In The Supreme Court of Nigeria

On Friday, the 12th day of April 2002

Before their Lordships

Idris Legbo Kutigi	…..	Justice, Supreme Court
Emmanuel Obioma Ogwuegbu	…..	Justice, Supreme Court
Anthony Ikechukwu Iguh	…..	Justice, Supreme Court
Aloysius Iyorgyer Katsina-Alu	…..	Justice, Supreme Court
Emmanuel Olayinka Ayoola	…..	Justice, Supreme Court

SC.116/1997

Between

Sabru Motors Nigeria Ltd ….. Appellant

And

Rajab Enterprises Nigeria Ltd ….. Respondent

Judgment of the Court

Delivered by

Emanuel Obioma Ogwuegbu. JSC

The appellant was the defendant in Suit No ADSY/25/93 instituted by the respondent as plaintiff in the High Court of Adamawa State, Yola Judicial Division. The defendant was an accredited distributor of the Anambra Motor Manufacturing Company Ltd. (Anamco for short). The parties entered into a contract for the sale of two Mercedes Benz Trucks, Model L.911/48C by the defendant to the plaintiff at a unit cost of ₦846,259.20. The plaintiff paid a total of ₦l,692,519.40 for the two vehicles with a bank draft. When the defendant failed to deliver the vehicles, the plaintiff commenced proceedings leading to this appeal.

Pleadings were ordered, filed and exchanged. In paragraph 12 of its amended statement of claim the plaintiff averred as follows:

> 12. Whereof the plaintiff claims against the defendant:
>
> (a) The sum of one million six hundred and ninety two thousand, five hundred and nineteen naira, forty kobo being the money originally paid to the defendant for the delivery of the two Mercedes L.911/48C trucks and the additional sum of four million, three hundred and seven thousand naira which the plaintiff will have to add to the sum originally paid to the defendant if the plaintiff were to buy the two trucks in the open market.
>
> (b) In the alternative to (a) above an order of this Hon. Court to compel the defendant to deliver to the plaintiff two new Mercedes trucks L.911/48C model.
>
> (c) An order of this Hon. Court compelling the defendant to pay interest on the sum of ₦1,692,519.40 at current bank rate to the plaintiff from the month of March 1993 until judgment is delivered."

The plaintiff's case as disclosed in the pleadings and from the evidence is that in February 1993, it placed an order with the defendant for the purchase of two Mercedes Benz trucks Model L.911/48C at a unit price of ₦846,259.20 totaling ₦1,692,517.40 excluding 1½% commission payable on delivery of the goods. The plaintiff duly paid for the two trucks and the money was remitted to Anamco. Subsequently, the defendant by a letter dated 31st March, 1993 (exhibit "R.S.1") informed the plaintiff that the prices of the vehicles had been reviewed upwards to ₦1,500,000.00 per truck and requested the plaintiff to remit an additional sum to make up the increased price. As a matter of fact, the defendant had on 13th April, 1993 collected the two trucks from Anamco at the old rate as evidenced by invoice No 9390 (exhibit "R.S.3") and instead of delivering them to the plaintiff, the defendant sold them to a third party, Leventis, on the pretence that the plaintiff did not pay the additional sum requested by the defendant. It was part of the plaintiff's case that the money which he paid for the trucks was raised from his bankers and he was charged interest at the rate of 35% from 1993 to 1994 and 21% thereafter and that the price of the trucks had gone up to ₦3,000,000.00 per truck.

The defendant's case was that the price of the trucks in question as at 1st February, 1993 was ₦2,039,180.00 at the rate of ₦1,019,590 each and that the plaintiff paid ₦1,692,519.40 which was not up to the total cost of the trucks. It was further averred that the price list of Anamco (exhibit "RS4") was subsequently reviewed upwards to ₦3,000,000 less 8.5% for the two trucks and that as a result, a letter dated 5th May, 1993 (exhibit "R S 5") was addressed to the plaintiff to pay an additional sum of ₦1,052,480.60 to cover the full costs of the two vehicles or elect to pay for one truck only and be refunded the balance of ₦320,019.40k of the money it had already paid. As the defendant did not hear from the plaintiff, it forwarded a draft (exhibit 7A) to the plaintiff with a letter dated 26th June, 1993. This was in refund of the money paid by the plaintiff and that the plaintiff refused to accept the refund. The defendant admitted taking delivery of the vehicles from Anamco on 13th April, 1993 and sold them to other customers.

At the conclusion of hearing, the learned trial Judge evaluated the evidence. He found for the plaintiff as follows:

(a) ₦1,692,519.40 being the price which plaintiff paid to the defendant for the two vehicles and

(b) ₦300,000.00 as damages.

Items (a) and (b) totaled ₦1,992,519.40 with interest on ₦1,692,519.40 at 5% simple interest from 1st March, 1993 to 31st March, 1995 and interest on the total judgment debt from 20/4/95, the date of judgment with interest. He entered judgment for the plaintiff accordingly.

The learned trial Judge found as a fact that the purchase price agreed by both parties was ₦846,259.20 and that the plaintiff paid ₦1,692,519.40 representing the price of the two trucks. He also found that the defendant took delivery of the two trucks from Anamco on 13/4/93 and that its failure to deliver them to the plaintiff that day or the day after was wrongful.

Dealing with the alternative claim for specific performance, he referred to Section 52 of the Sale of Goods Act, 1893 and held that as the trucks in question were not "specific or ascertained," the plaintiff was not entitled to specific performance. As to the claim for damages, the learned trial Judge referred to Section 51(3) of the Sale of Goods Act, 1893 and held that the plaintiff is entitled to the sum of ₦1,692,519,40 which it paid and that it failed to prove its actual loss at the time the defendant defaulted in delivering the vehicles. He nevertheless awarded ₦300,000.00 as damages.

The plaintiff was not satisfied with the judgment and it appealed to the Court of Appeal, Jos Division. Its complaints were that the learned trial Judge refused to make an order of specific performance and also the inadequacy of damages awarded. The court below dismissed the appeal on specific performance and allowed that on damages holding that the learned trial judge ought to have awarded the plaintiff the sum of ₦1,307,480.60 being the difference between the contract price of the two trucks (₦1,692.519.40) and their market or current price of ₦3,000,000.00 as at 13/4/93 when the defendant defaulted in delivering them to the plaintiff.

Dissatisfied with the judgment of the court below, the defendant appealed to this court. It filed three grounds of appeal and obtained the leave of this court to file and argue grounds of fact and mixed law and fact. The only issue formulated by the defendant from the three grounds of appeal as arising for determination is whether the court below was right after finding the plaintiff's evidence on damages inconsistent and/or contradictory, to have reviewed the same damages of ₦l,992,519.40 awarded by the trial court to ₦3,000,000.00 by placing reliance on the pleadings of the parties.

The learned counsel for the defendant in his brief of argument submitted that for a party to obtain relief on special damages, such relief must specifically be pleaded and proved. He referred the court to paragraphs 6 and 11 of the amended statement of claim filed by the plaintiff and argued that the defendant specifically denied them in its statement of defence. He specifically mentioned paragraph 10 of the statement of defence and that on a complete reading of the statement of defence, it cannot be said that the defendant admitted that the plaintiff is entitled to the damages claimed. It was further submitted that in paragraph 11 of the amended statement of claim the plaintiff claimed six million naira as current price of 2 Mercedes Trucks due for delivery to it, that this paragraph was clearly denied in paragraphs 3 and 15 of the statement of defence and that the denial put the plaintiff to strict proof of the damages claimed. The court was also referred to Section 51(3) of the Sale of Goods Act, 1893. It was also submitted that the plaintiff did not plead the price of the trucks at the time of the refusal to deliver.

It was contended that even if the pleadings were held to avail the plaintiff, it was wrong for the court below to have reviewed the damages awarded for the sole reason that there was an admission on the pleadings and that the court was also in error to have considered paragraph 10 of the statement of defence in isolation and without regard to paragraphs 2 and 15 thereof. The case of *Titiloye v Olupo (1991) 7 NWLR (Part 205) 519, (1991) 9-10 SCNJ 122 at 124 and 125* was cited in support of counsel's contention.

It was further contended that the plaintiff called two witnesses in proof of damages and that the court below rightly found their evidence to be "conflicting", "contradictory" and "contrary to pleadings", that PW1 and PW2 gave inconsistent evidence of the current price of the trucks and that the same court should not have proceeded to find an admission in exhibit "RS 1" which was

tendered through the plaintiff and which exhibit gave the price as ₦l,500,000.00 per vehicle, an amount which the same court found to be in conflict with the evidence.

It was finally submitted that the case of the plaintiff at the trial by its amended statement of claim was for ₦6,000,000.00 as cost of the trucks at the time of trial, that it is trite that a party is not permitted to change his case on appeal faced with the consequences of inconsistent, unreliable and contradictory evidence it called and to change its entire case relying on an admission which was never its case. We were referred to the case of *Imana v Robinson (1979) NSSC 1 at 11* on what strict proof entails. The court was urged to hold that given the findings of the court below on the evidence led by the plaintiff and the position held by the defendant in its pleadings, the court below was in error to have increased the damages awarded by the trial court and that the appeal should be allowed.

The learned counsel for the plaintiff adopted the sole issue identified by the defendant in its brief. It was his contention that counsel for the defendant in the brief laid unnecessary emphasis on the observation of the court below with regards to the evidence of the plaintiff's witnesses on the exact amount of damages the plaintiff was entitled to and overlooked the reasons given by that said court in arriving at its decision to interfere with the award made by the trial court. He referred the court to paragraph 12(a) of the amended statement of claim containing the substance of the plaintiff's claim in relation to damages and that it was the purchase price of the two vehicles which it had earlier paid to the defendant plus the amount it was entitled to if it were to purchase them in open market at the time the defendant defaulted in delivering them.

It was further submitted that the trial Judge having found that the plaintiff paid the defendant the full purchase price of the two vehicles, he failed to deliver and was therefore in breach of the contract, that the only issue left to be decided by him was the amount of damages which the plaintiff was entitled and that the answer is provided in Section 51(3) of the Sale of Goods Act, 1893. It was also argued that proof of price of the two vehicles at the time the vehicles ought to have been delivered became a question of law based on proved or admitted facts.

It was pointed out in the plaintiff's brief that special damages were mentioned in paragraph 11 of its amended statement of claim and that the actual and material relief claimed by the plaintiff against the defendant is contained in paragraph 12(a) which superceded the averment in paragraph 11.

It was further submitted that paragraph 10 of the statement of defence read together with exhibit "RSl" (a letter written to the plaintiff by the defendant showing that the price of each vehicle head risen to one million, five hundred naira) supplied the evidence and provided the basis for calculating the actual sum due to the plaintiff within the provisions of Section 51(3) of the Sale of Goods Act and that this was the error which the court below corrected when it awarded the sum of ₦l,307,480.60 which the plaintiff needed to make up the ₦3,000,000.00 to purchase the two vehicles in open market at the date of expected delivery. The court was urged to dismiss the appeal and to hold that the court below had done substantial justice without relying on the niceties and technicalities which would have had the effect of defeating justice.

The issue canvassed in this appeal concerns the adequacy of damages awarded to the plaintiff by the learned trial Judge which was reviewed upwards by the court below when the plaintiff's evidence in proof of its claim for damages is said to be inconsistent with its pleadings. Reliance was placed by both parties on various paragraphs of their pleadings as well as Section 51(3) of the Sale of Goods Act, 1893, an English Statute which is of general application. The courts below also considered the pleadings as well as Section 51(3) of the Act in relation to the plaintiff's claim for damages for non-delivery. Section 51 of the Sale of Goods Act provides:

> 51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

I will now consider paragraphs 6, 11 and 12(a) of the amended statement of claim and paragraphs 3, 10 and 15 of the statement of defence.

Amended Statement of Claim:

Paragraphs:

6. The defendant in an attempt to defraud the plaintiff and make secret gains for itself wrote series of letters to the plaintiff informing the plaintiff that the manufacturing company (Anamco Ltd.) had increased the price of the vehicles to one and half million naira per vehicle even after the defendant had taken delivery of the vehicles at the old price of ₦846,259.70k each and requested the plaintiff to pay additional sum of money to make up three million naira if the plaintiff desired to have the vehicles delivered to her. The plaintiff will rely on all the defendants' letters in this regard at the hearing of this suit.

11. The plaintiff avers that it will now require Six Million Naira at the current market value, to purchase the Mercedes trucks in question in the open market which the plaintiff now claims as special damages again defendant.

12 (a) Where of the plaintiff claims against the defendant

(a) The sum of *One Million, Six Hundred And Ninety Two Thousand, Five Hundred And Nineteen Naira, Forty Kobo being* the money originally paid by the plaintiff to the defendant for the delivery of the two Mercedes L.911/48C Trucks and the additional sum of *Four Million, Three Hundred And Seven Thousand Naira* which the plaintiff will have to add to the sum originally paid to the defendant if the plaintiff were to buy the two trucks in the open market.

(The italics are for emphasis)

Statement of Defence:

Paragraphs:

3. The defendant specifically denies paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the plaintiff's statement of claim and contends that the plaintiff is not entitled to the relief sought.

10. In reaction to paragraph 6 of the plaintiff's claim, the defendant avers that in line with the condition in the provisional price list issued by the manufacturers, *the price List of Anamco was reviewed and the cost of Mercedes Trucks L.911/48C was communicated to the plaintiff by defendant. Reliance shall be placed on Anamco's letter of 31-3-93 and revised price list of 25-3-93 to plaintiff. (Plaintiff is given notice to producer the original at the trial).*

15. Defendant specifically deny paragraph 11 of plaintiff's claim.

(Italics are for emphasis)."

An appeal is a rehearing by the appellate court with regard to all the questions involved in the action, including the question of what damages ought to be awarded. See section 16 of the Court of Appeal Act and Section 22 of the Supreme Court Act. The court can therefore substitute its own assessment if it decides to interfere at all with the Judge's award. See *Flint v Lovell (1935) 1 KB 354* and *Davies v Powell D Collieries Ltd. (1942) AC 601.* But an appellate court will not be inclined to reverse the finding of a trial Judge as to the amount of damages merely because it thinks that if it had heard the case in the first instance, it would have given a lesser sum. In order to justify a reversal of the award made by a trial court, an appellate court should be satisfied whether on the ground of excess or insufficiency that the Judge has acted on a wrong principle of law and that he has made an entirely erroneous estimate of the damages.

The court below indeed found that the evidence of PW1 is in conflict in itself and also in conflict with paragraph 11 of the amended statement of claim. The contention of the plaintiff is that it is at least entitled to ₦3,000,000.00 inclusive of the contract price of the two vehicles relying on Section 51(3) of the Sale of Goods Act and exhibits "RS1" and "RS3".

The court below after considering the evidence and the relevant Section of the Sale of Goods Act set aside the award of ₦1,992,519.40 as damages to the plaintiff and in its place, substituted the sum of ₦3,000.00. It held as follows:

> "It is crystal clear that the defendant, as per its letter dated 31/3/93 Ex. RSI admitted that the unit price of the trucks in question had been increased to ₦1,500,000.00. No further evidence is required to prove same. There being no evidence of any further increase that price is deemed to be the market price as at 13/4/93 when the defendant defaulted in delivering the two trucks. At the close of pleadings there was no issue requiring resolution with respect to the price of the vehicles in question as at 13/4/93. I therefore agree with the learned counsel to the plaintiff that the learned trial Judge ought to have awarded to the plaintiff the sum of ₦l,307.480.60 being the difference between the contract price of the two trucks (₦l,692,519.40.) and their market or current price of ₦3,000.000.00 as at 13/4/93"

The learned trial Judge reviewed the evidence of the plaintiff as to the market or current price of the two vehicles and came to the following conclusion:

> "This piece of evidence is also not useful. So I am left with Ex. RS1. Where does the writer of Ex. RS1 get his information that the price list has gone up to ₦l,5000,000.00: No new price list was referred to. But the difference has been worked out as ₦960,820.00 that being the market or current price (sic) at the time the defendant refused to deliver viz 13/4/93 or thereabout. In this case the plaintiff has not proved his actual loss and she is subject to all the rules on damages and the doctrine of mitigation."

The learned trial Judge cannot query the source of the information contained in exhibit "RS1" when the plaintiff pleaded it in paragraph 6 of its amended statement of claim and the defendant admitted forwarding the said exhibit "RS1" to the plaintiff in paragraph 10 of its statement of defence. The defendant went further to give the plaintiff notice to produce the original at the trial. The reason given by the learned trial Judge for not awarding damages based on the market price (exhibit R.S l under the provisions of Section 51(3)) is not that plaintiff's evidence is inconsistent with its pleadings. His reason was that exhibit "RS1" is of doubtful origin. He therefore concluded that plaintiff did not prove actual loss. This reason is untenable and was based on a wrong principle of law. As there was no finding by the learned trial Judge on the inconsistency of plaintiff's evidence with its pleadings, that issue does not arise in this appeal.

Exhibit "RS l" was written by the Commercial Manager of the defendant on 31/3/93 and the two trucks were delivered to the defendant by Anamco on 13/4/93. The said exhibit "RS l" reads:

> "31st March, 1993.
> Alhaja Jibrilla Mubi,
> Rajab Enterprises (Nig.) Ltd.
> Nepa Road,
> Jimeta - Yola.
>
> Dear Sir,
>
> Re: Purchase of L.911/48C
>
> We write to inform you that we have received a letter from Anamco Ltd. informing us that the L911/480 which we made deposit for, will be ready for collection by the end of March, 1993. You have made a deposit of 20% down payment for 2 No L911/48C at the rate of ₦l,019,590.00 to us. We are asking you to pay the remaining balance of 80%. But we have received a letter from Anamco dated 27/3/93 that the prices of vehicles have changed.
>
> *Now the vehicle that you made deposit for has increased to ₦1,500,000.00 (One million, five hundred thousand naira only).*
>
> The difference now is ₦480,410.00 (four hundred and eighty thousand, four hundred and ten naira only) for the two vehicles ordered, you should therefore pay additional sum of ₦960,820.00 (Nine hundred and sixty thousand, eight hundred and twenty naira only) drawn in favour of Anamco Ltd. We therefore look forward to receiving your full payment of ₦2,388,246.00 (two million, three hundred and eighty eight thousand, two hundred and forty six naira only) on or before the said date ,,,,,,,,,,,,,,,,,,,,
>
> Yours faithfully,
>
> Sabru Motors (Nig) Ltd.
>
> Sgd.
>
> Manager (Commercial)"

(Italics is for emphasis)

Exhibit "RS1" as mentioned earlier is the delivery note dated 13/4/93 showing that the two vehicles were delivered to the defendant on 13/4/93 at the price of ₦846,259.70 each. The courts below found as a fact that the plaintiff paid fully for the two vehicles, that they were delivered to the defendant on 13/4/93, that the defendant refused to deliver them to the plaintiff, sold them to a third party and was therefore in breach of their agreement. By the provision of Section 51(3) of the Sale of Goods Act which I have reproduced in this judgment and there being an available market for the type of vehicles in question at the time of breach, the measure of damages is therefore to be determined by the difference between the contract price and the market or current price at the time when the vehicles ought to have been delivered, or, if no time was fixed, then at the time of the refusal

to deliver. The learned trial Judge found that the vehicles having been collected on l3/4/93, the defendant ought to have delivered them on that day or the next day. There was no appeal against that finding. The court below applied provision of Section 51(3) to the facts as established by the pleadings and awarded ₦3,000,000.00 to the plaintiff as damages less the contract price which the plaintiff had already paid to the defendant.

The narrow issue is the way and manner the current or market price was arrived at. The court below found that by the letter dated 31/3/93 (exhibit "RS1") the defendant admitted that the unit price of the trucks in question had been increased to ₦1,5000.00, that the plaintiff pleaded the exhibit "RS1" in paragraph 6 of its amended statement of claim, that the defendant in paragraph 10 a of its statement of defence admitted paragraph 6 and that further evidence was not required to prove that fact. If that was the only issue at the trial, the plaintiff would not have offered any evidence on it because at the close of pleadings, there was no issue requiring resolution in respect of the price of the vehicles as at 13/4/93. See Section 75 of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990 which provides that:

> "No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided ……"

The proviso is not applicable.

That admission supplied the market or current price of the vehicles in the absence of any other price list. At the close of pleadings, issue was joined on the primary question of liability which the courts below resolved against the defendant. With the resolution of that issue and the admission by defendant of the market or current price, the quantum of damages is as prescribed by Section 51(3) of the Sale of Goods Act. The unit price of the type of vehicle in question at the time of non-delivery is a plain and an acknowledged fact as disclosed in exhibit "RS1" and the defendant in paragraph 10 of its statement of defence frankly admitted it. It is trite law that what is expressly admitted in a pleading requires no further proof. The court below was therefore entitled to ignore whatever evidence was led as to the price of the vehicles at the time of default because Section 51 (3) of the Act has fixed the amount of damages recoverable by a plaintiff who comes within its ambit. I agree with the court below that the learned trial Judge ought to have awarded to the plaintiff the sum of ₦1,307,480.60 being the difference between the contract price of the two trucks and their market or current price of ₦3,000,000.00 as at 13/4/93.

The learned trial Judge rightly found that Section 51(3) of the Sale of Goods Act applied but failed to apply it and this gave the court below the opportunity to interfere and reassess the damages. See *Davies v Powell Duffryn Associated Collieries (supra)* and *Cavanagh v Ulster Weaving Co. (1960) A.C. 145.* The damages recoverable under Section 51(3) are quantified on proof of market or current price and from the admission contained in the statement of defence and the production of exhibit "RS1" in evidence, no further proof was required.

In conclusion and for the reasons stated above, the appeal fails and it is dismissed by me. I award ₦10,000.00 costs in favour of the plaintiff.

Judgment delivered by
Idris Legbo Kutigi. JSC

I read in advance the judgment just rendered by my learned brother Ogwuegbu JSC. I agree with his reasoning and conclusions. It is trite what is expressly admitted in a pleading and conclusions. It is trite that what is expressly admitted in a pleading needs no further proof and the Court of Appeal rightly fixed the amount of damages recoverable as prescribed by Section 51(3) of the sale of Goods Act, 1893 a statute of general application. The appeal is clearly devoid of merit. It is accordingly dismissed with ₦10,000.00 costs to the plaintiff/respondent.

Judgment delivered by
Anthony Ikechukwu Iguh. JSC

I have had the privilege of reading in draft the judgment of my learned brother, Ogwuegbu, JSC. just delivered and I entirely agree that this appeal is without substance and ought to be dismissed.

The background facts leading to the institution of these proceedings at the High Court of Justice of Adamawa State of Nigeria have been adequately outlined in the leading judgment of my learned brother and no useful purpose will be served by my recounting them all over again. It suffices to state that the appellant was at all material times an accredited distributor of the Anambra State Motor Manufacturing Company Limited. Both the appellant and the respondent had entered into a contract for the sale and delivery of two Mercedes Benz L.911/48C Trucks by the appellant to the respondent. On the appellant's failure to

deliver the trucks, the respondent initiated proceedings at the High Court of Justice, Adamawa State against the appellant claiming as follows:

(a) The Sun of one million six hundred and ninety two thousand, five hundred and nineteen naira, forty kobo being the money originally paid by the plaintiff to the defendant for the delivery of the two Mercedes L.911/48C trucks and the additional sum of four million, three hundred and seven thousand naira which the plaintiff will have to add to the sum originally paid to the defendant if the plaintiff were to buy the two trucks in the open market.

(b) In the alternative to (a) above, an order of this Hon. Court to compel the defendant to deliver to the plaintiff two new Mercedes Trucks L.911/48C model.

(c) An order of this Hon. Court compelling the defendant to pay interest on the sum of ₦1,692,519.00 at the current bank rate to the plaintiff from the month of March, 1993 until judgment is delivered."

At the conclusion of trial, the learned trial Judge, Oluoti, J. found that the appellant was in breach of this contract when it failed to deliver the two trucks to the respondent. He found it established that the agreed purchase price by the parties in respect of the trucks was ₦846,259.70 per unit and that the respondent paid ₦1,692,519.40 being the cost of the two trucks to the appellant. He declined, rightly in my view, to make an order of specific performance of the contract of sale but proceeded to award the sum of ₦1,992,519.40 as damages to the to the respondent whereof ₦1,692,519.40 represented the price of the two trucks paid by the respondent to the appellant and ₦300,000.00 represented general damages for this breach of contract 5% simple interest was also awarded on the said ₦1,692,519.40. On appeal before the Court of Appeal, it was contended on behalf of the present respondent, then appellant, that since there was sample evidence that the price of each truck was admitted by the appellant to have risen to ₦1,500,000.00 when the vehicle ought to have been delivered, the damages of ₦300,000.00 awarded by the trial court in addition to the refund of the money paid by the respondent in respect of the contract price of the two trucks was inadequate and erroneous on point of law. This submission found favour with the Court of Appeal when it stated thus:

> "It is crystal clear that the defendant, as per its letter dated 31/3/93 Exh. R.S1 admitted that the unit price of the trucks in question had been increased to ₦1,500,000.00. No further evidence is required to prove same. There being no evidence of any further increase, that price is deemed to be the market price as at 13/4/ 93 when the defendant defaulted in delivering the two trucks. The learned trial Judge ought to have found accordingly. At the close of pleadings there was no issue requiring resolution with respect to the price of the vehicles in question as at 13/4/93. I therefore agree with learned counsel of the plaintiff that the learned trial Judge ought to have awarded to the plaintiff the sum of ₦1,307,480.60 being the difference between the contract price of the two trucks (₦l,692,519.40) and their market or current price of ₦3,000,000.00 as at 13/4/93 when the defendant defaulted in delivering them to the plaintiff. The appeal succeeds on this score. In sum the appeal partially succeeds. The award of ₦1,992,519.40 as damages to the plaintiff is set aside and in its place is substituted the sum of ₦3,000,000 (three million naira)."

On further appeal to this court the main issue in contention between the parties is whether the court below was right when it held hat the damages awarded by the trial court was inadequate having regard to the evidence and the state of the pleadings vis-a vis provisions of Section 51 of the Sale of Goods Act, 1893. I think I can start by stressing that in order to justify reversing the trial Judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that:

(i) the Judge acted upon some wrong principle of law; or

(ii) that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

See *Flint v Lovell (1935) 1 K.B. 360; Zik's Press Ltd v Ikoku (1951) 13 WACA 188; Idahosa v Oronsaye (1959) SCNLR 407; (1959) 4 FSC. l66; Bala v Bankole (1986) 3 NWLR (Part 27) 141; Ijebu-Ode Local Government v Adedeji Balogun and Co. Ltd. (1991) 1 NWLR (Part 166) 136 etc.* The claim by a buyer for damages for non-delivery in transaction for sale of goods is governed by section 51 of the Sale of Goods Act, 1893 which provides as follows:

"51 (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of the damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or (if no time was fixed) at the time of refusal to deliver."

Where therefore, the seller wrongfully fails to deliver the goods the subject matter of a contract of sale, the buyer may, among other things maintain an action for damages against the seller for non-delivery under Section 51(1) of the Sale of Goods Act. But by Section 51 (3) of the Act, where there is an available market goods in question the measure of damages for non-delivery or repudiation by the seller is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered or, if no time was fixed, then at the time of the refusal to deliver. Whereas Section 51(2) of the Act would seem to apply where there is an available market for the goods, the subject matter of the contract at the time of the breach, Section 51 (3) is a specific application of the general rule laid down in Section 51(2) to the situation where there is an available market for the goods at the time of a breach therefore plain under the Sale of Goods Act, 1893 that where there is an available market for the goods, the subject matter of a breach of contract by non-delivery, the measure of damages is prima facie to be assessed by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered. *See Hong Guan and Co. Ltd. v R. Jumabhoy* and *Sons Ltd. (1960) 2 All ER 100 PC and, if no time was fixed, then at the time of refusal to deliver. See Ashmore & Son v C. S. Cox & Co. (1899) 1 Q.B. 436 at 443. In* other words, the measure of damages under Section 52(3) of the Act is the difference between the contract price and the current or market price of the goods at the time of breach. *See Williams Brothers v Ed. T. Agius Ltd. (1914) A.C. 510 at 523.*

Attention must be drawn to the provisions of Section 54 of the Act which stipulates as follows:-

> "54 Nothing in this Act shall affect the right of the buyer or the seller …… to recover money paid where the consideration for the payment of it has failed."

I think it is correct view of the law to state that where after the buyer has paid the price (or part of it) to the seller, the seller fails to deliver the goods, he may either sue for damages, or for restitution of the money paid to the seller. If he sues for damages, the assessment should include the amount paid to the seller but he would have to prove and he is subject to all the rules on damages, such as remoteness of damage and the doctrine of mitigation.

Now, having regard to the above principles of law, the respondent in the first arm of his relief claimed the sum of ₦1,692,519.40 being the amount it originally paid to the appellant as contract price for the two trucks at the unit price of ₦846,859.70 each. This contract price of the two trucks was accordingly awarded by both courts below to the respondent and there is no controversy over this award.

It is not in dispute in the present case that there was at all material times available market for the trucks, the subject matter of the contract of sale. It seems to me that having regard to the facts of the present case, the measure of damages which the respondent is entitled to must be assessed pursuant to the provisions of Sections 51 (3) and 54 of the Sale of Goods Act, 1893. In addition to the recovery of the contract price of the two trucks paid by the respondent for total failure of consideration under Section 54 of the Act, such measure of damages must include the difference between the said contract price and the market or current price of the goods at the time or times when they ought to have been delivered or, if no time was fixed, then at the time of the refusal to deliver. The next question must be the market or current price of the said trucks at the time or times when they ought to have been delivered or if no such time was fixed, at the time of the refusal to deliver it.

In this regard the trial court had this to say:-

> "In this case no time was fixed for delivery. So I take the time the defendant refused to deliver. The defendant collected the vehicles from Anammco on the 13/4/ 93 and was expected to deliver same to the plaintiff on that day or the next. Exhibit RS1 was written on the 31/3/93. Part of that letter reads:
>
> "But we have received a letter from Anammco Dated 27th March, 1993 that the prices of vehicles have changed. Now the vehicle that you have made deposit for has increased to ₦l,500.000. The difference now is ₦480,410.00 for the two vehicles ordered, you should therefore pay additional sum of ₦960,820 …….. "

For its own part, the court below after setting out some relevant passages of the judgment of the learned trial Judge commented thus:

> "From the above extract, the learned trial Judge found that the time the defendant refused to deliver was about 13/4/93. He also found that by letter Exh. RS1, the market price of the vehicles in question at about 13/4/ 93 was stated to be ₦1,500,000 each. He nevertheless rejected this sum because there was no price list to support it. With profound respect, I disagree. Where a defendant admits a fact in dispute by his pleading that fact is taken to have been established and forms one of the agreed facts of the case."

The Court of Appeal went on: -

> "It is crystal clear that the defendant, as per its letter dated 31/3/93, exhibit R.S.1, admitted that the unit price of the trucks in question had been increase, ₦1,500,000.00. No further evidence is required to prove same. There being no evidence of any further increase, that price is deemed to be the market price as at 13/4/ 93 when the defendant defaulted in delivering the two trucks. The learned trial Judge ought to have found accordingly."

I think the Court of Appeal is perfectly right in the above observations and finding. It is clear that as per paragraph 10 of the appellant's statement of defence, there was an admission of a relevant fact in issue on its part to the effect that the market price of the trucks in question on about the 13th April, 1993 was ₦l,500,000.00 per unit. I agree entirely that the admission of a fact in issue in the pleadings by a defendant renders such a fact as established and such an admission may be accepted as one of the agreed facts of the case.

See *British Indian General Insurance Co. Nig. Ltd. v Tharwadan (1978) 3 S.C. 143 at 149; A.C.B. Ltd. v Alhaji Umaru Gwagwada (1994) 5 NWLR (Part 342) 25 at 42.* In my view, at the close of pleadings there was no issue requiring resolution with regard to the unit price of the trucks in question as at the 13th April, 1993.

From established evidence before the court, the market price of the trucks as at the 13th April, 1993 was admittedly ₦1, 500,000.00 per unit. This left the difference between the contract price of the two trucks which is ₦1,692,519.40 and their market price of ₦3,000,000.00 as at the time the appellant defaulted in delivering them to the respondent at ₦1,307,480,60. The Court of Appeal was, in my view, right when it held that the respondent's entitlement for this breach of contract comprised recovery of the already paid price in respect of the two trucks together with the sum of ₦l,307,480.00 been the difference between the contract price of the two trucks (₦1,692,519040) and their market or current price of ₦3,000,000.00 as at the 13th April, 1993 when the appellant defaulted in delivering them to the respondent.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogwuegbu, JSC that I, too, dismiss this appeal with ₦l0,000.00 costs to the respondents.

Judgment delivered by
Aloysius Iyorgyer Katsina-Alu. JSC

I have had the advantage of reading in draft the judgment of my learned brother Ogwuegbu, JSC. I agree with it and for the reasons which he gives, I too would dismiss the appeal with ₦10,000.00 costs to the respondent.

Judgment delivered by
Emmanuel Olayinka Ayoola. JSC

I agree that this appeal be dismissed for the reasons in the judgment of my learned brother Ogwuegbu, JSC. I too would dismiss it with costs as ordered by him.

Counsel

E. O. Jegede ….. For the Appellant

A. Akanmode ….. For the Respondent