IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

CASE NO: CC020 /08

AMADU JALLOH -PLAINTIFF

AND

DEEPAK COMMERCIAL BROKERAGE -DEFENDANT

REPRESENTATION

JENKINS-JOHNSTON & CO -COUNSEL FOR THE PLAINTIFF

BASMA & MACAULEY -COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.A
JUDGMENT DELIVERED ON THE 17TH MAY, 2016

1. The Plaintiff's claim against the Defendant is for damages for breach of contract; special damages in the sum of $205,000.00 or its equivalent in Leones. (Le 615,000,000.00); Interest on any sums found due the Plaintiff at the rate of 27 percent per annum as from January, 2007; Any further or other orders as may be necessary in the circumstances; And the costs of the action.
2. In his particulars of claim, the Plaintiff averred that on or about 3rd October, 2006, he placed on order with the Defendants for one (1) container load of Batteries – UM1- the cost of which was $31,500/00 which said sum was paid to the Defendants by Bank Transfer into their Bank Account No. 01203937001 at Standard Chartered Bank Dubai, United Arab Emirates. However, when the goods arrived in Sierra Leone and cleared through customs by the Plaintiff, they were found not to be in a marketable condition.
3. The Plaintiff thereupon contacted the local LLOYD'S Agents in Sierra Leone for a Non-Marine Survey of the said goods. The report of the LLOYD'S Agents dated 25th April, 2007 (NM 2/2007) showed that 200 cartons were partially damaged, 900 cartons were completely damaged and that both categories of batteries were written off as a total loss.
4. That when the Defendants were informed of the contents of the LLOYD'S report, they sent an email to the Plaintiff though their Local Agents, offering to give the Plaintiff 400 cartons of batteries "free of charge" on his next order,

and further promising that ... "this time we will double check the goods to ensure no problem."

5. The Plaintiff averred that by the conduct of the Defendants, he has suffered considerable financial loss and damage, and the reputation of his business has also being severely damaged. He is therefore claiming General Damages for Breach of Contract and also Special Damages.

DEFENDANT'S DEFENCE

6. That at the material time the Plaintiff placed his order with the Defendants for one container of Skie Brand UM 1 R 20 the cost was not US$31,500.00 but US$31,350.00 and that the said sum was not paid by the Plaintiff in full but subsequently in instalments of US$6,492.00 and US$24,315.00 respectively. There is still a balance of US$543 due and owing.
7. That the Plaintiff did not clear the goods soon after their arrival at the Queen Elizabeth Quay on or around 8th December, 2006 but did so after a period of one (1) month – that is on or around the 10th January, 2007.
8. That it was sometime in March, 2007 that the Plaintiff informed the Defendant that the consignment had problems and that it was the Defendants who asked the Plaintiff to obtain a LLOYD'S report from the LLOYD'S Agents.
9. That the report from the LLOYD'S Agents states that the application for Non-Marine Survey was made by the Plaintiff on the 20th of March, 2007, a period

of 2 months and 10 days after the clearing of the said consignment from the quay, and a period of 3 months and 12 days from the arrival of the goods.

10. That a letter dated the 25th April, 2007 from LLOYD'S Agents stated, inter alia, that 200 cartons were partially damaged and 900 completely damaged. It was also stated in the said letter, which was issued 27 days after the survey report of the 29th March, 2007 – that it was brought to their attention by the Plaintiff that 600 of the cartons had printed on them the numbers 2005/06/12 and "Z 2009 – 07 and which according to the said letter, the LLOYD'S Agents had not mentioned in their survey report of 29th March, 2007.

11. That the email referred to by the Plaintiff was not acceptance of liability either on the part of manufacturer or the Defendants but to maintain good business relation for the future and as "a matter of goodwill". Indeed in the said email, the said manufacturers were "surprised at this big problem".

12. That the goods were subjected to pre-shipment inspection and certified as qualified by Government authorities of the Peoples Republic of China.

13. That after the survey report, the Plaintiff sent 12 battery samples to the Manufacturers through the Defendants for testing where they were found not to be their production and not in any part of their production which constituted consignment under Bill of loading No. 554493266 shipped on

the 7th November, 2006 and which Bill of Loading contained therein the date of manufacture which is October, 2006 and date of expiry, July, 2009. Cartons with the date 2005/06/12 were not part of consignment shipped on the 7th November, 2006.

PLAINTIFF'S REPLY

14. That notwithstanding the expiry date of July, 2009 of the said batteries in the consignment, the same were discovered to be ether partially damaged or completely damaged in March, 2007, two (2) years before the supposed expiry date.
15. That the batteries found to be completely useless were part of the consignment shipped on the 7th November, 2006 and that he received no other consignment of batteries at that time except that received from the Defendant.

ISSUES

Solicitors for the parties each filed a list of issues in dispute in this matter. The two issues in dispute in this matter. The two (2) lists reveal the following contentions issues:

1) Whether or not the batteries complained of were the same batteries shipped by the Defendants to the Plaintiff.

2) Whether it would amount to breach of contract if the batteries complained of were unfit for the purpose for which they were purchased.

3) If there was a breach of contract what would be the measure of damages recoverable.

16. Before proceeding, to deal with the above issues it would be necessary to establish whether there exists a contract between the parties.

THE CONTRACT

17. In his particulars of claim the Plaintiff averred that on or about the 3rd October, 2006, he placed an order with the Defendants for one (1) container load of batteries – UM 1- the cost of which was $31,500/00 which said sum was paid to the Defendants by Bank Transfer into their Bank Account No. 0120393700 at Standard Chartered Bank, P.O. Box 999, Dubai, United Arab Emirates.

18. The Defendants in their defence admitted that the Plaintiff placed an order with them for Brand R20 batteries in or around October, 2006 but that the cost was not US$31,500.00 but US$31,350.00. The Defendants further contended that at the material time when the order was placed, the said sum was not paid by the Plaintiff but was paid subsequently. There is therefore no dispute as to the existence of a contract.

19. From the above, it could be discerned that there was a contract between the Plaintiff and the Defendants for the supply of one (1) container of batteries. However, there are contentions between the parties regarding the identity of the goods, their merchantability and the damages recoverable, if any. I shall deal with these contentions sequentially.

IDENTIFICATION OF THE GOODS

20. The contract here is one for the sale of specific goods – container of batteries. The parties agree that the Plaintiff placed an order for 1 container of Skie Brand R 20. There is evidence that the said container of batteries were shipped to Sierra Leone by the Defendants – Exhibit 9-Bill of loading issued on the 8th November, 2006 with booking number 554493266. The said Bill of Lading described the goods as one (1) container said to contain 1100 cartons. There is also Exhibit 37, a commercial Invoice No. APO 6225153 dated 27th October, 2006 issued by ANHUI LIGHT INDUSTRIES INTERNATIONAL COMPANY Ltd China to DCB DUBAI, U.A.E. in respect of SKIE BRAND BATTERY R20 packed in 1100 cartons. The said commercial Invoice has production date of the battery as October, 2006 and the expiry date as July, 2009. There is also Exhibit 38-a packing List from ANHUI LIGHT INDUSTRIES INTERNATIONAL COMPANY Ltd containing the same information as in Exhibit 37. Both Exhibits are said to have been received on the 27th August, 2007.

21. In addition to the above Exhibits, there are the following Exhibits:

- **Exhibit 51** which is an invoice from the Defendants to the Plaintiffs dated 9th November, 2006 and numbered DCB/503/06 for a total of 700 cartons of "Skie Brand Batteries" UM 1 (R 20).
- **Exhibit 52** – bill of lading issued on the 8th November, 2006 in respect of 700 cartons of batteries. This document has the same date of issue booking number, voyage number etc as Exhibit 9 –the bill of lading for 1,100 cartons of batteries.
- **Exhibit 53** Container inspection report carried out by Intertek Foreign Trade standard in respect of 700 cartons batteries. Although the container number in Exhibit 51 is different from that of stated in the Intertek report, the vessel and voyage numbers are the same.

22. Counsel for the Defendants submitted that there is no doubt that by virtue of Exhibit 9, the Bill of Lading, Exhibit 37 the Commercial Invoice, Exhibit 38 the Packing List, Exhibit 40-the Purchase Price of US$31,350.00 that the Defendants shipped 1,100 cartons of batteries to the Plaintiff.
23. He however contended that the batteries complained of by the Plaintiffs that were sent to the Defendant's Company were confirmed not be of any stock of batteries shipped by the Defendant's company to the Plaintiff or manufactured by the Defendants manufacturing company. Counsel proceeded to establish this by reference to the last paragraph of page 1 Exhibit 25 – the second inspection report

which reads "After presenting our report, Mr. Jalloh called our attention to two numbers not mentioned in our report:" 2005/06/12 printed on the cover of every box containing twelve (12) batteries and Z 2009-07 on the base of each battery. A further examination of the cargo revealed that 600 cartons had 2005/06/12 and Z 2009-07 on the base of each battery. What these numbers are meant to substantiate, we cannot tell because there was no indication on the cover of the boxes and batteries.

24. The Chinese writing on the cover of the boxes we understand from the Chinese Embassy in Freetown means "Red, Black. Check before printing" and thus has no connection with the batteries. Counsel for the Defendants submitted that the there was no reference in the first non-marine survey report of March to those marks mentioned now referred to in the second report and that was after the Plaintiff had drawn their attention to it. Counsel for the Defendants concluded by inviting the Court to look closely at the Bill of entry – Exhibit 20 (in respect of 700 cartons of batteries) and the absence of any evidence from the Plaintiff reconciling that with his own admission that he cleared 1,100 cartons of batteries.

25. I have listened carefully to Counsel on the issue of identification of the goods. As I had earlier stated, there was a contract between the Plaintiff and the Defendants for the supply of 1,100 cartons of batteries. Exhibit 9, the Bill of Lading proves that the Defendant had performed its own part of the bargain. This is a Free-on-Board

contract. In this type of contract, the property passes to the buyer upon shipment and prima facie so does risk. The price quoted in the "FOB" contract covers all expenses up to and delivery on board a named ship. Thereafter all further expenses fall upon the buyer. These expenses include freight, cost of export and import duties. I say this because the Defendant has raised issues about the number of cartons of batteries declared by the Plaintiff. To my mind, after the delivery of the Bill of Lading, the Defendant ceased to be privy to any contract between the Plaintiff and the third parties save to sub buyers. Therefore, the next stage of the contract which is between the Plaintiff and the National Revenue Authority (NRA) had no relevance to the Defendant. From the submissions of Counsel for the Defendants, it is apparent that the Plaintiff may not have fully declared the contents of Exhibit 9. This does not however defeat the fact that the contract had been fulfilled by the Defendant for 1,100 cartons of batteries. Based on the foregoing, I hold that the "goods" for our present purposes are those described in Exhibit 9.

MERCHANTIBILITY OR FITNESS FOR PURPOSE

The Defendant strongly contended that the goods shipped by them were merchantable quality and fit for the purpose for which they were sold. Their bases for this are as follows:-

a) That the batteries were subjected to pre-shipment inspection and certified as "qualified"-Exhibit 39 titled "certificate of pre-shipment issued by Entry-Exit

Inspection and Quarantine of the People's Republic of China" and the date of issue is November, 6, 2006. The goods were described therein as Skie Brand Battery R20.

b) That the Plaintiff did not clear the goods at the Quay upon arrival in Freetown on or around 8th December, 2006 but left the consignment of batteries lying uncleared under a torrid climate for a period of over a month.

c) That the survey carried out by Lloyds" agents headed, non-marine survey-NM 2/2007 which states that an application was made to them by the Plaintiff after a period of 2 months and 10days after clearing of the said consignment from the quay and a period of 3 months and 12 days from arrival of the said consignment for a survey report.

d) That though the Plaintiff under oath and his Writ of Summons admitted that 1,100 cartons of batteries were shipped as per Exhibit 9 and Exhibit 37, Exhibit 50 referred to 700 cartons which creates doubt as to whether the batteries supplied by the Defendant were the same as those claimed to be damaged.

e) That the fact that the Plaintiff had to call the attention of the surveyors to the fact that two numbers 2005/06/12 on the cover of every box containing 12 (twelve) batteries and Z 2009-09 at the base of each battery were not included in the first report when he had testified that he was present when the entire consignment was inspected creates credibility issues. Additionally, Exhibit 9 and Exhibit 37 give the date of manufacture and date of expiry as October, 2006 and July, 2009 respectively.

f) Finally, that the Plaintiff has not provided any evidence reconciling the inconsistency in Exhibits 9 and 20.

The Plaintiff on the other hand relied on:

a) The non-marine survey report prepared by Mining and General Services Ltd (an agent of Lloyds)-Exhibit 15 which said that he found the batteries to be a total loss.

b) An email sent on the 6th May, 2007 from the account DCB Export Macarthy @ yahoo.com sent to the Plaintiff amounted to an admission of liability by the Defendant.

In reply to this, the Defendant argued that the offer of 400 cartons of batteries was made by the manufacturer and not by them.

THE LAW

The Law on sale of goods in Sierra Leone is governed by the Sale of Goods Act, Cap 225 of the Laws of Sierra Leone, 1960. The relevant provision thereof is Section 16. Section 16 has two sub-sections; the first deals with fitness for the purpose and the second one deals with merchantability.

Section 16(1) provides that where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or Judgment and the goods are of a description which is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably

fit for such purpose. It can be seen that this sub-section does not apply in the case of a contract for the sale of a specific article under its patent or other trade name. In such a case, the buyer is deemed to buy on his own Judgment, although the goods are not specific (See HALSBURY LAWS OF ENGLAND, 2ND EDITION VOL. 29 Pages 63-64. Also CHANTER-V-HOPKINS (1838) 4 M & W 399).

26. However Section 16(2) of the Act is more appropriate for our present purpose. This sub-section provides that when goods are brought by description by a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods there is no implied condition as regards defects which such examination ought to have revealed. It is important to add that "goods are merchantable quality when they are of such quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept the goods in the circumstances of the case in performance of his offer to buy them, whether he buys for his own use or to sell again." Per FARWELL LJ in BRISTOL TRAMWAYS ETC CARRIAGE Co. LTD-v-FIAT MOTORS, LTD (1910) 2 KB 831.

27. Counsel for the Plaintiff in his submissions on this point referred this Court to the non-marine survey Reports carried out by the Mining and General Services Ltd (an agent of Lloyds) - Exhibit 15 which concluded that the batteries were a total loss. He also referred the Court to Exhibit 26 which is an email dated 6th May, 2007 from

the Defendants and or their manufacturers in which though expressing surprise at the fact that the batteries had been reported damaged, offered to give the Plaintiff 400 cartons of batteries free of charge as goodwill. In other words, the Defendants were prepared to ship another 1,100 cartons of batteries to the Plaintiff of which 400 cartons would be free of charge. On the issue of liability, Counsel for the Plaintiff referred to Halsbury's Laws of England 3rd Edition Vol. 34 at page 54. Counsel for the Plaintiff finally submitted that since the manufacturer were in china and the ultimate buyers were in Sierra Leone, there is no evidence that the Plaintiff had an opportunity to inspect the goods.

28. Counsel for the Defendant on this point submitted that the batteries complained of were not the same batteries supplied by the Defendant since there were two bills of lading with the same number and date of shipment but with different qualities. He further submitted that the batteries supplied by the Defendants were checked by Intertek and confirmed to be of acceptable quantity and quality-Exhibit 53.

29. Before determining the issue of merchantability, I would want to dispose of the issue relating to the admissibility of Exhibits 15 and 25 on the one part and Exhibits 39 and 51 of the other part. In the case of Exhibits 15 and 25, the maker of the report was deceased at the time of the trial while for Exhibits 39 and 51 the maker was out of the jurisdiction. I agree with the submission of Counsel for the Defendant on this point (which was not opposed by Counsel for the Plaintiff) and

hereby admit Exhibits 15, 25, 39 and 51. Whatever weight I shall attach to them would be apparent in the next stage of this Judgment.

30. On the issue of merchantability after perusing the various exhibits and submissions made by Counsel, I hold that the 1,100 cartons of batteries supplied by the Defendants were not of merchantable quality within the meaning of Section 16(2) of the Sale of Goods Act, 1960. In arriving at this conclusion, I took the following into consideration.

- Exhibit 15-the Non-Marine Survey Report from Mining and General Services Limited numbered NM 2/2007 which found that-

  -Partial Damaged Cargo-200 cartons

  -Completely Damaged Cargo -900 cartons

31. And recommended that both categories of batteries be written off as total loss.

- Exhibit 25 - Non-Marine Survey Report-NM 2/2007 which affirmed the findings contained in Exhibit 15. However, contained in this Exhibit is reference to a gap brought to the notice of the surveyors by the Plaintiff relating to the numbers printed on the cover of every box. The Defendants had issues with this aspect of the report but I am convinced that from the documents referred to in Exhibit 15-Original Bill of Lading, Proforma Invoice, Interim Protection Note and Photograph of damaged cargo, the batteries surveyed were the same referred to in Exhibit 9-the Bill of Lading.

To my mind, the information given by the Plaintiff to the Non-Marine Surveyors was for completeness.

32. I do not agree with the Defendants and will not accept the evidence that the Manufacturer tested the samples and found them not to be their production and not in any way part of that production which constituted the consignment under Exhibit 9. If it were so, why would the said manufacturers offer to give 400 cartons of batteries to the Plaintiff's gratis with the words "this time, we will double check goods to ensure no problem...." It is not in the nature of businessmen to make such offers.

33. I shall briefly comment on the report of the Intertek International Limited-Exhibit 53. The content of this Report is different from that of Marine and General Services. Among the functions of the Inspector of Intertek is to "examine the quantity and quality of the product whether it is new or old; whether it is in good condition or not." In the case of Marine and General Services, the batteries were tested in a touch and produced low poor very dim light and the others (900) were completely damaged. It appears to me that the test normally carried out by Intertek is whether the goods are acceptable to the consignee whilst in the case of Marine and General Services; it is whether it is usable. To my mind, in the case of batteries, the usability test should prevail over the acceptability test and I so hold.

Having held that the batteries were not of merchantable quality, what is the measure of damages recoverable?

34. On the issue of damages, Counsel for the Defendants referred this Court to a string of authorities ranging from the provisions of the Sale of Goods Act, Cap 225 of the Laws of Sierra Leone, 1960, McGregor on Damages paragraphs 20/057 to 20/059, the case of CASTROL LIMITED AND JOHN MICHAEL MOTORS LIMITED SC Civ. APP. No1/98 Per Renner-Thomas C. J pp 19-20; Chitty on Contract Vol. 1, 30th Edition paragraphs 26/001A to 26002 under the rubric "Expectation and Reliance" Interest and BENHAM-CARTER-v-HYDE PARK HOTEL LIMITED, (1948) 64 TLR at 178. He concluded that the Plaintiff has not proved the damages claimed.

35. Counsel for the Plaintiff in reply submitted that the items of damages claimed have been proved example the cost of the batteries had not only been proved but was admitted by the Defence witness. He referred the Court to Halsbury's Laws of England, 3rd Edition Vol 34 under the rubric "Sale of Goods"; the case of BAIMBA TURAY –v-SOCIETE COMMERCIALE DE L'OUEST AFRICAN (1962) S. L. L. R. Page 5; MASH & MURRELL LTD –v-JOSEPH .I. EMMANUEL LTD (1961) 1 ALL ER P. 485; BRISTOL TRAMWAYS ETC CARRIAGES Co LTD –v- FIAT MOTORS, LTD(1910) ALL ER page 113; BERSTEIN –v-PAMSON MOTORS GOLDEN

GREEN) LTD (1987) 2 ALL 220 and CROWTHER –v- SHANNON MOTOR Co. (a firm) (1975) 1 ALL ER 139.

THE LAW

36. Together with the general law on the Sale of Goods, the law relating to damages in such contracts has been codified in the Sale of Goods Act, Cap 225 of the Laws of Sierra Leone, 1960(more appropriately referred to as the Sale of Goods Act, 1960.) this Act is pari material the English Sale of Goods Act, 1893. Sections 53 and 54 which contain the relevant law which form the starting point in considering damages for the breach complained of herein, but since the statute consists of a codification of the common law, the bulk of the material remains case law. However, in so far as the guidance offered by precedents is concerned, the following observations by Warren L. H. Khoo J in delivering the Judgment of the Singapore Court of Appeal in HONG FOK REALTY PTE LTD-v-BIMA INVESTMENT Pte LTD (1993) 1SLR 73 at 80 should be noted:

37. "It must be borne in mind...that the ascertainment of damages is an exercise to establish a question of fact, that is, what loss and damage has been suffered by the Plaintiff in the particular case before the Court, and to award him damages ascertained according to those principles. Decided cases are useful more for the principles they enunciate, than for the result of the application of the principles."

By this I mean, case law will be very relevant in my analysis of the facts and law in this case but serious consideration will also be given to practical matters.

38. Having that in mind it should be noted that in the ultimate analysis, a claim for damages raises two distinct questions. These emerge from the fundamental principle that the remoteness of the damage for which compensation is claimed must be distinguished from the monetary assessment of that compensation. The first question is for what kind of damage is the Plaintiff entitled to recover compensation? To this end, the case of HADLEY-v-BAXENDALE (1854) 9 Ex. 341 (cited with approval by the Sierra Leone Supreme Court in the case of CASTROL LIMITED –v-JOHN MICHAEL MOTORS LIMITED) defined the kind of damage that is the appropriate subject of compensation, and excluded all other kinds as being too remote. The decision was concerned solely with what is correctly called remoteness of damages and it will conduce to clarify if this expression is reserved for cases where the Defendant denies liability for certain of the consequences that have flowed from his breach. To my mind, it is. To say otherwise will amount to denying the need for proof in ascertaining the damages claimed.

39. The second question, which must be kept quite distinct from the first, concerns the principles upon which damage must be evaluated or quantified in terms of money. This may be appropriately called the question of the measure of damages.

The principle adopted by the Courts in many cases dating back to at least 1848 is that of restitutio in integrum. If the Plaintiff has suffered damage that is not too remote, he must be restored to the position he would have been in had that particular damage not occurred.

40. The measure of damages for breach of warranty, as in the instant case, is prescribed by Section 53 of the Sale of Goods Act 1960. One may be tempted to ask why the remedy for breach of a condition (implied condition as to merchantability-Section 16(2) is covered by "Remedy for breach of warranty"? The answer to this is to be found in Section 53(1) of the said Act which provides that:

41. "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not only by reason only of such breach of warranty entitled to reject the goods; but may-..."

42. Section 53(2) provides that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. Section 53 (3) provides that in the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty to this, Section 54 adds that nothing in the Act

shall affect the buyer's right to recover interest or special damages where it is by law recoverable. It should be noted that Section 54 brings into play the second rule in HADLEY –v- BAXENDALE and in appropriate cases will displace Section 53 (2) and (3) and allow increased damages.

43. Section 53(3) is framed in terms of the first rule in Hadley v Baxendale excluding the element of the Defendant's special circumstances. Section 53 (3) states the normal measure of damages under the first rule in the case of warranty of quality but it would appear to be equally the normal measure for other breaches of warranty such as those of description and fitness.

44. The Plaintiff in this case has claimed both general and special damages. The distinction between the types of damages was succinctly dealt with by Renner-Thomas C.J in CASTROL LIMITED AND JOHN MICHAEL MOTORS LIMITED (S. C Civ. APP 1/98. In drawing the distinction, the Lord Chief Justice recognised three meanings attributed to the terms:

- The first meaning concerns liability coinciding with the distinction between the first and second rules in Hadley –v- Baxendale.

  "...damages ensuring naturally (which mean in the normal course of things) and cases where they are special and extraordinary circumstances beyond the reasonable provisions of the parties."

- The second meaning concerns proof. "General damages being such as the Jury may give when the Judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man and on the other hand special damages which are given in respect of any consequence reasonably and probably arising from the breach complained of."

  This type of general damages is usually concerned with non-pecuniary losses.

- The third distinction concerns pleadings and evidence. In this context, special damages is that precise amount of pecuniary loss which the claimant can prove to have resulted from the particular facts set out in the pleadings. They are specially pleaded and strictly proven. If proven, they will be awarded. If not proven, they will be rejected. On the other hand, general damages in this context are given in respect of such loss as the law presumes to result from the infringement of a legal right or duty. The loss must be equally proved but, invariably, the claimant cannot quantify exactly any particular items in it.

45. To conclude on this point, the assessment of damages that a Defendant is liable for breaching a contract is not an exact science and is hardly possible to pin down the

requisite degree of foresee ability with mathematical precision. However, this does not mean that damages are to be given just because it is difficult to quantify the damages. The law must draw a line somewhere. To this end, Hadley-v-Baxendale defined the kind of damage that is the appropriate subject of compensation and excluded others as being too remote.

APPLICATION OF THE LAW TO THE PRESENT CASE

46. I shall now endeavour to apply the above principles to the instant case in determining the quantum of damages recoverable.

47. The Plaintiff in this case claimed both general and special damages. I shall first dispose of the claim for special damages:-

48. 1) Cost of batteries-Le 132,000,000.00/US $31,500.00. The Plaintiff in his witness statement explained that he placed an order with the Defendants herein for 1(one) container load of batteries at a total cost of US $ 31,500.00. The amount was paid by the Plaintiff by the Bank transfer into the Defendants' Bank account No. 0120393700 at Standard Chartered Bank in Dubai, United Arab Emirates.

49. The Defendant did not disagree that payment was made by the Plaintiff but claimed that the sum cost of the batteries was US $31,350.00 which was paid in two instalments. It was also alleged that the sum of US $543 was still outstanding. This allegation was supported by Exhibit 46-The statement of the Accounts of the Plaintiff and Exhibit 36.

50. In determining the actual cost of the batteries, I have looked at Exhibit 7-the Proforma Invoice given by the Defendant to the Plaintiff numbered DCB/016/06 dated 3rd October, 2006. This invoice shows that the Plaintiff made payment of $7,000.00 made by Bank Transfer to the Defendant on the 13th October, 2006. In the witness statement of DW1, he admitted that the Plaintiff made another payment of $24,315.00 on or around 20th December, 2006.

51. The total sum of money paid by the Plaintiff to the Defendant in respect of the batteries was US $31,315.00. On the total cost of the batteries, I agree with the Defendant that it was $31,350.00 and not $31,500.000.00 as alleged by the Plaintiff. This was admitted by the Plaintiff in Exhibit 28. There is therefore an outstanding balance of $35/00 due and owing the Defendant by the Plaintiff.

52. The normal measure of damages as stated in Section 53(3) of the Sale of Goods Act, 1960, is the value of the goods as warranted less their value as they are, both values being taken at the contractual time for delivery, since this represents the amount that will put the buyer into the position he would have been in had the warranty been satisfied (Per Diplock LJ in ARYEH-v-KOSTORIS & SON (1967) 1 Lloyd's Report, 63 at page 73. In the instant case, the Non-Marine Survey Report has recommended that the batteries be written off as total loss. The value of the batteries was therefore Zero. In such a case, the market value of the goods as

warranted forms the measure of damages (See McGeregor on Damages, 18th Edition paragraph 20-059 at page 813.

53. Under this head, I hold that the Plaintiff has proven special damages.

2. Customs Duty, Income Tax, Store Rent and payment to Lloyds' Agents.

54. These heads were proven by the Plaintiff by various Exhibits and in his viva voce evidence save the Rent for the store which no proof was provided.

55. The Plaintiff is entitled to special damages for the costs of customs duty, income tax and payment to Lloyd's agent. The first two are expenses rendered futile by the Defendant's breach.

56. 3. Loss of Profits:

The Plaintiff is claiming loss of profit at Le 25,000,000/00 for a period of six months totalling Le 150,000,000.00. However, the Plaintiff has not adduced any or sufficient evidence as to how that sum was arrived at. There has not been any evidence of how much profit the Plaintiff made on previous sales. He was not led in evidence on that point during his testimony nor did he mention it in his written statement. In the circumstance, I am constrained to award this head as a special damage. In arriving at this conclusion, I am inspired by the dictum of Renner-Thomas CJ in CASTROL LIMITED-v-JOHN

MICHAEL MOTORS LIMITED S. C. Civ. APP. No. 1/98 thus "special damages is that precise amount of pecuniary loss which the claimant can prove to have resulted from the particular facts set out in the pleadings. They must be specifically pleaded and strictly proved. Examples are out of pocket expenses, loss of earnings and loss of profits. If proven, they will be awarded. If not proven, they will be rejected."

57. 4. Interest on loan of Le145,000,000.00.

Here again, the Plaintiff has not given evidence of the existence of such a loan either documentarily or by oral evidence. It is not enough for the Plaintiff to merely claim it in his Writ of Summons without pleading when it was contracted and its relationship with the purchase price of the batteries. This is a very regrettable lapse on the part of the Plaintiff. There is no basis on which the Court can make this award.

58. 5. Legal fees: The claim for Le10, 000,000.00 was not contested and is accordingly awarded.

Claim for General Damages.

59. The first rule in HADELY-v-BAXENDALE (supra) states that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the

instant case, we are faced with a contract for the sale of goods which is intended to be resold to third parties. Indeed, the Plaintiff in paragraph 6 of the particulars of claim averred that the discovery of the unmerchantability came about when the goods were delivered to his customers.

60. However, in a claim for general damages, the amount of compensation to be awarded for any loss suffered is at large. Evidence given in monetary terms of loss suffered would only act as a guide to the Court in calculating the quantum of damages to be awarded.

The instant case is basically a commercial transaction. Loss of profit could naturally flow from the failure of the seller to supply goods of merchantable quality. The only difficulty is how to quantify the loss. In the absence of an exact figure, I shall proceed on the premise that the Plaintiff would normally make new orders after selling the existing stock and be continual or periodic. The Plaintiff in his Writ of Summons claimed loss of profit at Le25, 000,000/00 for a period of six months amounting to Le150, 000,000/00. Though this head was not accepted as special damages, it will be in the interest of justice to be awarded as general damages.

61. In arriving at this conclusion, I relied on the Supreme Court decision in the CASTROL LIMITED CASE in which it was said that the fact that a claim for special

damages had not be proven, would not prevent a Judge from taking them into account in making an award of general damages.

CLAIM IN UNITED STATES DOLLARS

62. In this action, the Plaintiff has claimed in Leones and United States Dollars. Is a Judge in Sierra Leone right in making an award in foreign currency instead of Leones?

63. The question was dealt with extensively by Renner-Thomas C.J in the CASTROL LIMITED CASE (supra). His Lordship started by drawing a distinction between the pronouncement of a Judgment in foreign currency by our Courts and the enforcement of a money Judgment in any currency other than Leones. As far as enforcement is concerned, because the Leone is the only legal tender in Sierra Leone, no one can compel a Judgment debtor to satisfy a money Judgment in any currency other than the Leone. Difficulties would arise where a Judgment is pronounced in a foreign currency and Judgment is not satisfied so that execution become necessary thus raises the question: for the purpose of enforcement, what rate of exchange should be used to convert the foreign currency award into Leones? Should it be the rate of exchange at the date the cause of action arose, or should it be at the date of Judgment? In the view of the Learned Chief Justice, the rate of exchange to be used is that prevailing at the date of the cause of action arose.

His Lordship next considered whether our Courts do have jurisdiction to pronounce a Judgment in foreign currency.

64. In answering this question, His Lordship stated that it stands now; there is no legislation which prohibits the pronouncement of any Judgment in foreign currency. The test to be used in such a situation is the intention of the parties as clearly expressed in the dicta of Lord Goff in the case of the TEXACO MELBOURNE (1994) 1Lloyd's Law Report 473.

"first, it is necessary to ascertain whether there is an intention to be derived from the terms of the contract, that damages for breach of contract should be awarded in any particular currency or currencies.

65. In the absence of such an intention, the damage should be calculated in the currency in which the loss was felt by the Plaintiff or which most truly expresses his loss."

66. Applying this principle, I note that the Plaintiff sells his goods in Leones; his profits are calculated in Leones. He is ordinarily resident in Sierra Leone. The only time foreign exchange was used in the entire transaction was when money (United States Dollars) was transferred to the Defendant's accounts.(This was the same situation in the CASTROL CASE.)

67. In the circumstance, I hold that the proper course in this action is to award damages in Leones. This is easy to do in the instant case as the Plaintiff claimed Leones as the alternative. The exchange rate should be as it was in January, 2007.

68. I however note that there has being a significant fluctuation in the value of the Leones between January, 2007 and the present date. The "Texaco Melbourne" addressed this issue where it was said the fluctuations in the relevant currency is not to be taken into account. Delay between the date of breach and date of Judgment is compensated for by

the award of interest. In the circumstances, I consider this a proper case for the award of interest in this matter.

INTEREST

69. What rate of interest and for what period should this Court award the damages herein. Section 4(1) of the Law Reform (Miscellaneous Provisions) Act, Cap 19 of the Laws of Sierra Leone, 1960 provides as follows:-

> "In any proceedings tried in any Court of record for the recovery of any debts or damages, the Court may, if it thinks fits, order that shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on 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 the Judgment."

70. This provision imports a discretion on the Judge to award interest. I shall so exercise that discretion in favour of awarding interest.

71. Based on the totality of the evidence before the Court, I hereby find in favour of the Plaintiff and Order as follows:-

1. That the Defendants are liable to the Plaintiff for general damages for breach of contract in the sum of Le150,000,000.00
2. That the Defendants are liable to the Plaintiff for special damages as follows:-
    1) Cost of batteries -Le132,000,000.00
    2) Customs Duty -Le12,500,000.00

3) Income Tax -Le1,000,000/00

4) Payment to Lloyds Agent -Le8,500,000/00

5) Legal fees -Le10,000,000/00

Less the Leone equivalent of US $35/00(thirty-five United States Dollars.)

3. Interest on the total sum due the Plaintiff herein at the rate of 25 per annum from January 2007 until date of Judgment.

4. Costs to be taxed if not agreed.

Hon. Mr. Justice Sengu M. Koroma J A.