IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA AD-2015

CORAM: WOOD (MRS)CJ (PRESIDING)
ANSAH JSC
DOTSE JSC
BAFFOE-BONNIE JSC
AKAMBA JSC

CIVIL APPEAL
NO. J4/40/2013

28TH JANUARY 2015

GLENCORE A.G - PLAINTIFF/APPELLANT

VRS APPELLANT

VOLTA ALUMINUM COMPANY LIMITED - DEFENDANT/RESPONDENT
RESPONDENT

JUDGMENT

JONES DOTSE JSC:-

It is provided in *sections 1 (1), 47, 48 (1) and (2) of the Sale of Goods Act, 1962 (Act 137)* as follows:

> *"1(1) a contract for the sale of goods is a contract by which the seller agrees to transfer the property in the goods to the buyer for a consideration called the price, consisting wholly or partly of money."*

47. Damages for non-acceptance

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods in accordance with the terms of the contract, the seller may maintain an action against the buyer for damages for non-acceptance.

(2) In a contract for the sale of goods to be delivered by instalments,

(a) if each instalment is to be separately paid for, subsection (1) shall apply to each instalment separately, ***but where the buyer has by words or conduct shown an intention to repudiate the contract the seller may, if the seller accepts the repudiation, maintain an action for damages for non-acceptance in respect of the goods;***

(b) in any other case, a breach in respect of one or more instalments shall be treated for the purposes of subsection (1) as though it were a breach in respect of the whole contract or of the remaining part of the contract.

48. Assessment of damages

(1) The measure of damages in an action for damages is the loss which could reasonably have been foreseen by the buyer at the time when the contract was made as likely to arise from the breach of contract.

(2) Where there is an available market for the goods, the measure of damages is prima facie to be ascertained by the ***differences between the contract price and the market or current price.***

(a) If a time has been fixed for acceptance, ***or if the buyer repudiates the contract before the time of performance, and the seller does not accept the repudiation, at the time or times when the goods ought to have been accepted.***

(b) ***In any other case, at the time or times of the refusal to accept the goods****." Emphasis supplied.*

BRIEF FACTS

This is an appeal by the Plaintiff/Appellant/Appellant, hereafter referred to as the Plaintiff against the decision of the Court of Appeal rendered on 7th day of July, 2011 which also affirmed the decision of the High Court, dated 13th November 2009 by which the Defendants/Respondents/Respondents hereafter referred to as the Defendants were directed to pay the Plaintiff's, general damages of GH¢25,000.00.

PLAINTIFF'S CLAIMS IN THE TRIAL HIGH COURT

The Plaintiff claimed the following reliefs against the defendants:

a. A declaration that, on the basis of the correspondence between, the conduct of the Plaintiff and Defendant, a valid and binding contract existed between them for the sale of **26,250 metric tons of alumina by the Plaintiff to the Defendant.**

b. A declaration that in as much as the Defendant indicated its refusal and/or refused to accept delivery of the **26, 250 metric tons of alumina** from the Plaintiff, the Defendant breached the contract between it and Plaintiff.

c. General damages for breach of contract.

d. Special damages in the sum of US$6,918,750, which the Plaintiff has lost as a result of the Defendant's breach, and the subsequent fall in the price of alumina.

e. Costs, including solicitors' fee."

Even though the parties in this case testified and were cross-examined, the material evidence upon which their contractual relationship was founded and established had been based mainly on electronic communication and documentary evidence. As a result, we deem it appropriate, at this stage to refer to some of the salient features of the core correspondence and or transactions between the parties with the relevant dates to support them. These are as follows:-

19th August 2008

The Plaintiff made an offer of the Alumina to the Defendant valid till 4 pm New York time on the next day

20th August 2008

The Defendant, acting through its Chief Finance Officer, Felix Gaisie, accepted the Plaintiff's offer, with further instructions ***to "go ahead and secure it for us***".

20th August 2008

The Defendant's Felix Gaisie wrote to his colleague, Dela Agbo, to take steps to establish letters of credit in favour of the Plaintiff.

25th August 2008

The Plaintiff emailed the defendant, nominating the "MV Pan Leader or sub" to ship the Alumina.

26th August 2008

The Defendant emailed the Plaintiff approving the "MV Pan Leader or sub".

29th August 2008

The Defendant assured the Plaintiff that it needed the Alumina despite its attitude and said "you will get the signed contract".

1st September 2008

The Defendant wrote to the Plaintiff with the assurance that it was not contemplating breaching the contract, saying they were "not going back on our acceptance of your offer and apologize if that is the impression created."

10th September 2008

The Defendant emailed the plaintiff that it was no longer interested in the Alumina, as it intended to take delivery of alumina from "one of its shareholders".

19th September 2008

Plaintiff nominates MV Ellicon as the new vessel for the carriage of the cargo, but there is no confirmation from the Defendant.

19th September 2008

The plaintiff wrote to the defendant to accept the Defendant's repudiation.

17th October 2008

On this date, M.V. Marine Bulker set sail from a port in Brazil to Nikolayev-Ukraine with alumina for Talco. See Exhibit U. The Plaintiff claimed it took this action to mitigate it's losses.

24th October 2008

The Defendant (showing renewed interest after its breach) emailed the Plaintiff that it expected the Alumina to arrive in Tema no later than mid November 2008.

28th – 31st October 2008

The Plaintiff held the Alumina in transit in Gibraltar for possible shipment to the Defendant, as the Defendant showed renewed interest.

28th October 2008

The Defendant wrote to the Plaintiff to state that its letters of credit had failed, compelling the Plaintiff to continue its steps in mitigation."

It has to be noted and observed that, the vessel which finally lifted the Brazilian cargo which the Defendants contracted to buy, was MV Marine Bulker. The evidence on record indicates that there was no prior notification to the Defendants by the Plaintiffs on this new vessel.

There is also no indication that there was prior approval by the Defendants before the Brazilian alumina was loaded onto this vessel.

There is however indication that, the Defendants were notified by a later correspondence after the cargo had already been lifted by the vessel MV Marine Bulker.

It is also necessary to state the following facts and chain of events in the contractual relationships between the parties.

From the evidence on record, the Plaintiff contractually agreed to lift 26,250 metric tons of Brazilian alumina for the Defendant and an Australian alumina for another company called TALCO in one of the former Soviet Republics.

Following the Defendants breach to accept the Brazilian alumina, the Plaintiff diverted this cargo to TALCO in a bid to mitigate their losses. Having delivered the Brazilian cargo that was meant for the Defendants to TALCO, the plaintiff had to consign the Australian cargo originally meant for TALCO to China and deposited them in three warehouses until they found markets for them.

Indeed the Plaintiff, in paragraph 55 (f) of their statement of claim averred as follows:-

> *"By shipping the goods to TALCO, the Plaintiff was left with an unsold Australian cargo that was originally meant for TALCO."*

It is therefore clear that, contractually, it is the Brazilian cargo contract that the Defendants had repudiated and it is to that contract that damages must be looked at and assessed.

What is of interest here is that, whilst the plaintiff failed to give any details about the prices at which it sold the Brazilian cargo to TALCO, which was the original cargo meant for the Defendants, it rather sought to give some indicative prices at which it sold the Australian cargo.

The above constitute a brief summary of the material dealings between the parties herein.

DECISION BY THE HIGH COURT

Thereafter, the case proceeded to trial, and the High Court after an evaluation of the merits of the case delivered judgment in the following terms:

> *"In conclusion, I declare that on the basis of the correspondence between and conduct of the Plaintiff and Defendant, a valid and binding contract existed between them for the sale of 26,250 metric tons of alumina by the defendant.*
>
> *I also declare that in as much as the defendant indicated its refusal and/or refused to accept delivery of the 26,250 metric tons of alumina from the plaintiff, the defendant breached the contract between it and plaintiff.*
>
> ***I will hold that plaintiff is entitled to general damages and award damages of GH¢25,000 in favour of Plaintiff. I will however hold that plaintiff is not entitled to the special damages being claimed."***

APPEAL TO COURT OF APPEAL AND JUDGMENT

Dissatisfied with the decision of the High Court, the Plaintiff unsuccessfully appealed against the Judgment to the Court of Appeal. In it's judgment of even date already referred to supra, the Court of appeal in a unanimous decision dismissed the appeal in the following terms:-

> "*Having closely looked at all the relevant evidence in the Record of Appeal including the exhibits tendered, I am of the view that the plaintiff's case is not founded on any loss or damages it incurred on the price of mid November Australian alumina it contracted with Talco and the actual sale price of the Australian cargo sold to Chinese companies.* ***The plaintiff did not tender any evidence in respect of the agreed price of the November Australian alumina between the plaintiff and Talco. Nor did the plaintiff also tender the agreed price of the Brazilian alumina the subject matter of the contract which defendant repudiated, which plaintiff conveyed to Nikolayev, Ukraine or Tipo, Georgia. I am referring particularly to the agreed sale price between the plaintiff and buyers in the Ukraine or Georgia, because that specifically is the cargo in respect of which the***

plaintiff had a claim against the defendant. The evidence was entirely silent on this. The plaintiff's claim is based on a perceived loss comparing 20th August 2008 Brazilian alumina price with an entirely different cargo, the subject matter of a contract between the plaintiff and Talco negotiated on the basis of November 2008 and not August 2008 alumina prices. The plaintiff admitted that the November 2008 consignment was contractually assigned to Talco and had nothing to do with Defendant and as the trial judge stated, whatever arrangement made after the repudiation of the contract by the defendant from the late September 2008 up to October 2008 represented a separate set of events.

How much did the plaintiff sell the Brazilian cargo to Talco when it was conveyed to Ukraine or Georgia after the repudiation of 10th September 2008 and acceptance of the breach of plaintiff on September 19, 2008? There was nothing in the evidence on this to enable a clinical statutory assessment to be made by the trial court or in this court.

We think, in the circumstances, it was within the discretion of the learned trial judge to award nominal damages, even if she did not advert her mind to the issue of statutory damages as defined in section 48 of Act 137 in her judgment.

The appeal in the circumstances is dismissed and the judgment of the trial court, awarding nominal damages affirmed."

APPEAL TO SUPREME COURT

As the Plaintiffs' were still dissatisfied with the decision of the Court of Appeal, they appealed to this court, because the Court of Appeal:-

a. awarded a low figure as general damages; and

b. declined to award special damages

GROUNDS OF APPEAL

The following then constituted the grounds of appeal by the Plaintiff to this court:

a. **"The Court of Appeal erred when it affirmed the High Court's award of general damages on the basis that there were no multipliers in the evidence to guide the assessment of general damages.**

b. The Court of Appeal came to the wrong conclusion when it found that the consequential loss claimed by the Appellant was too remote to warrant the award of special damages.

c. The decision of the Court of Appeal was against the weight of the evidence."

RELIEFS SOUGHT FROM THE COURT OF APPEAL

The reliefs which the plaintiff seeks from this court are:-

a. "An upward variation of the general damages affirmed by the Court of Appeal; and

b. A reversal of the decision of Court of Appeal declining the grant of special damages."

It is to be noted and observed that, in their submissions in their statement of case, learned Counsel for the plaintiffs, submitted as follows:-

> *"For reasons to be given near the end of this statement of case, the appellant will abandon grounds B & C and focus on Ground A. "*

Indeed, learned Counsel for the Plaintiff only extensively argued ground A of the appeal, and did not profer any arguments in respect of grounds B & C. These are therefore to be considered as having been abandoned.

It is again interesting to note and observe that, learned counsel for the Plaintiffs in their statement of case stated as follows:-

> "*It is admitted that no evidence was provided of how much the appellant sold the rejected alumina to Talco for. However, we submit (and will demonstrate) that this was no reason not to assess*

damages properly and in accordance with the Sale of Goods Act, 1962 (Act 137)."

We have indeed verified the above statement and found it to be correct in the sense that, the plaintiffs did not provide any evidence of the said particulars of sale of this Brazilian Cargo to TALCO.

At the trial court, the plaintiff's did not anchor their case on the Sale of Goods Act, 1962, Act 137 specifically, although the facts stated therein fitted into a contract under the Sale of Goods Act.

In view of the fact that the appeal has been narrowed down to the Court of Appeal's affirmation of the High Court's award of general damages on the basis that there were no multipliers in the evidence to guide the assessment of general damages, it is considered worthwhile to quote in extenso portions of the High Court judgment on this issue. This is to fully understand why the learned trial Judge dismissed the special damages and also **awarded only nominal damages by way of general damages.**

REASONS FOR THE HIGH COURT DECISION

"From the totality of the evidence adduced, it is my opinion that P.W1 did not lead sufficient evidence to convince the court that the cargo on board the vessel M/V Maren Bulker was originally meant for Defendant. ***Indeed, that the conditions required for the delivery of the goods pursuant to the contract of sale had not been satisfied.***

Defendant has also made a case that the vessel M/V Maren Bulker had never been nominated by the Plaintiff and approved by the Defendant as was required. The Plaintiff relied on a draft commercial invoice attached to the Plaintiff's draft contract of sale dated 24th October 2008 and tendered in evidence as exhibit "AA", in support of shipment. This email was sent to Defendant after the M/V Maren Bulker had set sail on October 17, 2008.

For a start, notice cannot be retroactive; notice was required to be given in advance. This is because prior approval of Defendant was required before any loading or dispatch of any cargo, the subject matter of the contract between the parties. It is in line with this that in August 2008, the vessel Pan Leader was nominated and approved by the parties, subsequently,

Plaintiff nominated M/V Elikon. According to D.W.I the essence of giving Defendant prior notice of the vessel nominated by Plaintiff ***is to ensure that the vessel would fit into the dock of the buyer and secondly to vet the last five cargo carried by the vessel to ensure that the current cargo would not be contaminated by the previous cargo. Plaintiff did not challenge this evidence.***

D.W.1 also stated that Defendant had to be notified of Plaintiff's intention to load a vessel so that Defendant could exercise its option of either choosing to be there to supervise the loading or nominate an agent to do it. Also, Defendant had not notified Plaintiff of the establishment of Letters of credit, which was the mode of payment.

The evidence led is that the first time Defendant became aware of the vessel was an invoice. So on October 25, 2008 Defendant wrote to P.W.1 that it had noticed an error on the face of the commercial invoice. Plaintiff did not provide any satisfactory explanation as to why it did not give Defendant prior official notification of the nomination of the vessel M/V Maren Bulker.

It is Plaintiff's further case that it secured the vessel on 28th August 2008 under a Charter Party Agreement which is referred to in the Bill of Lading dated 17th October 2008, and covering the goods consigned to Talco. P.W.1 tendered in evidence a copy of the said Charter Party (exhibit "AD") and Bill of Lading (exhibit "U"). ***The Defendant called as a witness, Mr. Kofi Mbiah, Chief Executive Officer of Shippers Council. His evidence, which I accept, was that the Bill of Lading in question did not make reference to the Charter Party dated 28th August 2008, but rather to a Charter Party dated 23rd September 2008. Furthermore, the Bill of Lading is not transferable on its face and thus could not have passed title to Defendant****.*

The damage that Plaintiff is contending it suffered is, in my opinion therefore, too remote, and I will so find. *In the circumstances Plaintiff cannot claim to have mitigated its loss by sending the cargo to Talco.*

Also the basis for the claim for demurrage against the Defendant has not been proved. The decision to send the vessel for maintenance was a decision, which the Plaintiff admits it took on its own; the same applies to the decision to hold the vessel for up to 31st December 2008."

Concluding her delivery, the learned trial Judge also gave the following explanation for the award of the nominal damages.

"It is trite learning that the measure of damages is a computation of how much money must be paid by the party in breach to the innocent party. The purpose is to put the innocent party in nearly the same position that he would have been had the other party not breached the contract. In ***Royal Dutch Airlines (KLM) & Another v Farmex Limited [1989-90] GLR 266,*** *the Supreme Court held that on the measure of damages in breach of contract, the principle adopted by the Courts was restitution in integrum i.e. if the Plaintiff has suffered damages – not too remote- he must, as far as money could do it, be restored to the position he would have been in had that particular damage not occurred.* ***Plaintiff therefore ought to be compensated for the expenses incurred in instituting the instant action.***

The plaintiff has not made any other claim for special damages. ***For the plaintiff to be awarded special damages it has to establish what loss it has suffered by reason of the breach by leading evidence as to the quantifiable loss.*** *In the absence of evidence as to any quantifiable loss suffered, Plaintiff will only be entitled to the award of general damages. See* ***Yungdong Industries Limited v Roro Services [2005-06] SCGLR 819.***

In the case of ***Delmas Agency Ghana Limited v Food Distributor International Limited [2007-2008] SCGLR 748****; the general principle relating to damages was expatiated on.* ***It was held that general damages are as the law will presume to be the natural or probable consequence of the Defendant's act. It ari****ses by inference of the law and therefore need not be proved by evidence. The law implies general damages in every infringement of an absolute right.* ***The catch, it was further stated, is that only nominal damages***

are awarded; *where the Plaintiff has suffered a properly quantifiable loss; he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate. In the instant case, on the evidence adduced by Plaintiff, I am of the opinion that Plaintiff is entitled to general damages."*

These quotations are necessary because they explain why the Court of Appeal did not disturb those findings of fact.

REASONS WHY THE COURT OF APPEAL DID NOT DISTURB THE FINDINGS OF FACT BY THE TRIAL COURT

The following constitute the main reasons why the Court of Appeal did not disturb the findings made by the trial court:

"I have closely considered the findings of the trial judge in respect of the cargo carried on the MV Maren Bulker and I find no cause to disturb those findings as the plaintiff insisted at all times that its conduct with regard to the goods on the vessel were intended to mitigate its loss. As acts done in mitigation occur after a breach or anticipated breach, there is no reason to conclude that there was a subsisting contract between the Plaintiff and Defendant in relation to the Brazilian cargo carried on the MV Maren Bulker given that the plaintiff concedes in its reply to the Defendant's written submission that the appeal herein is not targeted at the decision of the trial court as to whether there was a valid contract between the plaintiff and the Defendant which was breached, ***but the appeal is targeted only at the treatment of damages, both general and special, by the trial court."***

ANALYSIS OF THE STATEMENTS OF CASE FILED FOR AND ON BEHALF OF THE PARTIES

We have perused the erudite and well researched statements of case filed for and on behalf of the parties by their learned counsel. We take this opportunity to congratulate them for assisting this court with the detailed submissions contained in their statements of case.

FOR THE PLAINTIFF'S

Learned Counsel for the Plaintiff, anchored his submission on the following core issues:-

1. That the Court of Appeal failed to consider the CRU monitor which according to Counsel ought to have been considered.

2. That, section 48 (2) of the *Sale of Goods Act 1962 (Act 137)* is relevant in the computation of the damages flowing from the breach of contract by the Defendants.

In this respect, learned Counsel for the Plaintiff's submitted that in the assessment of damages arising from the Brazilian alumina cargo that was sold by Plaintiff's to TALCO, the said section 48 (2) of the Act had to be applied.

The position was stated by the Plaintiffs as follows:-

> *"The position of the law on assessment of damages where a buyer breaches a sale of goods contract is that the court must calculate the damages by subtracting the market value of the goods at the time the goods ought to have been accepted (or at the time of the breach, where applicable) from the value of the goods at the time the contract was formed."*

In discussions and analysis which will soon follow, it will be examined whether the plaintiff provided the material evidence upon which the said computation could have been applied. Even so, the court will have to consider whether taking all the facts into context, Plaintiff's are entitled to the statutory damages under the Sale of Goods Act, or not.

3. The Plaintiff also argued that, the re-sale of the rejected cargo is irrelevant in the assessment of damages as is stated in section 48 (2) of *Sale of Goods Act 1962 (Act 137).*

4. Finally, learned Counsel for the Plaintiff argued that, even though the first appellate court, (the Court of Appeal) confirmed and affirmed the findings of fact made by the trial High Court, this second appellate Court (Supreme Court) can for good reasons especially where the said findings are

perverse, depart from them and make new findings of fact provided they can be supported by the record of appeal.(ROA)

See cases such as the following:-

1. **Mensah v Mensah [2012]1 SCGLR 391**
2. **Gregory v Tandoh IV & Anr. [2010] SCGLR 971**
3. **Obeng v Assemblies of God [2010] SCGLR 300**

Just to mention a few.

However, we wish to state that having evaluated the findings of fact made by the trial court and same affirmed by the Court of Appeal, this Court does not see anything perverse to merit a reversal of the said findings of fact.

STATEMENT OF CASE BY DEFENDANTS

Even though learned counsel for the Defendants argued many points in response to that of the plaintiff, in substance, the issues considered germane to this appeal are the following:-

i. That the Plaintiff's case has been anchored on a non-existent contract. This preposition has been based on the fact that, even though conclusive findings of fact have been made to establish the fact that the agreement between the parties was entered into on 20th August 2008, the fact remains that, there were some loose ends of this agreement, which needed to be tidied up.

   For example, the nomination and acceptance of the vessel to lift the cargo, the request by Defendants to vary the price, the establishment of a valid L/C, etc all remained to be resolved. It is this which stretched the agreement to October 2008 on the basis that it had not been finalized. Can those factors be taken into consideration in looking at the 20th August 2008 contract?

ii. That the Plaintiff failed to prove the actual loss it has suffered by reason of the Defendant's breach of contract, and whether these must be taken into consideration.

A perusal of the above submission gives an indication that the defendant's have not appreciated the total abandonment of the grounds of appeal on special damages. Since this ground of appeal has been abandoned, there is no justification for holding on to it. It is therefore of no consequence.

iii. That the Plaintiff's case in the Supreme Court constitutes a departure from its pleadings and arguments in the lower courts. For that reason, they cannot argue a fresh point of law on appeal.

This argument has been anchored on the basis that, the plaintiff's claim in this court for statutory damages under the Sale of Goods Act, 1962 (Act 137) not having been the case it argued in the trial court, constitutes a departure from its pleadings and the set up of an entirely new case.

The resolution of this issue like the previous one poses no problems. We will therefore deal with it peremptorily. It has to be noted that, the facts upon which the plaintiff's based their claims throughout from the trial court, through to the 1st appellate court and this court have basically been the same, save for semantics in the submissions of learned counsel.

The reference and reliance on the Sale of Goods Act, is a question of law. The Law is presumed to be in the bosom of the Judge, and it does not really matter whether the parties specifically made reference to the sale of Goods Act or not. The Court is presumed to apply any applicable law to a given set of facts.

For example, the transaction in the instant case between the parties even though not specifically mentioned, is one under section 1(1) of the Sale of Goods Act, which states that *"Contract for the sale of goods is a contract by which the seller agrees to transfer the property in the goods to the buyer for a consideration called the price, consisting wholly or partly of money."*

Applying the above definition to the contract that was deemed to have been entered into between the parties herein in or about 20th August, 2008 is one covered by the definition in section 1 (1) of the Sale of Goods Act.

Thus, once the facts of the case support the legal position stated in the Sale of Goods Act, it is incumbent and imperative for the courts to apply such a law. As a matter of fact, being an issue, regulated by substantive law, means that it cannot be ignored once the facts relate to the given situation.

However, the issues of whether the losses of the Plaintiff have been caused by the proximate or remote acts of the Defendants to make them liable for the damages therein under the rule in ***Hadley V Baxendale (1854) 9 Exch 341*** will be considered under a separate and detailed discussion.

iv. Learned Counsel for the Defendant, ended his submissions in the statement of case to the effect that the Plaintiff's case cannot be brought under section 48 of the Sale of Goods Act, (Act 137).

This is one of the core and contentious issues to be determined in this appeal. For now, it is safe to conclude that, once the Plaintiff's have pleaded certain facts which give rise to a specific situation in which some provisions of the Sale of Goods Act, 1962, (Act 137) can be said to be applicable, it cannot be said that, the Plaintiff's case does not come under section 48 of Act 137.

What this court is therefore called upon to consider in this appeal is whether the application of section 48 of Act 137 and the computation of damages, so copiously relied upon by the plaintiff is applicable to the circumstances of this case if at all.

In resolving the issues raised in this appeal, we are of the view that, this court must consider whether the application and interpretation urged upon this court by the Plaintiff's reliance on section 48 of the Sale of Goods Act, considering the evidence led by them in support, including the CRU monitor is sufficient to have enabled the trial court and any other court make a finding for them in terms urged upon this court in respect of the award of general damages.

Whenever it has been ascertained by a court of law, that a buyer has wrongfully neglected or refused to accept goods which it had contracted to buy from the seller, pursuant to section 47 (1) of the Sale of Goods Act, 1962 (Act 137) the seller may maintain an action against the buyer for damages for the non-acceptance.

In this case, it would therefore mean that the Plaintiff's may take an action against the Defendant's for this breach of contract. The facts in this case are very well known and the Plaintiff's have exercised the options available to them under the law and that is why they are in this court.

Furthermore, section 48 (1) of Act 137 has circumscribed the measure of damages that is available to be proven by the seller in case it institutes an action. This is defined as *"the measure of damages in an action for damages is the loss which could reasonably have been foreseen by the buyer at the time when the contract was made as likely to arise from the breach of contract."*

The above provisions are the exact re-statement of the locus classicus principle in the case of ***Hadley v Baxendale (1854) 9 Exch 341 156. E.R.145.***

The Supreme Court, speaking with unanimity in the case of ***Tema Oil Refinery v African Automobile Ltd. [2011] 2 SCGLR 907***, at *pages 929 to 930* explained in detail this case of Hadley v Baxendale in the following terms:-

> *"The locus classicus on the rule regarding remoteness of damage in contract which is applicable when the damages being claimed are general or unliquidated is to be found in the decision in Hadley v Baxendale [1854] 9 Exch 341 earlier referred to. In this case, the plaintiff's mill was brought to a standstill by the breakage of its only crankshaft. The defendant carriers failed to deliver the broken shaft to the manufacturer at the time it had promised to do, and the plaintiff sued to recover the profits it would have made had the mill been started again without the delay. The Court rejected the claim on the ground that the facts known to the defendant were insufficient to show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person. Expatiating on the judgment of the court, Baron Alderson, explained the rationale for its judgment thus:*
>
> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it.*

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff's to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from, such a breach of contract".

The statement of Baron Alderson in the ***Hadley v Baxendale*** case continued thus:-

"For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract… But it is obvious that in the great multitude of cases of millers sending off broken shaft's to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as would have been fairly and reasonably contemplated by both the parties when they made this contract."

It can therefore be stated with some degree of emphasis that Hadley v Baxendale establishes two limbs of foreseeability; and these are; (i) damages which are foreseeable from the nature of the breach itself and (ii) damages which are foreseeable by the parties at the time of contracting because special circumstances have been brought to their attention which make the damages within the reasonable contemplation of the parties.

Chitty on Contracts, General Principles, (25th ed) paragraph 1692 states on this principle thus:

> *"The principle laid down in **Hadley v Baxendale** have been interpreted and restated by the Court of Appeal in 1949 in **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd. [1949] 2 KB 528** and by the House of Lords in 1967, in **Koufos v C. Czarnikow Ltd (The Heron II) [1969] 1 AC 350.**"*

The learned Authors of Chitty on Contracts then summarized the effect of these decisions and its import on the rule in ***Hadley v Baxendale*** as follows:-

> *"A type or kind of loss is not too remote or consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question) it was within their reasonable contemplation as a not unlikely result of that breach."*

Under the circumstances of this case, and considering the information available to the defendants, what would a reasonable man in their position have expected a repudiation of the Brazilian alumina cargo to be?

Is it reasonable under the circumstances to foresee that such a breach would lead to the defendants being saddled with the difference in money value in respect of an Australian alumina cargo in respect of which they had never been aware off?

Similarly, even in respect of the Brazilian Cargo, can the losses be said to be sufficiently likely to result from the breach of the contract and to make it proper for them to be held liable for the losses as if they flowed naturally from the breach or that the loss should have been within their contemplation? From the settled findings of the trial court and confirmed by the first appellate court, it appears there is no such proximate or remote cause to enable the Defendants to be liable for the exemplary damages being urged on this court by the plaintiffs.

We have referred to portions of the findings by the learned trial Judge on how the Plaintiff claimed to have secured the vessel on 28th August, 2008 under a Charter Party Agreement dated 17th October 2008 marked in the ROA as Exhibit AD. The bill of lading supposedly in proof of this is marked as exhibit U in the ROA.

We have verified all the said findings and found them to be correct. For example, the Bill of lading, exhibit U, is consigned to the *"Order of TALCO management"* and is non negotiable.

The port of discharge is NIKOLAYEV, Ukraine or Poti, Georgia, and the vessel named is MV Maren Bulker, and the cargo therein is stated to be *"Sandy metalluigical Grade Alumina*" with a gross weight of 26, 249.79 MT.

This Bill of lading was dated 17th October 2008 in Brazil. Exhibit AD, the Charter Party on the other hand was dated 28th August, 2008 and it is the instrument by which the vessel was secured.

However, it is worth noting that, the bill of lading exhibit U did not make any reference to the Charter Party dated 28th August 2008, exhibit AD, but rather to another Charter Party dated 23rd September 2008 which is of no relevance to the Defendants. Plaintiff's representative testified in court that on 17th October 2008 the MV Marine Bulker set sail from Villa Do Conde Port in Brazil to Nikolayev, Ukraine.

However, per exhibit AA, dated 24th October 2008, the Plaintiff's per an email also of even date, exhibit Z communicated thus:-

> *"Charles/Felix,*
>
> *Pls. see attached for the new contract and invoice covering our latest agreement. To reiterate our position – please be advised in the event that VALCO fails to open a letter of credit from a bank acceptable to Glencore by the close of business on October 31, we well revert to the existing terms of our agreement (namely $465/ton price). Regards Matt"*

Exhibit AA is the Alumina Supply Agreement between the Plaintiff and Defendant, dated **24th October 2008.**

The question that begs for an answer is this:-

If the Brazilian cargo, meant for the Defendants, had already been consigned and shipped to TALCO on board MV. Maren Bulker on the 17th October 2008, what was there for the Plaintiff's to enter into an agreement with the Defendants to buy a Brazilian Cargo of 26, 250 metric tones of alumina as per exhibit AA dated 24th October 2008?

Quite clearly it is apparent that the cargo on board the MV Maren Bulker was not meant for the defendants as is clearly depicted by the Bill of lading, exhibit U.

Indeed the following explanation by the Plaintiff's representative in his testimony exposes the lack of candour on the part of Plaintiffs. He explained thus:

> *"On August 28th when defendant asked us to secure the cargo, we did. However, in the alumina industry you need to take your cargoes. So when that cargo secured we needed to move it. It was clear at that time that defendant was not performing, so we needed to make a decision on where to send the cargo.*
>
> *After reviewing our options, our shipping department decided the best place to send the cargo was to Talco, an alumina smelter in Tajikistan".*

From all the above analysis, it is quite certain that the findings of fact made by the learned trial Judge on very key material issues have been supported by the evidence in the appeal record.

This is because, exhibit U, did not make reference to the Charter Party of relevance to the Defendants, which is dated 28th August 2008, but rather as exhibit AD indicates to a charter party dated 23rd September 2008.

In view of the legal position that such documents are not transferable, on its face value, title to the cargo could not in any case have been passed onto the Defendants.

As a matter of fact, having considered the merits of the plaintiff's case in detail we are inclined to accept the conclusions of the learned trial Judge, which were accepted and confirmed by the Court of Appeal that the damages the plaintiff contended it suffered are neither proximate nor within permissible remote limits to entitle them to any meaningful award of damages. See also the case of ***Delmas America Line v Kisko [2003-2005] 2 GLR 544***, holding 3 where the Supreme Court expatiated on computation of damages in similar circumstances:

> *"The measure of damages for the undelivered portion of the goods was* ***the difference between the cost of the goods and their market price at the contracted place of destination****.*

Since the goods had not been delivered an adjustment could not be made for freight and other allowances because freight was a separate item of cost from the cost of goods even in C & F shipment term. Thus, the trial judge was right in excluding freight from the calculation of damages for non-delivery. In any case, the list of lost goods presented by the plaintiffs themselves, exhibit K, provided only the cost of the goods and made no reference to freight cost. However, since the court awarded exactly the figure provided by the plaintiffs as damages, no provision had been made for the element of damages that was to be used to compensate the aggrieved plaintiffs. On the evidence, however, the figures in exhibit K were certainly inflated because they were higher than those in exhibit B, the pre-litigation invoice submitted by the suppliers from which they were extracted. ***Unfortunately, the plaintiffs did not indicate the actual quantum of damages they had suffered.*** *The court would therefore use the more credible figures extracted from exhibit B in respect of the undelivered or lost goods, adjust them by a margin of ten per cent and grant that sum as general damages. Since they did not plead a higher profit margin as special damages no such award would be made."*

Speaking generally on the issue of the proximate and or remoteness of damage in the Plaintiff's case, we believe it is the several weaknesses in the formulation of the Plaintiff's case as had been enumerated in the judgments of the two lower courts, and further explained herein that had completely eroded any strength that the plaintiff's had in their quest for enhanced award of damages.

What must be noted is that, if the Brazilian Cargo was even not meant for the defendants, then the Australian cargo, which was not what they even contracted for would be too remote to merit any discussion on whether to consider the award of the statutory damages as is stipulated in section 48 (2) of the Sale of Goods Act, 1962 (Act 137).

Section 48 (2) of the Sale of Goods Act, connotes that, where a market is available for the repudiated goods the measure of damages is ***difference money,*** and that means, the difference between the contract price and the market price.

This then would imply application of general contract law principles to sale of goods contracts. Difference money as stipulated under section 48 (2) constitutes the **foreseeable loss** where there is an available market.

In considering the application of this section 48 (2) of the Sale of Goods Act, it has been very difficult to find local decided cases on the issue.

We have been persuaded by the decision of the England and Wales High Court (Commercial Court) in the case of **Glencore Energy UK Ltd v Cirrus Oil Services Ltd.** No. [2014] EWHC87 Comm. Case No. 2012 Folio 936 dated 24th January 2014, Coram Justice Cooke, and the American appellate Court of Illinois in the case of *Oloffson v Coomer 1973 II III App. 3d. 918, 296 N.E. 2D 871, coram: Alloy J.*

Since we would want to draw some parallels from the above English and American cases, we will set out the facts in extenso and also the relevant statutory provisions which are in pari materia to our own section 48 of the Sale of Goods Act, and finally the decisions of the courts.

FACTS OF THE CASE – GLENCORE V CIRRUS

In this action the claimant (Glencore) sought damages from the defendant (Cirrus Oil) for repudiation of a contract alleged to have been made on 4th April 2012 for the sale of 630,000 barrels of Ebok oil. Glencore's case is that the contract was concluded when a "firm offer" made in an email of 3rd April 2012 was accepted by a "good news" email from Cirrus Oil on the morning of 4th April 2012 in the context of negotiations which had been conducted between Mr Anthony Stimler for Glencore and Mrs Ivy Owusu for Cirrus Oil.

Ebok is a young oil field in Nigeria with several different wells and reservoirs. Commercial production commenced only in December 2010. It was agreed between the parties that Ebok crude oil is invariably produced and sold as a blend of oil from various wells or reservoirs within the Ebok field. The field is subject to a joint venture between Oriental Energy Resources and Afren Plc, with production controlled by Afren. The oil produced was sold on behalf of the joint venture by Socar Trading SA, which is the international trading arm of the Azerbaijan state oil company.

It appears that the nature of the arrangement between Afren and Socar involved Socar purchasing the crude oil from Afren and selling it at the same price to its purchasers but receiving a marketing fee for doing so of something in excess of $0.25 per barrel.

Following the alleged email acceptance of Cirrus Oil on 4th April 2012 Glencore purchased the relevant cargo from Socar, specifically for sale into Ghana, as the cargo was intended to be sold by Cirrus Oil to Tema Oil Refinery ("TOR").

Very shortly after the email of 4th April 2012, it became apparent that TOR would not accept a blend of Ebok crude oil, insisting that the cargo should comprise oil from only one well, – well 16 – an assay of which had been produced to it (together with two other assays).

Even though, many issues were set down for trial, only the following is germane to our circumstance in this case. The High Court, settled the issue thus:-

i) "If there was a binding agreement not induced by misrepresentation, as it is common ground that Cirrus Oil refused to proceed with the contract, **what damages are recoverable by Glencore? The issue between the parties here, on the basis that the loss falls to be assessed as the difference between the contract and market value of the oil, is the true open market value at the time it would have been delivered at the end of May 2012."**

The judgment of the English High Court, continued it's analysis by expatiating on section 50 (2) and (3) of the English Sale of Goods Act, 1979, which provisions are in pari materia to our own sections 47 and 48 of the Sale of Goods Act.

"Section 50 (2) and (3) of the Sale of Goods Act 1979 provides for damages for non-acceptance, on the basis of the prima facie rule that the loss is to be ascertained as **"the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance at the time of the refusal to accept)", is a claim for lost profits."**

The judgment then continued by explaining the rationale for the computation of damages provided under the said sections 50 (2) & (3) of the English Sale of Goods Act. It is to be noted that, this rational is applicable to our own circumstances and would have been deemed to be applicable to this case if the plaintiff's had pleaded and led evidence on the multipliers to entitle them to claims under special damages, using the second limb to the ***Hadley v Baxendale*** principle. This is what the learned trial Commercial Judge said:

> *"The measure of damage constituted by section 50(2) and (3) of the Sale of Goods Act was designed to compensate the* ***seller for the loss of the bargain with the buyer by computing how much worse off the seller would be, if at the time of the breach, he had sold the goods to a substitute buyer****. The measure constitutes both a ceiling and a floor to the loss claim on the assumption that the seller had gone out into the market and sold at the date of breach. Movement in the market thereafter is then excluded from the calculation on the basis that any change in the figures affected thereby is the result of the seller's own decision to play the market."*

OLOFFSON V COOMER CASE

The facts and the decision of the Appellate court of Illinois, in the case of **Oloffson v Coomer**, already referred to supra supports the decision we have come to in this case. In the **Oloffson v Coomer** case, it is to be noted that, the judgment from which Oloffson appealed awarded him as plaintiff damages, which was the difference between the contract and the market prices in June, 1970, the day upon which Coomer, the defendant first advised Oloffson he would not deliver.

Facts and decision in the said case are as follows:-

"Oloffson was a grain dealer. Coomer was a farmer. Oloffson was in the business of merchandising grain. Consequently, he was a "merchant" within the meaning of section 2-1-4 of the Uniform Commercial Code. (III.Rev. Stat. 1969, ch 26, $2-104). Coomer, however, was simply in the business of growing rather than merchandising grain.

On April 16, 1970, Coomer agreed to sell to Oloffson, for delivery in October and December of 1970, 40,000 bushels of corn. Oloffson testified at the trial that the entire agreement was embodied in two separate contracts, each covering 20,000 bushels and that the first 20,000 bushels were to be delivered on or before October 30 at a price of $1.12 ¾ per bushel and the second 20,000 bushels were to be delivered on or before December 15, at a price of $1.12 ¼ per bushel. Coomer, in his testimony agreed that the 40,000 bushels were to be delivered but stated that he was to deliver all he could by October 30 and the balance by December 15.

On June 3, 1970, Coomer informed Oloffson that he was not going to plant corn because the season had been too wet. He told Oloffson to arrange elsewhere to obtain the corn if Oloffson had obligated himself to deliver to any third party. The price for a bushel of corn on June 3, 1970, for future delivery, was $1.16. In September of 1970, Oloffson asked Coomer about delivery of the corn and Coomer repeated that he would not be able to deliver. Oloffson, however, persisted. He mailed Coomer confirmations of the April 16 agreement. Coomer ignored these. Oloffson's attorney then requested that Coomer perform. Coomer ignored this request likewise.

The scheduled delivery dates referred to passed with no corn delivered. Oloffson then covered his obligation to his own vendee by purchasing 20,000 bushels at $1.35 per bushel and 20,000 bushels at $1.49 per bushel. The judgment from which Oloffson appeals awarded Oloffson as damages, the difference between the contract and the market prices on June 3, 1970, the day upon which Coomer first advised Oloffson he would not deliver.

Oloffson argues on this appeal that the **proper measure of his damages was the difference between the contract price and the market price on the dates the corn should have been delivered in accordance with the April 16 agreement**. Plaintiff does not seek any other damages. The trial court prior to entry of judgment, in an opinion finding the facts and reviewing the law, found that plaintiff was entitled to recover judgment only for the sum of $1,500 plus costs as we have indicated which is equal to the amount of the difference between the minimum contract price and the price on June 3, 1970, of $1.16 per bushel (taking the greatest differential from $1.12 ¼ per bushel multiplied by

40,000 bushels). We believe the findings and the judgment of the trial court were proper and should be affirmed." *Emphasis supplied*.

It should be noted that, in the above cited Illinois appellate court case, the Plaintiff indeed pleaded and led evidence on the difference between the contract price and the market price on the due dates that the grain should have been delivered.

However, since the Plaintiffs have abandoned their special damages, and have admitted that no evidence was led on how they sold the rejected alumina to Talco, they should be deemed not to be entitled to any measure of damages therein because they are special in nature.

We have derived some guidance in the decision we have arrived at from the combined effect of the decisions in the ***Delmas America Africa Line v Kisko Products***, ***Glencore Energy v Cirrus Oil*** and ***Oloffson v Coomer*** cases all already referred to supra.

In view of the above observations we deem it expedient to set out the facts in extenso in the said **Delmas America Africa Line Inc. v Kisko Products (Ghana) Ltd**, as follows:-

> "*The Plaintiff, a Ghanaian company that dealt in used car spare parts and accessories, purchased a consignment of those goods in Canada. Ocean marine shipping, the freight forwarders engaged by the Plaintiffs, contracted the defendants, a shipping company based in the United States, to transship the goods to Ghana. When the container arrived in New York from Canada, the defendants on the ground observed that it exceeded the maximum allowable weight, engaged a stevedoring company which reworked the cargo and removed the excess.*
>
> *However, when the cargo arrived in Ghana, the Plaintiffs found that a number of the items were damaged and some of the goods taken off the container in New York were missing. The defendants however ignored the Plaintiffs' requests to address the problem. The Plaintiffs, therefore brought an action at the High Court as owners or consignees for* ***general*** *and* ***special damages*** *against the defendants for breach of contract by failing to provide adequate protection for the goods in the container. In*

their defence, the defendants contended, inter alia, that there was no privity of contract between them and the plaintiffs because the contract for the shipping of the goods was with Ocean Marine Shipping and the consignees of the goods were Ocean Lane Shipping and since the Plaintiffs were neither the consignees nor the indorsees of the bill of lading, they lacked capacity under section 7 (1) of the Bill of Lading Act, 1961 (Act 42) to bring the action. Moreover, they the defendants, were exempted from liability under section 4 (2) (1) of Act 42. The plaintiffs however submitted that they had brought the action not under Act 42 but at common law as the undisclosed principals of the consignors, Ocean Marine Shipping. The court found on the evidence, inter alia that:

i. the consignors had acted merely as agents of the plaintiffs .

ii. the defendants were aware that the plaintiffs were the owners of the goods.

iii. the defendants were responsible for the reworking of the goods and

iv the surveyor's report supported the claim of the plaintiffs that the stowage of the goods after the reworking was unsatisfactory.

The trial Judge then held, inter alia, that, as the real owners of the goods, the plaintiffs were entitled to sue the defendants in their capacity as an undisclosed principal, and on the **basis of the values of both the damaged and lost goods the Plaintiffs had pleaded,** she awarded the plaintiffs **both general** and **special damages** denominated in US dollars. An appeal by the defendants to the Court of Appeal was dismissed, but the Court changed the currency of the damages awarded against the defendants to Canadian Dollars.

Both parties felt aggrieved by this judgment and therefore whilst the defendants appealed, the plaintiffs also cross-appealed to the Supreme Court.

The Supreme Court by a majority decision of 4 – 1, dismissed both appeals, and held inter alia as follows:-

> "The proper measure of damages for the goods that were delivered in a damaged condition was the **difference between the actual or potential value of the relevant item as undamaged goods, and**

> **what those goods would have fetched as damaged goods at Tema. However, the courts below did not have any credible figures, actual or estimated before them on the latter aspect because the plaintiffs made no special pleadings for them**. Accordingly, the court would merely award general damages based on exhibit figures, adjusted upwards by ten percent as general damages."

In view of the above it is quite clear that, having abandoned the relief of special damages, the plaintiffs can only be entitled to award of damages under the first limb of the rule in **Hadley v Baxendale**. As has been demonstrated in this judgment, the Plaintiff's have not led any credible evidence that will entitle them to the enhance measure of damages that they are requesting for.

In the same vein, we have observed that, the parties in the **Glencore Energy v Cirrus Oil** cases already, referred to supra, led expert evidence on the movement of the Ebok Oil on the markets to demonstrate how sophisticated and developed it was. Glencore Energy thus must be deemed therein as being forthright by coming out with all the necessary evidence capable of assisting the court in arriving at the decision given therein.

In any case, from the way the learned trial Judge analsyed the judgment, it is clear that the measure of damages in issue therein was special damages. For example, the learned trial Judge observed thus:

> "The overall position which emerges therefore is that of a crude oil which traded in January – July 2012 at prices between DTD - $4.40 and DTD $ 5.50 per barrel."

Elsewhere in the judgment, the learned trial Judge remarked as follows:-

> "In the light of these matters, and doing the best I can with the evidence available, I find that the market value of the Glencore/Cirrus Oil value on an FOB Nigeria basis was DTD -$4.90 per barrel which equates to DTD - $3.75 CFR Tema.
>
> I find that, on the balance of probabilities, the cargo quantity would have been 661,500 barrels as Glencore would have exercised its option to take the additional 5% on top of the 630,000 barrel figure (since it was making

such a profit) and there was oil available to take, as shown by the contract quantity sold to Exxon."

The English High Court, concluded the judgment thus:

> "The difference between the net contract price of DTD + $0.03 per barrel and the market value of DTD -$3.75 per barrel is therefore $3.78 per barrel. The difference on a cargo quantity of 661,500 barrels amounts to $2,500,470. "

All these are clear indications that it was special damages that the court considered and awarded. Whilst we are not dealing with special damages in the instant case, this measure of damages therefore becomes irrelevant and superfluous.

CONCLUSION

We are persuaded by the rule in *Hadley v Baxendale* and the *Glencore v Cirrus* and the other cases referred to and state that, the computation of damages under Section 48 of the Sale of Good Act can either be general or special depending on the circumstances of each case.

The first limb of the principle in *Hadley v Baxendale* applies to general damages, that is damages that are foreseeable without proving that special circumstances were brought to the attention of the person in breach. The second limb of the principle applies to special damages and this implies that those special damages have been proved, and are those damages that are foreseeable by the parties at the time of contracting because special circumstances have been brought to their attention and this makes the damages within the reasonable contemplation of the parties. Again, as the name implies, being special damages they have to be pleaded and proven at the trial.

It will be recalled that, the Plaintiff's endorsed their writ of summons with a relief of USD 6,918,750.00 as special damages for the loss they suffered for the breach of contract. However as later events have proven, the trial court dismissed the claims of special damages as not having been proven, and in this court, the Plaintiffs have abandoned it altogether.

What this therefore means is that, the Plaintiffs must be deemed to be entitled to only general damages under the heads of claim under section 48 of the Act.

See the case of ***Delmas America Lines v Kisko*** already referred to. Since the plaintiffs have not led any evidence on the multipliers which will entitle the court to use in the award of the general damages on the lines suggested in the Delmas America Line case, the Plaintiffs must be deemed to have not led credible evidence to have entitled them to enhanced general damages using the first limb of the principle in *Hadley v Baxendale.*

We have read the statement of case of the Plaintiff's and would want to reiterate the fact that, the contract price/market price differential stipulated in section 48 of the Act, is not a computation of lost profits, as was contended and sought to be applied in the mathematical computation by the plaintiff's.

Lost profit is the difference between the total net cost to the seller of acquiring the goods and bringing them to the market on the one hand and the net sale price that would have been obtained on the other. In the ***Glencore v Cirrus Oil*** case, already referred to supra, the court stated that, *"The difference between this measure of damages and the section 50 of the English Act computation is illustrated by the different claims originally put forward in the particulars of claim by Glencore."* See also ***Oloffson v Coomer***, already referred to.

In expatiating further on the applicability of the section 50 (2) and (3) of the English Sales of Goods Act, which are in pari materia with our own section 48, the learned Justice Cooke stated as follows in the ***Glencore v Cirrus case*** as follows:-

> *"The alternative claim which was the only one pursued at the trial, was the claim based on section 50 (2) and (3) of the Sale of Goods Act. The point is illustrated by a simple situation where the cost of the goods to the seller is £100, the on sale price is also £100, and the market price at the time of the breach by the on sale buyer is £50. If the buyer had accepted the goods, the seller would in fact have made no profit at all, but, in accordance with section 50 (2) and (3) of the Sale of Goods Act, the prima facie measure of loss is £50 because the seller is left with goods worth less than the contract price."*

With the above explanation, we are of the considered view that, the Plaintiffs if they had succeeded in proving their special damages would have been entitled to measure of damages using the above formula or if they had made alternative claims based on proven damages for breach.

Under the circumstances, what the Plaintiffs are entitled to are general damages using the first limb of the *Hadley v Baxendale* principle.

However, since the Plaintiff's did not lead sufficient evidence with any degree of clarity and certainty to merit the computation of damages therein, we are of the view that the award of nominal damages by the trial court and confirmed by the Court of Appeal in favour of the Plaintiffs are considered adequate.

We will therefore dismiss the appeal herein.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

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