injunction to restrain the defedants' company

whether by itself, its servants or agents from preventing the plaintiffs from proceeding with the performance of his side of the contract.

I have avoided the task of reproducing the particulars of claim as they are in the main clauses in the Agreement, the subject matter of this action which I shall reproduce in extenso in the judgment later.

The Appellants (then defendants) filed a Statement of Defence which was later amended and filed.

There are several points of law raised in some of the Grounds of Appeal which I consider sufficient to dispose of this Appeal. They are:-

GROUNDS OF APPEAL

1. That the learned trial Judge failed to consider sufficiently or at all the submissions that James International Enterprises Limited and Eric James (Carrying on Business as James International Enterprises) were separate and distinct entities in law.
2. The learned trial Judge was wrong in law in:-
   (a) holding that Counsel for the plaintiff ought not to have addressed them on the non-registration of the plaintiffs/ respondent's business.
   (b) his interpretation of the Business Names Registration Act Cap. 257 of the Laws of Sierra Leone 1960.
   (c) in refusing the appellant's (defendant's application to amend their defence by Notice of Motion dated 11th March, 1996.
   (d) holding that James International Enterprises is not a business name and consequently wrong in failing to consider the effects of non registration thereof under the Business Names Act Cap 257 Laws of Sierra Leone 1960.

3. The learned trial Judge was wrong in law and in fact in his interpretation of the Agreement dated 27th June, 1985 and expressed to be between the Appellant and Respondent herein particularly clause 2 and 6 of the said Agreement.
4. The learned trial Judge was wrong in law in upholding the objection of Counsel for the Respondent to the 1st Defence witness (Jabez Sho-Cole) giving evidence in favour of the Appellant.
5. That the learned trial Judge(s) failed to consider adequately or at all evidence that the Plaintiffs had fundamentally breached the Agreement dated 27th June, 1985 and
7. a . .....
8. The learned trial Judge was wrong in law in denying the Appellants the right to cross-examine PW2 Abubakarr Kabba and/or alternatively in considering his evidence or failing to expunge the same.
9. In view of the evidence adduced the learned trial Judge was wrong in law in
   (a) awarding damages for breach of contract at all and/or alternatively that the learned trial Judge did not apply the correct principles or any principles of law regarding the quantum of damages.
   (b) awarding the sum of Le.100,000.00 as damages.
   (c) alternatively, the appellant will argue that the said sum was excessive and inordinate taking into consideration all the circumstances of the case
10. The learned trial Judge was wrong in law and in fact
   (a) in awarding special damages at the rate of Le.496,292.00 per diem for loss of commission or profit or margin from September, 1992 until payment with interest at the rate of 37% per annum.

(b) in awarding special damages for non days and other days during which the appellant's business did not operate and/or when a proper account had not been taken of the number of bags of life flour sold by defendants from September, 1992

(c) in awarding interest at the rate of 37% per annum and/or in awarding interest until payment.

11. That the decision is unreasonable and cannot be supported having regard to the evidence.

I shall deal with Grounds 1 and 2 together as they deal with the legal capacity of the plaintiffs/respondents to institute this action.

The forceful argument of Counsel for the defendants/appellants is that the plaintiff/respondent lacks legal capacity that Eric James (carrying on business as James International Enterprises) ought to register Under Cap. 257 Business Registration Act wherein it is provided in Section 3:

"The following proprietors and firms shall be registered in the manner directed by the Ordinance." (Emphasis mine)

(a) every proprietor having a place of business in Sierra Leone and carrying on business under a business name which does not consist of his ordinary name without any addition thereto".

"Proprietor" is defined in Section 1 to mean an individual carrying on business of which he is the sole proprietor.

It is not in dispute that the plaintiff/respondent were carrying on business in this Country as a sole proprietor under the name of the title of the action herein. There is evidence that this business was not registered as required in the statute. The agreement, Exhibit "A" was entered into by the plaintiff/respondent by that name.

Eric James himself said at Page 242 line 17-18 of the record:

"James International Enterprises was a business name"

line 25 – 27 "Eric James carrying on business as James International Enterprises was registered in Germany in 1970". It was never registered in Sierra Leone"

Page 243 line 8-13 "Eric James carrying on business as James International Enterprises was not registered as a Company in Germany.
It was registered in Germany as Tax Payer. It was not registered to do business in Sierra Leone. It was not registered under any law in Sierra Leone".

Page 224 Line 6 "It was a one man business. I was the sole person".

What then is the effect of non-registration? It cannot be doubted that a party who is guilty of a breach of a Statutory Provision which is mandatory cannot recover any benefit arising from many transaction entered into in that business name. For such proprietor lacks the legal status or capacity to institute any such proceedings. For he suffers the full impact of the maxim ex-turpi causa non oritur actio and all the remedies in law are denied to him.

The position will be otherwise where an individual carrying on business in a name or style other than his own when he could be used in his own name followed by the words "trading as A.B. or in his business name

followed by the words (a trading name)" See MASON & SONS v MOGRIDGE (1892) STLR805.

In this case the plaintiff/respondent was under a legal obligation to register the business Under Cap. 257 in the manner provided for in Sections 3, 4,5 and 6. The default of non-compliance is punishable on summary conviction to a fine. Since a violation of these statutory provisions is attendant with criminal sanctions any transactions conducted by it in that name is tainted with illegality and therefore unforceable since the court will not lend its aid to it.

This unenforcebility is reaffirmed by Section 12 of the Act which provides:

> "Where any proprietor or firm required under this Ordinance to furnish a statement of particulars or of any change in particulars makes default in so doing the rights of the proprietor or firm under or arising out of any contract made or entered into by him or it or on his or its behalf at any time while he or it is so in default, in relation to the business in respect of which the statement of particulars is required shall not be enforceable by action or other legal proceedings either in the business name under which the business is carried on or otherwise:"

In this respect I will refer to two cases: **NABIEU AMADU v AIAH SIDIKI** (1972-73 A.L.R. (S.L.) 421 Privy Council. It was held that the possession of diamond by the appellants in contravention of the Minerals Act. 196 Section 67 was an illegality which deprived the appellants of a claim for either the return of the diamond or for the payment of the proceedings of its sale without relying on the illegal possession. The Board

held "In these circumstances the fact that the illegality was not pleaded nor argued at the trial is of no consequence."

In **STRONGMAN** (1945) **LTD.** V **SINCOCK** (1955) 2 QB Lord Denning M.R. expressed the view as being the correct state of the law that the business STRONGMAN (1945) LTD cannot sue on a contract for work done which was done in contravention of the Defence Registration 56A as it was a work carried on without proper licence, which makes it a criminal offence.

It is pertinent to note that in these two cases as in the instant case a violation of the provisions is made a criminal offence punishable with imprisonment or a fine.

As regards Ground 2(c):-

From the records the defendants/appellants did make an application on the 11th March, 1996 to amend their Statement of Defence by pleading the non registration of the plaintiff/respondent pursuant to the above provisions of the law. The application was refused by the Learned Trial Judge on the ground it was not made with promtitude. In my view an amendment can be made at any stage of the proceedings if it can be made without injustice to the otherside.

The issue therein raised was of a fundamental nature as it goes to the jurisdiction of the court to adjudicate on the matter before it. For this was a non-compliance with mandatory statutory provisions which renders the proceedings void and a nullity. Also this was an opportunity for the judge to have adjudicated on this all important issue instead of abdicating his

responsibility by holding that the words "(carrying on business as James International Enterprises)" are descriptive of Eric James where there is glaring evidence that the words represent a business name used in all the business entities set up by him.

The relevant pieces of evidence are, at Page 242 line 17 P.W. 4 deposed as follows" James International Enterprises was a business name". In line 23 he said "It was a business name used by several business including James International Enterprises Limited".

In his Judgment the learned trial Judge said at Page 321 Lines 5-7

> "It is my view that the words (carrying on business in the name and style of James International Enterprises are all describing who Eric James is".

In my view if the amendment had been granted, which I am of the view ought to have been the plaintiff/respondent would have availed himself of his undoubted right to lead evidence of registration of the businesses, an attempt which was unsuccessfully made before us to tender fresh evidence of such registration and was refused by us that the issue of non-registration was already a Ground of Appeal in these proceedings.

The learned trial Judge ought to have allowed the amendment. His refusal in my view was wrong. The Appeal on this ground is allowed.

GROUND 3: The defendants/appellants have complained that the learned trial Judge erred in his interpretation Clauses 2 and 6 of the agreement, Exhibit "A" in that the judge stated the following:-

Page 322 – Line 20-32:- "If James is the sole distributor why should he go into a discussion with the defendants after taking delivery of one hundred and ninety thousand bags from the inception of the agreement, before the defendants can sell as additional quantity of flour to him. Learned Counsel for the defendants submits that the effect of Clauses 2 and 6 of Exhibit "A" is to limit the obligation to supply flour to the quantity mentioned in these two Clauses. He further submits that Clauses 2 and 6 do not imply that the defendants should supply flour to the plaintiffs ad infinitum ....".

Page 323 Lines 1-7 he said "I do not therefore agree with counsel that the effect of Clauses 2 and 6 is to limit the defendants' obligation to just the quantities mentioned in Clauses 2 and 6. Counsel's submission that the plaintiff and the defendants must discuss further supplies of flour after the initial supply, if accepted would make nonsense of the whole agreement"

Counsel for the for the defendants/appellants has argued that on the supply and payment of 200,000 bags the obligations of the parties under Exhibit "A" would have been discharged unless further agreement for additional quantity under Clause 6 is agreed to.

Counsel for the plaintiff/respondent contended that on a proper interpretation of the agreement Exhibit "A" the intention of the parties ought to be looked into as to whether the contract was to ensue for a period or until lawfully terminated. He submitted that it was a continuous agreement being an agreement between manufacturers and distributor. That Clause 1 of the agreement describes the plaintiff/respondent as sole distributor, that the learned trial Judge was right when he stated (at Page 323 Lines 20-27) the following.

> "Learned Counsel himself has submitted that there is an ambiguity in Clause 1 on the one hand and Clauses 2 and 6 on the other ..... He submitted that whereas Clause 1 implies an unlimited number of bags of flour, Clauses 2 and 6 relate only to a limited specified number of bags. I quite agree with this submission but I do not, with respect, agree with the further submission that when the specific number of bags in Clauses 2 and 6 been supplied the defendants, Seaboard, have no further obligation to supply further bags of flour".

It is therefore necessary to reproduce the Agreement Exhibit "A" which provides:-

> "Seaboard appoints James sole distributor "Life Flour in Sierra Leone and hereby undertake not to sell "Life Flour" to any other person at anytime during the currency of the agreement subject to the terms and conditions hereafter set forth.
>
> 2. Seaboard shall sell an initial number of 100,000 bags of pounds each of life flour to the distributor during the currency of this Agreement and the distributor agrees to buy the first 100,000 bags of each flour milled by Seaboard after the date hereof.

3. Seaboard shall sell life flour at the Government approved price to the distributor and the distributor shall pay 3 U.S. Dollars of the price per bag based on the current official exchange rate to a bank account so designated by Seaboard; the remainder of the price shall be sold by Seaboard.
4. The distributor shall take delivery and collect daily from Seaboard's premises Cline Town, the bags of flour in such quantities as Seaboard shall from time to time mill.
5. The distributor shall pay to Seaboard the price herein before mentioned in the manner hereinbefore described on or before it collects and takes delivery of the bags of flour from Seaboard.
6. Upon the receipt of the distributor made at any time before the distributor shall have taken delivery and paid for ninety thousand bags of life flour Seaboard agrees to sell to the distributor a further one hundred thousand bags of flour on the same terms and conditions as the original one thousand bags of flour after the distributor has taken delivery and paid for one hundred and ninety thousand bags since the inception of this contract. Seaboard will discuss with the distributor if the distributor so desires the sale of an additional quantity of flour under the terms and conditions as set herein.
7. Any variation of the terms of this agreement shall be valid provided such variation is made in writing and mutally agreed to by the parties.
8. If any dispute or difference shall arise between Seaboard and the distributor with respect to this agreement then in every such case the dispute shall be referred to an Arbitrator in the case of the

parties mutally agreeing on one otherwise these Arbitrators are to be appointed by the two appointees of the parties. The award of the Arbitrator or Arbitrators shall be binding on both parties.

9. This agreement shall be governed by the Laws of Sierra Leone.
10. Either party shall have the right to terminate this exclusive arrangement upon any default by the other party not cured within 10 days or by written notice.

In my interpretation the distributorship of the plaintiff/respondent under the agreement is operational during the currency of the agreement subject to the terms and conditions therein. The object of the agreement from the words used in my view can never be to make the plaintiff/respondent had the sole monopoly for the distribution of their products ad infinitum or inperpectuity. If the intention was to create a monopoly there would have been no need for Clauses 2 and 6 which are limited in scope. The learned trial Judge himself accepted the limitation imposed by these clauses when he said at Page 321 line 20 – 23.

"Whereas Clause 1 confers sole distributorship on the plaintiff, Clause 6 virtually takes away this right of sole distributorship. It does so in a complicated and vague manner:

This is what Clause 6 states -

Upon the request of the distributor made at any time, before the distributor shall have taken delivery and paid for ninety thousand bags of "Life Flour, Seaboard agrees to sell to the distributor a further one hundred thousand bags of flour on the same terms and conditions as the original one hundred thousand bags of flour since the inception of this contract; Seaboard will discuss with the

distributor if the distributor so desires, the sale of an additional

quantity of flour under the terms and conditions as set herein....."

But this is not an accurate quotation of the clause, for it omitted the words "after the distributor has taken delivery and paid for one hundred and ninety thousand bags".

These omitted words reinforced my view of the limitation of the distributorship of the plaintiff/respondent as to the quantity of bags of flour they were obligated to under the contract. Any further supply of flour to the plaintiff/respondent was contingent on a desire being expressed by him and followed by a fruitful discussion. Perhaps if the significance of these omitted words were considered and taken into account his interpretation of the distributorship of the plaintiff/respondent would have been different; and would have accorded with the obvious interpretation that the distributorship of the plaintiff/respondent of "Life Flour" was limited to the specified agreed quantities of 200,000 bags.

I can conceive of nothing more patently clear of the intention of the parties than the words used in the clauses. The words admit of no other meaning that that the sole distributorship is limited on the performance of the parties of their respective obligations under the agreement Exhibit "A". The words used in deeds are regarded with sanity and if they are plain, the court will interprete them according to their ordinary meaning and will not redraft it in order to accord with a meaning which may never have been the intention of the parties. I will therefore hold that the distributorship of the plaintiff/respondent is limited on the supply and payment of 200,000 bags of "Life Flour". The interpretation of the learned trial Judge in my view is erroneous. This Ground of Appeal therefore succeeds

Ground 4: Counsel for the defendants/appellants has argued that the learned trial Judge in upholding the objection of Counsel for the plaintiff/respondent to the defence witness Mr. Sho Cole continuing with his evidence deprived the defence of a vital witness in support of their case. The objection was on the ground that the witness being an ex-employee of the defendants/appellants' Company and having testified to the following:-

> "I told the court that I was not aware of the existence of Exhibit "A". I was aware of the sale of flour from Seaboard West Africa Limited to James International Enterprises Limited. I was personally involved in this transaction".

Counsel argued that any further evidence that would be proferred by this witness would touch and concern confidential information obtained by him in the course of his employment with the defendants/appellants' company. That there is an implied duty of fidelity of all employees that they should not disclose confidential information regarding their employers business.

Counsel for the defendants/appellants has contended that in the absence of any legal disqualification as to the competence of a witness there is no rule of law which prevents an ex-employee giving evidence against a former employer on matter of non-confidential nature.

The question is, was the skill or knowledge obtained by the witness special or peculiar to this former employer's business? If it is and would be detrimental to the employer's business if disclosed, the court can do what it can to prevent such a result by granting an injuction. The attitude of the court in such a case is that he who has received information in confidence

shall not take unfair advantage of it and make use of it to the prejudice of him who gave him - See Lord Denning M.R. in **SEAGER** v **COPYDEX LTD**. (1967) 2 A.E.R. 415. This principle only applies where the information obtained is private to the employer's business. It is however different where the information is of non private nature and already in the public domain or when its non disclosure might expose the ex-employee to a criminal prosecution as an accomplice. Wood V.C. put it in a vivid phrase "There is no confidence as to the disclosure of iniquity". See Lord Denning M.R. in **INITIAL SERVICES LTD**. V **PUTTERILL** (1945) 2 A.E.R

In my view the learned trial Judge was wrong to have upheld the objection of Counsel for the plaintiff/respondent at that stage. Any further evidence may or may not amount to a disclosure of confidential information prejudicial to the business of the plaintiff/respondent and which is of a special or peculiar nature. The procedure was for the court to have interrogated the witness before hearing him on oath or to elecit the facts upon his examination or cross-examination, when, if his incompetence appears at that stage his evidence will be rejected. This procedure unfortunately was not followed. The Appeal on this ground is allowed.

Ground 8:- It has been argued by counsel for the defendants/appellants conceeded by counsel for the plaintiff/respondent that the evidence of Abubakarr Kebe who gave evidence-in-chief but was not made available for cross-examination was clearly inadmissible.

I find this to be trite law that a witness who gave evidence-in-chief but was not made available for cross-examination without evidence that he is dead or insane is inadmissible. See **BINGLEY** v **MARSHALL** 6 L.T.

682;**MASON v CLAMP** 12 WR 973

I have examined the records and I find that this evidence was never considered by the learned trial Judge, which if he had done would have greatly affected the Judgment in that inadmissible evidence was admitted and considered. There is no much merit on this ground. This ground of appeal therefore fails.

Ground 9 - As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft-quoted words of Lord Blackburn, that measure of damages is to be as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong (see LIVINGSTONE v **RAWYARDS COAL CO**. (1880) 5 App. Case 25 at 39).

The loss claimed here by the plaintiff/respondent is the non-payment of commission or profit for the period September, 1992 until payment estimated at Le.496,292.00 per diem.

This payment of commission margin or profit by the defendants/appellants to the plaintiff/respondent is not provided for in the agreement, although it was the accepted practice between them for the plaintiff/respondent to retain the margin between the factory price and the market price of the product as the commission (or profit) for the services rendered as distributor. The loss suffered as stated supra is the deprivation of this commission by the termination of the agreement. The termination of the agreement as pleaded and upheld by the learned trial Judge, is the

defendants/appellants non-compliance with Clause 10 of the Agreement in that ten days written notice was not served by them on the

plaintiff/respondent of any default before terminating the agreement.

The question is was there a breach of Clause 10, for which the plaintiff/respondent is entitled to general damages? Clause 10 states:-

> "Either party shall have a right to terminate this exclusive arrangement upon any default by the other party not cured within ten days or written notice (Emphasis mine)"

The learned trial Judge in interpreting this clause stated the following at Page 333 Line 25- and Page 334 Line 1 and 2.

> "Having exhaustively gone through the entire evidence adduced before me I hold that the defendants were in breach of Clause 10 of the Agreement in Exhibit "A" I am of the view that if there had been any default on the part of the plaintiff the defendants ought to have given them ten days written notice calling upon them to remedy the default in accordance with Clause 10 of the Agreement Exhibit "A". I have found as a fact that no notice of termination was given to the plaintiff. I would accordingly hold that the defendants were in breach of contract".

With respect to the learned trial Judge this is certainly not an interpretation that accords with the ordinary meaning of the words used. My appreciation of the meaning of this Clause is that either party was legally entitled to terminate the agreement if a defaulting party did not cure a default

within ten days, alternatively by written notice terminating the agreement. This Clause it must be admitted was inellegantly drawn up. For there is no provision as to how a default was to be communicated to the defaulting

party, whether orally or in writing.

The fundamental error in this part of the judgment has been caused by the learned trial Judge redrafting Clause 10 by substituting the word "of" for the word "or" in the clause. Such alteration of the clause gave a compeltely different connotation to the meaning the clause intended to convey. See vide Exhibit "A" Page 351 Vol 3 of the record, and the judgment at Page 324 line 4-10 wherein the learned Judge said:-

> "Learned Counsel for the defendants submits that each party to the agreement had the right to discontinue the agreement under Clause 6. I agree, but this discontinuance can only become lawful if notice is given to the other side as demanded by Clause 10 of the agreement which states that either party shall have the right to terminate this exclusive agreement upon any default by the other party not cured within ten days <u>of</u> written notice. (Emphasis mine)

It is on the basis of this error that is the alteration of the wording that led the learned trial Judge to take an excursion into the realm of what is reasonable notice, even oblivious of the fact that ten days had been stipulated to care a default.

The ordinary interpretation of Clause 10 in my view is (what as I have stated supra) that the Agreement can be terminated by either party if a default was not cured within ten days, or by written notice (simpliciter). In conclusion I must state that I do not find any breach of contract of Exhibit "A" for which the plaintiff/respondent is entitled to general damages.

Before leaving this aspect of the appeal I consider it necessary to deal with a finding of the learned trial Judge for awarding damages for beach of a new contract. He said Page 333 line 14-17 -

> "I have found as a fact that there were several breaches in the performance of the contract in Exhibit "A". These changes constituted a new contract. It is my view that the defendants were in breach of the new contract".

This might be so in view of the patent disregard by both parties of some of the terms of the agreement. The question is however are these variations substantial departure from the material terms of the agreement?

If they are then it might not be wrong to hold that the parties intend to abrogate the original contract and substitute another in which case the original contract became extinguished and destitute of effect. What I consider to be a major departure from the original agreement is Exhibit "B". This Exhibit reads as follows:-

Dear Eric,

FLOUR PAYMENT ARRANGEMENTS

We have been concerned for some time over the cash handling arrangements and congestion experienced at the mill given the volumes now obtaining which led us to introduce up-country depositing in certain town as a trial project. In co-operation with out bankers, this has been very successful so we plan to extend this now to cover all remaining customers.

As from Monday, 9th March 1992 all Freetown and District customers will be required to pay their cash direct into one of our two main bankers in Freetown; either Barclays, Siaka Stevens Street or Standard Chartered Lightfoot Boston Street. Our bankers and our insurance advisers concur

with this apporach as the constant threat of cash seizure and attack on our staff will be greatly reduced.

By implementing these changes, which will avoid the need to count cash daily, we shall be taking back the office that was previously made available to you on a grace and favour basis as of that date. The modalities of verifying bank tellers undertaken by our own administration for up-country customers will be extended to cover the remaining ones. Commissions will continue to be paid on a daily basis.

With kind regards,

Yours sincerely,

(Sgd) Leslie Thompson

Managing Director.

The situation here seemed to have been acquiesed to by the plaintiff/respondent for a considerable period of time, thereby find comfort in this new arrangement until August 1992 when the commission ceased to be paid. The issue now is are either parties entitled to sue on this new arrangement. This arrangement is devoid of legal efficacy in that it is not supported by consideration as argued by counsel for the defendants/appellants neither is it made under seal. The breach which is being complained of is the non-payment of commission which has ever been the practice between the parties and expressly preserved in Exhibit "B". But since Exhibit "B" does not constitute a contract, and counsel for the plaintiff/respondent has also deprecated the Learned Judge's finding a new contract, there is no basis for any breach of contract been found for which general damages can be awarded.

The appeal on this ground succeeds.

GROUND 10 (a & b) The complaint here is that the learned trial Judge was wrong to have awarded special damages of Le.496,292.00 per diem for loss of commission or profit from September, 1992 until payment, as prayed for in the Statement of Claim. Counsel argued that there is no evidence as to the quantum of production per diem on which the margin or profit is based. I find that P.W.4 Eric James himself has testified to the following:-

> "In February 1992 when the mill was actually functioning without break down we were looking at a production between 365,000 bags and 700,000 bags annually. Daily basis would be 1000-5000 bags depending on the sale. There were days when we sold less."

It is clear from this that there were fluctuations in the production and sales per day of which the learned trial Judge took no account. Account should also be taken of non-working days as well as public holidays which should be excluded in any computation of period for which commission was payable. The period of 12 months if this period was the reasonable period for which notice of termination ought to have been served, the non-exclusion of these days will falsify any arithmetical calculation of the loss suffered by the plaintiff/respondent. There is also no evidence that rate of commission of Le.496,292.00 was static and never varied. P.W.4 Eric James testified as to the variation of the rate of commission. He stated at Page 227 line 8-9 -

> "We are paid between 4% and 10% of the proceeds the rest went to Seaboard".

The evidence contained in Exhibit "X" to wit:-

> "Pursuant to the High Court Order of the Hon. Mr. Justice N.D. Alhadi on Thursday 27th May, 1993 we regret to inform you that the Company's Bank

Account has been frozen. As a result the Company cannot carry on its operation and is forced to lay-off the entire staff with immediate effect".

was not taken into account (which was of much relevance in determining the day's commissions were payable during that period).

In my view the proper assessable loss suffered by the plaintiff/respondent has not been sufficiently pleaded as required by law and strictly proved by the evidence. The claim for the special damages in the Statement of Claim is devoid of any particulars of damage suffered and how occasioned. It is claimed in Paragraph 9 in the Statement of Claim as follows:-

"By reason of the premises the plaintiff has suffered loss and damages.

PARTICULARS OF SPECIAL DAMAGES

1. Loss of commission or profit from September, 1992 Until payment at Le.496,292.00."

It is trite law that special damages is such loss as the law will not presume to be the consequence of the defendants' act but which depends on the special circumstances of the case. It must therefore be proved at the trial by evidence that the loss was incurred and it was a direct result of the defendants conduct.

It is pertinent to observe the remarks of Bowen L.J. in **RATCLIFFE** v **EVANS** (1892) 2QB 524 at 532-533.

"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves ....and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage ought to be stated and

proved. As much certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry".

See also **HEDJAZI v FAHS** 1970/71 ALR (S.L.)9

AGIP (SL) LTD v **EDMASK** 1972/73 ALR (SL) 218

BONHAM-CARTER v **HYDE PARK HOTEL** (1948) WN 89

ANGLO BYPRIAN AGENCIES LIMITED v **PEPHOS INDUSTRIES LIMITED** (1951) 1 AER 873

The Appeal on this ground succeeds.

GROUND 10 (c) On this ground except where the payment of interest in an action for breach of contract or payment of a debt arose out of an agreement or the payment of interest is under a statute, the successful party is not entitled to interest as of right. The payment of interest in the absence of a right under a contract or statute is at the discretion of the court. The award of the rate of interest is not at the whim and caprice of the individual judge, but a discretion which should be exercised judicially by evidence of the prevailing commercial rate of interest. Section 4 of Cap. 19. The Law Reform (Miscellaneous Provision). Act is the usual precept in the exercise of such discretion.

This Section provides:-

"In any proceedings tried in any Court of record for the recovery of any debt or damage.

The Court may, if it thinks fit order that there

shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of Judgment"

The rate of interest awarded in this jurisdiction is usually 4% of the debt or damages between the date when the cause of action arose and the date of the Judgment. The appeal on this ground is allowed.

I am indebted to Counsel on both sides for the tenacity and courage in which they argued their respective cases for fifty three sittings of this court; however for reasons given in upholding the several grounds of appeal; I hold that on the totality the appeal is allowed.

I therefore order, that the order of this court dated 14th October, 1996 to wit:

i. That the taxed costs be paid to the Solicitor for the Plaintiff/respondent on his personal undertaking to refund the same to the defendant/applicant if the appeal is successful.

ii. As for the general damages for breach of contract the defendant/applicant is now ordered to pay 25% of it to the plaintiff/respondent by means of a bank draft within six (6) weeks from the date of this Order. The plaintiff/respondent is to give an undertaking for its repayment if the appeal is successful.

iii. That the defendant/applicant enter into a bond guaranteeing the payment to the plaintiff/respondent of the remaining

75% of the general damages, the special damages and interest within twenty-one (21) days of the date of this Order.

iv. The assessed costs of the application remains at Le.150,000 (One Hundred and Fifty Thousand Leones).

v. Order (i) above to be complied with within twenty one (21) days of the date hereof, be discharged; and I make the following Orders:-

(a) That the costs if already taxed and paid to the solicitor of the Plaintiff/respondent be refunded by him to the defendants/ Appellants within six weeks from todays date.

(b) That the 25% of the general damages if already paid be refunded to the defendants/appellants within six weeks from todays date.

(c) That the bond guaranteeing the payment of the remaining 75% of the general damages, the special damages and interest be discharged.

(d) The costs of this Appeal to be paid by the plaintiff/ respondent to the defendants/appellants. Such costs to be taxed.

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Hon. Mr. Justice N.D. Alhadi, J.A.

(I Agree) .....

Hon. Mrs. Justice V.A.D. Wright, J.S.C.

(I Agree) .....

Hon. Mr. Justice M.E. T. Thompson, J.A.