

IN THE SUPREME COURT OF NIGERIA

Suit No: SC374/2001

Petitioner: Baker Marine Nigeria Limited

And

Respondent: Chevron Nigeria Limited

Date Delivered: 2006-06-09

Judge(s): Salihu Modibo Alfa Belgore , Umaru Atu Kalgo , Aloma Mariam Mukhtar , Mahmud Mohammed , Ikechi Francis Ogburn

Judgment Delivered

The dispute between the parties, was submitted to an Arbitral Tribunal. Consequent upon the reference pursuant to Exhibit 7 - Jack-Up Barge Contract No. LGST - 92 - 03, the parties filed and exchanged their pleadings. The Appellant further amended its Statement of Claim and in its Claim or Relief No IV appearing at page 66 of the Records, it appears as follows:

"(iv) U.S. \$10,000.00 (Ten Million U.S. Dollars) as aggravated damages for conspiracy with the claimant's Joint Service Partner to breach the Jack-Up Barge Contract No LGST. 92 .03 as renewed, to the economic injury of the claimant"

On the completion of the trial, the Tribunal in its decision on 14th March, 1996 and titled Arbitral Award spanning from pages 90 - 160 of the Records, recognized that the Appellant was only entitled to nominal damages for the breach of contract identified, but in the end, awarded a lump sum for both the breach and the tort of negligence. The Respondent being dissatisfied with the said award, on 19th March, 1996, took out a Civil Summons at the Federal High Court, Lagos and therein, sought for an order that the said award, be set-aside or in the Alternative, for an order refusing the enforcement of the said award.

The Respondent also on the same 19th March, 1996 filed a Notice of Originating Motion in respect of the said reliefs. The grounds upon which the applicant relied on are as follows:

- "(a) that the award contains decisions on matters which are beyond the scope of the submission to arbitration; and
- (b) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration".

Particulars were duly supplied. In paragraph 14 of the said particulars, the-following appear:

"14. The arbitrators lacked the jurisdiction:-

- (a) to award punitive damages in the circumstances - not permissible under Nigerian law;
- (b) to award punitive damages which had been specifically excluded by the agreement under which the dispute was submitted to arbitration;
- (c) to award damages punitive or otherwise for an alleged tortuous act;
- (d) in any case, to award damages for the tort of conspiracy when the claimant had failed to establish that he had suffered loss thereby;"

See pages 4 to 6 (vol. 1) of the Records:

On the same 19th March, 1996, the Respondent filed both an application Ex Parte for an interim injunction and an interlocutory order of injunction restraining the Appellant from enforcing the said award pending the determination of the substantive application for injunction and pending the determination of the originating motion respectively. See pages 438 and 448 (vol. 3) of the Records.

The Appellant on its part took out an originating summons on 25th March, 1996 wherein it sought therein for an order directing that the said award, be recognised and enforced as the judgment of the court in the same manner and to the same effect. It also sought for an order granting leave to the Appellant, to enforce payment of 21% per annum interest on the said award from the date of the award, till the final and complete payment. It relied for the said Summons on,

"(a) the certified true copy of the original award made by the Tribunal.

(b) The original arbitration agreement as contained in the certified copy of the Jack-up Barge Contract No. LGST 92-03 (hereinafter called "the Agreement") and the amendment (Renewal) therein".

See pages 462 and 463 of Vol. 3 of the Records. I note that the Appellant, on 4th April, 1996, filed a Notice of Preliminary Objection to the said application for an injunction by the Respondent and relied on three (3) grounds which, in my respectful view, are irrelevant to the narrow issue for determination in this appeal. The Respondent did file a counter-affidavit in respect of the Preliminary Objection. See pages 470 and 473 of the said Records.

However, both applications afore-stated, were heard together by the learned trial Judge - Ukeje, J. (as she then was). In a considered Ruling- (spanning from pages 583 to 631 of the said Records) delivered on 14th November, 1996, His Lordship, dismissed the Preliminary Objection. In respect of 'Consequential Orders', he/she made, various findings of facts and at the said page 631 thereof, he/she stated as follows:

'2 For all those, and the other findings supra, I hereby set aside Arbitral Award dated 14th March, 1996 in terms of Section 219(2) of the Arbitration Act (Cap. 19 LFN 1990). Equally, the substantial damages of US \$750,000 payment is set aside".

3. Accordingly, the Applicant's application therefore, succeeds. For, in the case of KSUB v. FANZ Construction Company Limited (1990) 7 NWLR (Pt. 258) 595, the Supreme Court held that "A High Court has the power to set aside the award of an Arbitration'.

4. Conversely, for the-reasons adduced supra, I hereby refuse to recognise the said Arbitral Award, and therefore, I withhold leave to the Respondents to enforce the Arbitral Award aforesaid.

Accordingly, the Respondent's Application dated 25th March, 1996, fails and is hereby dismissed.

Those are the findings of this Court in this matter".

The Appellant, aggrieved by the said Ruling, appealed to the Court of Appeal, Lagos Division on twelve (12) grounds of appeal which were reduced to eleven (11) in the Amended Notice of Appeal filed on 6th May, 1997. After hearing from the learned counsel for the parties, in a unanimous Judgment delivered on 13th December, 1999, the court below dismissed the appeal.

Dissatisfied again by the said decision, the Appellant, appealed to this Court originally on six (6) grounds of appeal which was filed on 23rd December, 1999. It later filed on 20th May, 2002, a Notice of Appeal containing, only two (2) grounds of appeal, which read as follows:

"1 The learned Justices of the Court of Appeal, Lagos Division erred in law in confirming the order of the Federal High Court, Lagos, which set aside the Award of \$750,000.00 US Dollars made by the Arbitrators in favour of the Applicant as damages for both breach and conspiracy when on that footing it has not been shown that there was an

-error of law on the face of the Award.

2 The learned Justices of the Court of Appeal erred in law when they held that the award made by the three Arbitrators in favour of the Appellant "carried an-error of law on its face" and thereby confirmed the setting aside of the award by the Federal High Court for the reasons stated in the lead judgment namely.-

"It seems to me that since the Arbitrators had stated in the award that the Appellant did not prove that it suffered any (sic) pecuniary damages, it was no longer open to them to award "substantial damages" in the place of nominal damages which they recognised in the award as applicable. It is in my view another way of awarding punitive damages which parties by their contract have excluded".

When:-

The award of US \$750,000 as damages in favour of the Appellant is justified on the basis of the award of a lump sum of nominal damages for breach of contract and for the tort of conspiracy found against the Respondent".

When the appeal came up for hearing on 13th March 2006, Ayanlaja, Esqr, (SAN) - learned counsel for the Appellant appearing with Obebe, Esqr, referred to the Notice of Appeal which he said was filed, pursuant to the Order of this Court made on 8th January, 2004. He referred to the Appellant's Brief of Argument filed on 20th May, 2002 and the Reply Brief dated 10th November, 2005 and deemed duly filed and served by the court on the said 13th March, 2006.

The learned Senior Advocate of Nigeria, in his oral submission, referred to the said award and submitted that the award, was made both for breach of contract and conspiracy. He stated that the finding of the learned trial Judge was not justified. It was his further submission that if the court below, had taken into consideration that the award was not only in respect of the tort of contract and tort of negligence, the award made by the Arbitrators, should not have been disturbed.

As to the Arbitrators awarding one lump sum, he submitted that they were perfectly entitled to do so. He referred to the "Additional List of Authorities and submitted that where separate causes of action, are tried together as in this case, but the damage suffered, is the same, that only one award of damages, will be made. He referred to Halsbury's Laws of England 4th Edition (Reissue) Vol. 12 (1) Damages paragraph 1153 - General Principles and submitted that this supports this proposition including the cases cited therein in respect thereof. He made available to the Justices of the Panel, a photo copy of the said General Principles. He finally, urged the court, to allow the appeal, set aside the Judgment of the court below and order that the award be enforced as a judgment of the trial court.

Chief Soetan - learned counsel for the Respondent appearing with Ademagba, Esqr, referred to the Respondent's Brief of Argument - dated and filed on 1st July 2002. He relied on and adopted paragraph 2.01 (a) of the Brief and referred to the award made by the Arbitrators. He stated that the finding of the arbitrators, was that the awards were replete with contradictions and inconsistencies which according to him amounted to misconduct. But that the court below said that it amounted, to an error in law. Learned counsel submitted that even if the award is at large which he said he did not concede, that the Arbitrators exceeded their authority. He referred to page 8 of their Brief and submitted that the award was not based on error of law, but on a technical point which amounted to a misconduct. He urged the court to uphold the judgment of the court below and dismiss the appeal.

Mr. Ayanlaja (SAN) in reply about the inconsistencies, stated that he had taken care of that. He referred to pages 101 to 105 of vol. 1 of the Records i.e. - part of the judgment of the trial court and stated that the Respondent, have not appealed against the findings of the court below. That the court below, summed up the issues for determination and that there is no appeal in respect of this point. He submitted that the tort of conspiracy, was not within the intention of the parties. He still urged the court to allow the appeal.

The Appellant in its Brief in paragraph 3.00, states that only one issue and a subsidiary issue arise for determination in this appeal.

The main issue is,

"Whether there is an error on the face of the Award as to justify the order of the court below confirming the order of the Federal High Court which set aside the damages, of US \$750,000 awarded by the Arbitrators in favour of the Appellant".

The subsidiary issue is,

"Whether damages for the tort of conspiracy as opposed to that for breach of contract can be at large and aggravated".

On its part, the Respondent states in its Brief that subject to what is said about the subsidiary issue in paragraph 4.12 of the Respondent's Brief, that it adopts the said Appellant's issue reproduced hereinabove.

In my respectful view, the controversy in this appeal, is very narrow. Therefore, in order to determine it, the court will certainly be guided by the terms or the relevant provisions in the Agreement between the parties i.e. the provisions in Exhibit 7. I will reproduce the paragraphs germane to the issue for determination.

"12.3.4: The language to be used in the arbitration proceedings shall be English and the procedure (in so far as not governed by the said UNICITRAL rules or this clause 12.3) shall be governed by the substantive laws of the Federal Republic of Nigeria.

12.3.5: The arbitral award shall exclude punitive damages and attorney's fees (except as expressly provided otherwise elsewhere in this Contract) and shall contain written reasons upon which the award is based.

12.3.8: This Contract shall be interpreted in accordance with the laws of the Federal Republic of Nigeria without regard to principles of conflicts rules",

It has been stated and restated in a number of decided authorities that in the interpretation of contracts or documents, the basic principle of law, is that, it is not the duty of any court or tribunal, to make contracts for the parties. See *Fakorede & ors. v. Attorney-General of Western State* (1972) 1 All NLR 178 @ 189. Contracts, as a rule, are made by the parties thereto who are bound by the terms thereof and the court are always reluctant, to read into a contract, terms on which there is no agreement. See *Alhaji Baba v. Nigerian Civil Aviation Training Centre & anor.* (1991) 5 NWLR (Pt. 192) 388 @ 413; (1991) 7 SCNJ. 1 In other words, a court or tribunal, cannot write a new contract for the parties. See *Aouad v. Kessrawani* (1956) SCNLR 83; (1956) 1 FSC. 35.

Now, the Arbitrators before making the award that is the subject-matter of controversy had made some material or crucial findings of fact. At page 156 of Vol. 1 of the Records, the Arbitrators stated inter alia, as follows:

"But on the issue of damages for the breach, the Claimant appears to have lost sight of the fact that very much depended on what losses they proved that they suffered as a result of the breach. We have also rejected any claims that the damages were exemplary or aggravated".

At page 158 thereof, they stated inter alia, as follows:

" Where a party has established a breach but fails to prove damages or grounds from which the value of the loss can be quantified, he is entitled to only nominal damages. See *Maine & McGregor on Damages* (12th Edition) paragraph 203 at p. 192".

Surprisingly, as if making, with respect, a U-turn, at the same page 158, they stated inter alia, as follows:

"In our view, this is a case in which we cannot award nominal damages because of some peculiar facts of the case".

The Arbitrators found as a fact, that the Respondent was in breach of the said Agreement with the Appellant. But they then found as a fact, that the Appellant failed to prove that they suffered as a result of the breach. That it failed to prove

the damage or grounds from which the value of the loss could be quantified and therefore, or in the circumstances, it was entitled to only nominal damages. More importantly, the Arbitrators recognised that the said Agreement of the parties clearly excluded the award of punitive damages. I was going to think that there may be a difference between a "punitive" and "exemplary" or "aggravated" damages, but the Arbitrators so to say, have spared me that burden/ordeal. For said they at page 152 of vol. 1 of the Records, inter alia, as follows:

"(b) There is another reason the contract, Exhibit 7 itself to show that the award of aggravated or exemplary damages is not intended by the contract itself. For it is provided in paragraph 12. 3. 5 thus

"12. 3. 5: The arbitral award shall exclude punitive damages and attorney's fees (except as expressly provided otherwise elsewhere in this contract) and shall contain written reasons upon which the award is based",

They continued, up to page 153 thereof, thus:

"In the famous dictum of Scott, L.J. in his judgment in the case of *Dumbbell v. Roberts* (144) (sic) (meaning (1944) 1 All E.R. 326, at p. 330, damages are "punitive" or exemplary" when they are awarded by way of punishment of the defendant, or as a deterrent and are not limited to compensation for the defendant's loss. In our view, both aggravated and exemplary damages are punitive and their award has been expressly prohibited by the contract itself, (contumelious (sic) disregard of the Claimant's rights - if proved (but it was not) - is within the same categorization: See *Merest v. Harvey* (1814) 5 Taunt, P.442, 443".

They went on and on and further stated, inter alia, still on page 153, thus:

" We do not, therefore, see how the Claimant could claim U.S. \$5,000.00 as general damages and also U.S. \$10,000.00 as aggravated damages. For the same reason we do not see how we can award U.S. \$10,000.00 to the Claimant on the same facts as exemplary damages. Furthermore, we are satisfied that the learned authors of *Maine & McGregor* (cit. op) put the law correctly at paragraph 211 (pages 199 - 200) when they stated:

"(b) Contract. On the other hand, in contract with the exception of the anomalous case of breach of promise of marriage, exemplary damages are not recoverable'.

Then, they cited many Local or Nigerian decided authorities in support which they said, are cases of tort but not on contract.

In conclusion in respect of the above holdings they stated as follows:

"On the principle of all these decided cases, we are satisfied that quite apart from the fact that the contract, Exhibit 7, did not intend that such damages, being punitive in nature, should be awarded in case of a breach, they are not recoverable on the settled principles of general law. We therefore make no awards on paragraphs (ii), (iii) and (v) of the further amended statement of claim. On (iv) we shall only consider General Damages'.

As to the distinction between Exemplary or Aggravated damages and General Damages, see also the cases of *Odogu v. Attorney-General of the Federation & 6 ors.* (1996) 6 NWLR (Pt. 456) 508; (1996) 7 SCNJ. 132- per *Ogundare, JSC*, (of blessed memory); *Odiba v. Azege* (1998) 9 NWLR (Pt. 566) 370; (1998) 7 SCNJ. 119 @ 135 - per *Iguh, JSC* and the English case of *Addis v. Gramophone Co. Ltd.* (1909) A.C. 88.

It is noted by me, that the Arbitrators, as found by the trial court, made an award only in respect of claim (iv) relating to exemplary damages for breach of contract, conspiracy and interference. They rejected and made no awards in" respect of the other claims (i), (ii),(iii), (v), (vi) and (vii). It is therefore, worrisome, disturbing and surprising to me, that in spite of their material findings and weighty pronouncements, they, with respect, ended up, in awarding punitive damages to the Appellant.

Indeed, the learned trial Judge in his/her said Ruling, at page 642 of vol. 3 of the Records, had this to say, inter alia;

"It is my view that "substantial damages" is not the same as "nominal damages" which is the class of damages to which the Claimant is entitled under Nigerian Law for breach of contract".

I agree. This is because, by no stretch of imagination, can the award by the Arbitrators of US \$750,000.00, by Nigerian standard or even in law, be treated, boil down, or be regarded, as nominal damages.

The court below - per Oguntade, JCA (as he then was), stated rightly and justifiably, in my respectful view, inter alia, (and as also reproduced in Ground 2 of the Appellant's Notice of Appeal) as follows:

"It seems to me that since the arbitrators had stated in the award that the Appellant did not prove that it suffered any pecuniary damages, it was no longer open to them to award substantial damages in the place of nominal damages which they recognized in the award as applicable. It is in my view another way of awarding punitive damages which parties by their contract have excluded. The award clearly carried an error of law on the face".

I take 'carried an error of law on the face,' as meaning, in the face of all the said pronouncements by the said Arbitrators some of which I have reproduced hereinabove in this Judgment. In fact, my said learned brother at page 20 of his said Judgment, (although not paged by the Registrar of the court below, but should be page 777 in vol. 4 of the Records), after disagreeing (for good reasons therein stated) with the learned trial Judge in his/her statement that the Arbitrators, lacked jurisdiction, stated finally in respect of the point, as follows:

" I would see error of the arbitrators as one on the face of the records rather than an absence of jurisdiction".

So, any other strained interpretation of the use of the words "error on the face of the award", with respect, must be grossly misconceived. I so hold.

However, the learned Jurist also stated later at the same page as follows:

"Indeed, the learned arbitrators themselves found that to the extent that there was indeed breach but no evidence of loss, then the award of anything other than nominal damages is not in accordance with Nigerian Law as stipulated by the parties. And I agree that damages of US \$750,000.00 is not nominal damages".

I have in so many words, also stated so in this Judgment. The Arbitrators, with respect, started their said Arbitral award well, but at the end, they went rather too far in awarding such excessive damages. Worse still, they lumped the award of damages for breach of contract with that of conspiracy. They apparently, with respect, were misled by the said General Principles the photocopy of which, were flaunted before this Court on the hearing date. I have also read the said principles in the said Halbury's Laws of England. (Reissue).

That was why the Arbitrators stated at page 159 of Vol. 1 of the Records, inter alia, as follows:

"We must also observe that the factual bases (or basis) for claims for breach and for conspiracy are practically the same. We shall, therefore, award one lump sum as damages".

In the said "1153 General. Principles" which were discussed by the learned Authors of the Book, under the head or title '(2) Practice on Assessment of Damages', the following appear and which portion was shaded by Mr. Ayanlaja (SAN):

" Where separate causes of action are tried together, but the damage suffered is the same, only one award of damages will be made'.

I note that in reference 6 by the said Authors, it is stated as follows:

"6, This course will be followed in e.g. personal injury cases where the causes of action may be a breach of statutory duty and negligence, but the damage is one and the same".

From this commentary by the said Authors, I believe that it behoves all learned counsel, to make sure they cite authorities that will clearly support the particular case they are either prosecuting or defending or the proposition of the law they wish to rely on.

It needs to be stressed by me that the said principle, relates to English law and certainly not strictly Nigerian Law. I had noted or reproduced above in this Judgment, one of the terms of the written Agreement of the parties in clause 12. 3. 4 of Exhibit 7, is that they will be guided by Nigerian Law and not English Law or the said "General Principles" applicable to English courts.

It is very plain to me, that this appeal, absolutely, lacks substance and any merit. This Court, as I know it, does not concern itself with academic discussions or matters. In fact, all courts of law are enjoined to adjudicate between parties in relation to their compelling legal interests and never to engage in a mere academic questions, or arguments or discourse, no matter how erudite or beneficial it may be to the public at large. So said this Court - per Achike, JSC (of blessed memory) in the case of Adelaja & 2 ors. v. Alade & anor. (1999) 4 SCNJ. 225 @ 245 citing the cases of Union Bank v. Edionseri (1988) 2 NWLR (Pt. 74) 93 and Julius Berger (Nig.) Ltd, v. Femi (1993) 5 NWLR (Pt. 295) 612.

In any case, these are concurrent findings of fact by the two lower courts and it has been stated by this Court "umpteenth" times, in its decided cases, that in such circumstances or situations, it will not interfere. See Aladeye & 2 ors. v. The Administrator, Osun State & 2 ors. (1976) 12 SCNJ. 192 (a) 207- per Ogundare, JSC, (of blessed memory), and Iguh, JSC, also citing several other cases therein and Charles Ume v. Okoronkwo & anor. (1996) 12 SCNJ.404 @ 413 - per Ogwuegbu, JSC. where several cases, were also cited with approval.

In the end result, this appeal, with respect, absolutely, lacks substance and merit. It fails and it is accordingly dismissed. I hereby and accordingly, affirm the said decision of the court below affirming the Ruling of the trial court.

Costs follow events. The Respondent is awarded N10,000.00 (Ten thousand Naira) costs payable to it by the Appellant. I wish I could have awarded more, had the Rules of Court permitted me to do so in this instant appeal.

Judgement delivered by
Salihu Modibo Alfa Belgore, J.S.C

I agree with my learned brother, Ogbuagu, JSC that this appeal has no merit. For the reasons fully adumbrated in the judgment I also dismiss this appeal with N10,000.00 costs.

Judgement delivered by
Umaru Atu Kalgo, J.S.C

I have had the advantage of reading in draft the judgment just delivered by my learned brother Ogbuagu JSC. I entirely agree with it and for the reasons he has given therein, I too find no merit in the appeal and I dismissed it with N10,000.00 costs to the respondent

Judgement delivered by
Aloma Mariam Mukhtar, J.S.C

A matter for arbitration between the parties to this appeal was referred to an arbitration panel consisting of the Honourable Justice Kayode Eso (rtd) Judge Bola Ajibola, and Justice Nnaemeka-Agu (rtd) The decision of the panel was not satisfactory to the respondent, so it went to the Federal High Court under Sections 29, 32, 48 and 52 of the

Arbitration and Conciliation Act for the following:

'1. an order that the award dated 14th March, 1996 in the above mentioned arbitration by Honourable Justice Kayode Eso (rtd.), Judge Bola Ajibola and Honourable Justice P. Nnaemeka-Agu (rtd.) the arbitrators therein be set aside.

Or in the alternative;

2. an order refusing the enforcement of the award dated 14th March, 1996 in the above mentioned arbitration by Honourable Justice Kayode Eso (rtd.), Judge Bola Ajibola and Honourable Justice P. Nnaemeka-Agu (rtd.), the arbitrators therein.'

The Federal High Court granted the application and set aside the award of the panel thus:-

"For all those, and the other findings supra, I hereby set aside Arbitral Award dated 14th March 1996 in terms of Section 219 (2) of the Arbitration Act (Cap 19 LFN (1990). Equally, the substantial damages of U\$750,000 payment is set aside."

Aggrieved by the decision the respondent appealed to the court below on twelve grounds of appeal. The court found the appeal devoid of merit, and dismissed it. Aggrieved again, the respondent/appellant appealed to this court on six grounds of appeal. In accordance with the rules of this court, learned counsel exchanged briefs of argument. In the appellant's brief of argument, learned Senior Advocate for the appellant formulated an issue, and what he described as a subsidiary issue. The main issue is :-

"Whether damages for the tort of conspiracy as opposed to that for breach of contract can be at large and aggravated."

The respondent adopted the issue for determination. In their brief of argument learned Senior Advocate for the appellant attacked the opinion expressed in the lead judgment of the court below, which reads as follows :-

"It seems to me that since the Arbitrators had stated in the award that the appellant did not prove that it suffered any pecuniary damages, it was no longer open to them to award substantial damages in the place of nominal damages which they recognized in the award as applicable. It is in my view another way of awarding punitive damages, which the parties by their contract have excluded. The award clearly carried an error of law on its face."

I believe that looking at the record of proceedings of the arbitral panel carefully, one will find that the lower court did not go off trail in that the appellant's case lacked proof of pecuniary damages. The consequence of that is that only nominal and not substantial damages should have been awarded. The above reproduced holding of the court below was not arrived at in vacuum, it was borne out of the decision of the arbitral panel which reads thus: -

"We have sought for evidence of any losses which on the evidence before us, the Claimants proved that it suffered as a result of the breach. Much of the evidence goes to show that the respondents continued to perform well inspite of the strike. We do not know how this proved the quantum of damages. The Claimants, admitted by the evidence of CW 3 under cross-examination that their total annual takings under the contract amounted to U.S.\$2.7 million. But they failed to give any evidence of what they lost by the diversion of their expatriate staffer conspiracy to do so. It is now a settled point of law that quantum of damages, like any other issue in our civil procedure, is a matter of evidence. Where one gives no evidence that can help in the assessment of damages, the one is normally entitled to nominal damages."

It is the submission of learned counsel for the appellant that the learned justices of the Court of Appeal completely misread and miscomprehended the award of the arbitrators, which is succinctly set out in the record. Learned counsel for the respondent has replied that the appellant has omitted to indicate precisely how the award had been misread or miscomprehended. It is a fact that all the appellant did was to reproduce the various reasonings of the learned arbitrators on the issue of damages, and the arbitrator's conclusion on which it awarded damages and held as follows: -

"In the result, taking all these into account we assess damages due to the Claimant from the respondent at U.S. \$750,000.00. (Seven hundred and fifty thousand U.S. Dollars) and award same to the Claimant (sic)."

Then the learned Senior Advocate after reproducing the above excerpt of the judgment submitted that the approach of the learned arbitrators cannot on the face of the award be said to contain any error of law on the face of it. The approach of the learned judge of the Federal High Court and the confirmation rendered to it by the court below on the basis of an error of law on the face of the award cannot therefore be justified. I agree that the arbitrators were alive to the obligation on them in the prevailing circumstance where there was no proof of damage of the quantum suffered by the appellant even if there was breach. Indeed they posited the position of the law in that situation and confirmed that the appellant is entitled to only nominal damages. But then rather than adhere to the principle of law they went contrary to it and awarded a lump sum as damages. In Halsbury's laws of England 4th Edition Re issue Volume 12 (1), the authors in paragraph 980 reiterated the position of the law on proof of loss on award of damages, thus: -

"An innocent party who cannot show that he occupies a worse financial position after breach than he would have occupied had the contract been performed can ordinarily recover only nominal damages for breach of contract."

The arbitrators it seems (even though aware of the above principle of law) did not apply it. In consequence they erred in law, and so the courts below were in order in setting aside the damages awarded by the Arbitrators. In this vein I affirm the judgment of the Court of Appeal upholding the decision of the Federal High Court. The lead judgment delivered by my learned brother Ogbuagu JSC has been read by me and I am in full agreement that the appeal has no merit and deserves to fail. The appeal is hereby dismissed. I abide by the order as to costs and all other orders made in the lead judgment.

Judgement delivered by
Mahmud Mohammed, J.S.C

I have read in advance the judgment of my learned brother Ogbuagu JSC which has just been delivered. I completely agree with his reasoning and conclusion for dismissing this appeal.

The main issue as agreed by the parties in this appeal is whether there is an error on the face of the Arbitral Award of the sum of \$750,000.00 in favour of the appellant justifying its being set aside by the trial Federal High Court and the affirmation of that decision by the court below. From the record of this appeal, it is clear that the Arbitral Panel reviewed the evidence adduced by the appellant as claimant before it and came to the conclusion that the evidence was not sufficient to establish the quantum of damages suffered by the appellant as the result of the breach of contract. Following this finding by the panel, it supported the finding with the correct statement of the law to guide it in its subsequent decision on the claim in these words: -

'It is now a settled part of law that quantum of damages, like any other issue in our civil procedure is a matter of evidence. Where one gives no evidence that can help in the assessment of damages, then one is normally entitled to nominal damages'.

The rather baffling question is where the panel later found enough evidence to support its decision at pages 158-159 of the record that-

'In our view, this is a case in which we cannot award nominal damages because of some peculiar facts of the case, xxxxxxxxxx In our view if all those charges are deemed as admitted, the claimants would be entitled to substantial and not nominal damages.'

Clearly in my view, this decision does not flow from the earlier findings of the Arbitral Panel on the quality of the evidence led by the appellant to prove the quantum of the damages they suffered as the result of the breach of the contract, a dispute submitted to the Arbitral Panel for determination and award. The findings of the trial court and the court below that an error of law had been disclosed on the face of the award to justify its being set aside is quite in order.

For the foregoing reasons and the fuller reasons contained in the judgment of my learned brother Ogbuagu JSC, I also see no merit at all in this appeal, which I hereby dismiss with N10,000.00 costs to the respondent.