IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 58 OF 2017

(Being High Court, Zomba District Registry, Personal Injury Case Number 645 of 2013)

BETWEEN

REGISTERED TRUSTEES OF
MEDICAL AID SOCIETY OF MALAWI……..…APPELLANT

AND

DR MAKANDIA T/A ORACARE DENTAL CLINIC…..RESPONDENT

CORAM: **THE HON THE CHIEF JUSTICE A K C NYIRENDA SC JA**
HON JUSTICE E B TWEA SC JA
HON JUSTICE DR. J M ANSAH SC JA
HON JUSTICE R R MZIKAMANDA SC JA
HON JUSTICE A C CHIPETA SC JA
HON JUSTICE L P CHIKOPA SC JA
HON JUSTICE F E KAPANDA SC JA
HON JUSTICE D F MWAUNGULU SC JA
HON JUSTICE A D KAMANGA SC JA

N. CHALAMANDA……..……..**COUNSEL FOR THE APPELLANT**
MSUKU ……..…**COUNSEL FOR THE RESPONDENT**
MSOWOYA/MAIDENI/KUMBANI...**JUDICIAL RESEARCH OFFICERS**
C. CHIMTANDE/MASIYANO……..……**COURT CLERKS**
Z. MTHUNZI/MSIMUKO……..…**COURT REPORTERS**

JUDGMENT

NYIRENDA, CJ

This matter should not have taken this long to determine. It is only appropriate to acknowledge to the parties that the length of time it has taken to come up with the judgment could have been avoided, whatever the reasons for the delay might be. What is cardinal is that this Court leads by example in resolving disputes with speed and in any event, within a reasonable time and without undue delay.

Liability having been admitted by the appellant before the court below, the only issue before this Court is the nature and measure of damages which the respondent should be allowed. Even in that respect, some of the damages that were sought and claimed by the respondent have since been paid and accepted by the respondent, as we soon detail.

The appellant is a long-established health insurance service provider, well known in this country and for a while in the past, the only one in that market. The respondent is a professional dentist of years of experience with dental clinics in some major cities in the country. Since as far back as 1991, the appellant and the respondent engaged in contractual agreements where the respondent provided dental services to the appellant's members for which the appellant would periodically pay the respondent upon the respondent submitting to the appellant relevant invoices.

On several occasions the agreements were terminated on account of misunderstandings between the parties but subsequently re- entered. That common occurrence came to be in 2001 when the contract was terminated by

the appellant on allegations that the respondent was making irregular claims. The parties engaged in discussion and managed to resolve their misunderstanding. The agreement was re-entered in 2003 by letter of 2nd April, 2003 from the appellant's General Manager to the respondent. The letter is titled '"RE-REGISTRATION AS A SERVICE PROVIDER" and states, in the fourth paragraph:

> "Consequent to this decision, the Board has directed that the reinstatement be on a probationary period of six months, during which time your dealings will be frequently reviewed. Serve (sic) for this, all other rules and regulations remain as were prior to your
>
> suspension and deletion from the provider list."

By letter of 28th July 2010, the appellant terminated the agreement again with effect from the date of the letter, citing as reasons, unsustainable claiming pattern by the respondent. It is this termination and events around it that resulted into the present action. The respondent sought damages for defamation and embarrassment, on account of the negative publicity of the termination of the agreement by the appellant. He also sought damages for loss of business.

I have said liability was admitted by the appellant. Pursuant to the admission of liability, damages in respect of defamation and embarrassment were settled. The matter then proceeded before the Assistant Registrar for assessment of damages for loss of business. The Assistant Registrar awarded the respondent K1,519,916,200.65. It is only and specifically this award that is on appeal before this Court. The short of it is that the appellant considers the award excessively and unreasonably high, on all account and in particular, regard being had to the agreement in question.

In arriving at this measure of damages for loss of business, the Assistant Registrar made a number of factual findings and looked at relevant legal authorities and principles in the area on call. It is to these considerations that this appeal also turns.

An important factual finding that the Assistant Registrar made was that the agreement in question had a termination clause. The clause provided that either party had the right to terminate the agreement upon giving the other three months' written notice. The notice did not have to give reasons for termination. A rather unsatisfactory state of affairs for a commercial agreement, but that issue is not on appeal by any of the parties and therefore that the finding of the Assistant Registrar in that regard is not before us. We are able to say the respondent was not happy with this clause as evidenced by earlier protestation through correspondence between the parties. Be that as might have been the case, the clause remained operative and applied in all the agreements that were entered into between the parties, as correctly determined by the Assistant Registrar.

In awarding what she did, the Assistant Registrar reasoned as follows:

> The evidence which has not been disputed is that the Plaintiff's income was increasing by 36.3% from 2004 to 2010. According to the evidence of PW2 the Plaintiff's projected income from 2011 to
> 2015 is K529,184,595.37. In Malawi the retirement age is 60 years of birth. The Plaintiff has argued that he would have retired in 2023 which year he would have been 65 years of birth. I do not consider this as realistic. I therefore use the conventional retirement age in the public service. This means that he has up to 2018. In short future loss will be for 2017 and 2018. From 2016-2018 the Plaintiff projected income is K990,731,605.28.In short this court awards the Plaintiff the sum of K1,519,916,200.65..."

The position therefore is that the Assistant Registrar awarded the respondent damages for loss of business based on what was considered to be his active professional age until his retirement and that the yardstick was the retiring age in the public service in Malawi. This will most probably be the first time to come across this principle, but like every aspect of law, there is always room for activism, and the breaking of new ground. Unfortunately, this is a principle that cannot be supported in a contractual relationship as I explain later.

Turning to the arguments by both the appellant and the respondent, there has been extensive coverage of the definition of and the principles governing general damages and special damages in the context of damages for loss of business.

Damages for loss of business are multi-dimensional. They could be general damages, for example, where the claimant asserts that as a result of the defendant's conduct, his business reputation and good will has been tarnished. The actual consequences of loss of business reputation and loss of good will on the business will invariably not be easy to determine and would much depend on the nature of the business and the extent to which the impugned actions will have affected the business. Understandably such damages would be at large and therefore general in nature.

The opposite would obtain with regard to loss of business profits. These are quantifiable losses which must be in the knowledge of the claimant and therefore should not be kept away from the defendant as well as the court. These are what are referred to as special damages.

The subject here was discussed at considerable length in *Manica (Malawi) Limited v Mbendera t/a P.G. Stationery* [2005] MLR, 225. We will do well to cite much of what this Court said at pages 230-231:

"It may be necessary, before we go further, to consider the principles relating to assessment of damages, and as to the distinction between general and special damages in relation to pleadings.

Firstly, the general principle is that in awarding damages a plaintiff is to be put in the same position as before the tort. Greener, LJ, stated thus in the case of *Hall v Barclay* [1937] AC 620 at 623:

> "In my judgment, it is undoubted fact that there are two rules with which we begin in ascertaining how the damages should be ascertained. The first is this: A plaintiff who is suffering from a wrong committed by a defendant is entitled, so far as money can do it, to be put in the same position as if he has not suffered that wrong. This is what is referred to as *restitutio in integrum*."

Secondly, as to how the plaintiff has to deal with a claim of damages in his statement of claim we do not have to go further than paragraph 2025 in McGregor on Damages, 16th Edition. The learned Author says in that paragraph: "In considering how the plaintiff must deal with the damages in his statement of claim, a basic distinction must be made between general damage or damages and special damage or damages. General damage consists in all items of loss which the plaintiff is not required to specify in his pleadings in order to permit proof and recovery in in respect of them at the trial. Special damage consists in all items of loss which must be specified by him before they may be proved and recovery granted. The basic test of whether damages are general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or of specific amount of claim, which he will be confronted with at the trial... If the claim is one which cannot with justice be sprung upon the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed."

Bullen and Leake, 12th Edition, at page 60 has explained further:

> "Whenever the plaintiff has suffered any 'special damage' this must be alleged in the statement of claim with all necessary particulars, and the plaintiff will not be allowed at the trial to give evidence of any 'special damage' which is not claimed explicitly in his statement of claim or particulars. Special damage in the sense of a monetary loss which the plaintiff has sustained up to date of trial must be pleaded and particularized, otherwise it cannot be recovered."

In *J M B Namandwa v J Tennet and Sons Ltd* (Civil Cause No.

26 of 1982), unreported, the plaintiff, in his statement of claim sought *"...loss of profits to be assessed as special damages and ...loss of use of a motor vehicle as general damages..."* Jere J. as he then was had this to say in relation to special damages:

> "The claim as already stated is for loss of profits to be assessed as damages. Loss of profit is special damage and as such it must be pleaded specifically and particularised and of course proved. A classical case on this point is no doubt *Hayward and another v Pullinger & Partners Ltd* (1950) 1 All ER 581. In this case objection to the pleading was taken as a preliminary issue. Devlin J. as he then was ruled that in an action for wrongful dismissal a claim for salary and commission which would have been earned if proper notice was given is special damage and as such must be pleaded...I hold in this case that the statement of claim was defective in that special damages have not been pleaded and proved. If any authority is needed for this proposition, it is *Ilkiw v Samuels and others* [1963] 1 WLR at 991, particularly I rely on the judgment of Lord Diplock pages 1003-1007."

From the cases cited the threshold is that where a clear and precise amount of a particular item which is being claimed has crystallized or it can be measured with complete accuracy in monetary terms, the plaintiff must plead this loss as special damages in order to warn the other party. Moreover, it is cardinal that the actual quantum sought must also be specified with particularity since it is already available to the plaintiff.

These principles resonate and are replicated in several other cases before this Court and courts below, as in *Zampita and another v Okoyo Garage* [1991] MLR 532, *Theu v Attorney General* [1994] MLR 348, *Chinyama v Land Train Haulage* [1999] MLR 99, *Press (Farming) Ltd v Issat,* [2000-1] MLR 373 and *Venetian Blinds Specialists Ltd v Appex Holdings Ltd* [2007] MLR 422. What comes to the fore is that general damages will, by their nature be generally pleaded and where proven, generally awarded at the discretion of the court. Special damages, on the other hand, must be specifically pleaded and where proven they will be specifically awarded. As pointed out earlier, where the

damages resulting from a breach are known, it is cardinal that they should not be withheld from a defendant and unleashed on him as a surprise.

The respondent in this case, by his claim, sought damages for defamation, embarrassment and loss of business generally. The statement of claim is shy of characterizing the loss as loss of profits or such specific loss. The respondent considers that having admitted liability for loss of business, the appellant could not be heard contesting that matter at this stage. The position, as I understand it, is that when a matter is referred for damages to be assessed, the assessment must follow the path of and be within what has been claimed in the pleadings. An assessment of damages could never be without context. In other words, what was to be assessed and probably payable, if so found, as loss of business was to be within what had been claimed in the pleadings. The distinction between general damages and special damages remains primary and must guide the pleadings in appropriate cases.

Now, if the respondent's pleadings did not include a claim for special damages resulting from the loss of business, the Assistant Registrar should have been hesitant to allow the parties delve into what was obviously a complex and detailed computation of damages in respect of loss of profits. Loss of business profits are special damages which if not specifically pleaded would surprise the defendant and result into embarrassment as it here happened. What transpired in the instant case is a typical example of where the respondent was allowed to take advantage of the appellant's admission of liability to go all the way to obtain that which the respondent himself might not have anticipated. I am inclined to make this observation considering that if the respondent was really convinced that he was owed and entitled to colossal sums of money that the appellant was adjudged to pay by the Assistant Registrar, he would not have spared the moment to carefully and specially articulate his claim. My observation is that the direction that this matter took on assessment of damages

was an afterthought on part of the respondent. An afterthought that resulted with the appellant's full admission of liability and more especially when the appellant settled part of the claim. At that development, the respondent decided he would make an attempt at as much damages as he would get, and that he did, with the blessing of the Assistant Registrar.

The agreement that was signed between the appellant and the respondent contained a clause on termination which was available to either party. This clause provided that either party could terminate the agreement, without ascribing reasons, on three months' notice. This term was not new to the agreements between the appellant and the respondent. The parties had dealings for a considerable period of time and each time they engaged in a contract the three months' notice of termination clause was included. As I pointed out earlier, the respondent seemed not happy with the term as evidenced by the concerns he raised earlier in their relationship. The respondent nonetheless yielded to the agreements with the three months' notice term. In those circumstances, it is tempting to impute that the respondent was alive to this term when he merely pleaded for loss of business, without more.

My conviction is that the respondent realised and acknowledged that in the nature of the notice clause in the agreement, damages for loss of business were virtually circumscribed. A basic and common principle of contract is that where an agreement between parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, the party signing will ordinarily be bound by the terms of the written agreement; Chitty on Contract, General Principles; Thirtieth Edition, Para 12-002.

There has been considerable reference to the case of *Frank Kilembe v Total Malawi Ltd*, MSCA, Civil Appeal No 17 of 2014 (unreported) by both parties on the implications of a notice clause as was in issue in the case at hand. If I have understood the respondent correctly, part of his argument is that the appellant, for no cause at all and perhaps treacherously, terminated the agreement and therefore that we should not be concerned with the implications of the termination notice. He submits thus:

> "Such principle (notice of termination) would suffice where termination is being claimed to be based on contractual terms but the same have not been complied with. In the present case, termination was based on unrelated reasons. It cannot therefore, be open to the appellant to use a contractual term to limit their liability."

Going further, the respondent argues that the Kilembe decision is not relevant and should have no application to the instant case. In his submission:

> "Firstly, in the Frank Kilembe case, it was a pure case of lease. One would therefore not expect such a relationship to be linked to one's age. Lease has nothing to do with age and as such, indeed, the principles akin to employment law principles cannot apply. In the present case, the Respondent is a dentist. It is a profession akin to employment and therefore, age-based. Lease can be transferred and therefore, one's age has no relevance to the business. This is not the case with the Respondent's business.
>
> Secondly, it would seem that the determination by the court in the Frank Kilembe case, was based on the very nature of the subject matter; i.e. leases. The court proceeded on the basis that by their very nature, leases are determinable whether there is a provision on the contract or not. This is a matter of law. This comes out very clear from the sentence just after the one quoted by the Appellant. The court said:
>
> > I do not think that such damages are foreseeable in relation to leases and licences like the present. The licences are issued on the basis that they are determined by either party on appropriate notice and, in certain circumstances without notice. Where, like here, the licence or lease is determinable by notice of a certain duration, it should be

safely assumed that both parties foresee that this is the period which, *ceteris parabus*, should determine their loses...

Clearly, in that case, and correctly the court proceeded on the basis that leases are by their very nature, determinable with or without notice. The Court starts from general principles governing leases to the facts of the specific case. In other words, the Court was merely applying the principles as they apply to leases generally to that particular case.

The correct interpretation of the Frank Kilembe case should be that by law, leases are determinable even without reasons. Any person entering into lease agreements therefore, ought to know this and therefore where termination happens for whatever reason, damages must be limited to notice period and in some cases, no notice at all."

The appellant, on the other side, has thrown its weight on the Kilembe case to the extent that the exposition therein on notice of termination is on point to the case at hand.

The Kilembe case deals with several issues that were in context and is good reading. On notice of termination clauses, the Court was as clear as it could have been when it said:

"The appellant wants to be compensated for the length of time that he would have been in business up to retirement at the age of seventy. I do not see how this principle, in the absence of a statute, should apply to breaches of contract. The principle probably applies under the Employment Act and certainly applies in personal injury claims which really base on tortious liability. I do not think that such damages are foreseeable in relation to leases and licences like the present. The licences are issued based on that they are determinable by either party on appropriate notice and, in certain circumstances, without notice. Where, like here, the licence or lease is determinable by notice of a certain duration, it should be

> safely assumed that both parties foresee that this is the period which, *ceteris paribus*, should determine their losses should there be termination by breach or otherwise of the licence. The appellant, therefore, will be compensated for loss of income for the one month in which the respondent should have given notice."

The principle that comes from this passage is not new and has not wavered in its application over time. Between the appellant and the respondent was a written contract, signed by both parties; surely to their full understanding of what they were signing for. They were also aware of the subject matter to which the agreement would apply and in those circumstances they consciously accepted that either party could terminate the agreement with three months' notice. The termination could be with reasons or without any reason at all. The relevant provision of the agreement states:

> "Kindly note that the Society has the right to terminate your registration at any time without giving any reason by giving you three months' written notice. Should you also wish to terminate the registration you will be required to give three months' written notice to the Society."

As it turns out, the appellant did not just wake up to terminate the agreement, contrary to what is suggested by the respondent. The letter of termination explained and gave the following reasons:

> "It has been noted that your treatment regime and general claiming pattern is not sustainable to the Society. Consequently, we regret to advise that the agreement between MASM and Yourself is terminated with immediate effect." It is quite possible that the reasons given for termination were wrong or incorrect or indeed unsubstantiated in the long run. That is not the same as being capricious or wanton as the respondent suggests. The only issue that is conspicuous is the failure by the appellant to allow the respondent three months' notice. The principle in the Kilembe

decision is certainly on point in the instant case on the application of the notice clause between the appellant the respondent.

As I conclude, special damages, such as loss of business profits, which must be known to the claimant, must be especially and specifically pleaded, see further, *Theu v Attorney General* [1994] MLR 348, *General Farming Limited v Chombo*, MSCA Civil Appeal No. 15 of 1995, *Chinyama v Land Train Haulage* [1999] MLR 99, *Venetian Blinds Specialists Ltd v Appex Holdings Ltd* [2013] MLR 422. What the respondent pleaded was a general claim for loss of business which ordinarily would have been at large. There is nothing in the respondent's pleadings to direct us to any special damage or damages beyond what is provided for in the contract agreement between the parties. It is therefore to that extent only that the appellant is liable to the respondent for loss of business for termination of the agreement.

I remain with determining the amount that should be awarded in lieu of the three months' notice. I hazard that the respondent had fewer patients in the three months following the abrupt termination of the agreement. I acknowledge that this observation is unsupported and without proof from the respondent. I am though in no doubt that the respondent did not completely close his operations during that period. At any event he was duty bound to continue operating in order to mitigate loss of business.

In order to determine what should be payable for the three months, I have found guidance in Exhibit CM (3) where the respondent demonstrates the amounts of money which he received from the appellant annually from the year 2004 to 2010, when the agreement was terminated. In 2004, the appellant deposited a total amount of K5,686,807.50 into the respondent's account. Over the years, the deposits became larger by each year. In 2009, an amount of K24,822,340.00

was deposited. In 2010, an amount of K33,384,824 was deposited into the respondent's account and not K36,528,922.00 as the respondent puts it. The other amounts that the respondent has included on the 2010 tabulation were deposited in 2011 and 2013.

Based on the amount that was deposited into the respondent's account in 2010 and by simple arithmetic, the respondent can be credited with K2, 800,000,00 a month during that period although it still remains difficult for us to determine whether this amount was monthly income or monthly profit. As I mention earlier, the respondent did not or was not expected to close his clinic. He was duty bound to mitigate his loss. Unfortunately, while the respondent made an attempt to tabulate what he was receiving from the appellant in a year, he withheld tabulation of the amounts that he was making from the time the agreement was terminated. With absolute discretion, I am content in accepting K2,800,00.00 a month and for the three months it translates to K8,4000,000.00. As I point out above, the respondent was not expected to close his clinic. Raising the K8,400,000.00 must therefore have been an equally shared responsibility between the respondent and the appellant. The appellant therefore owes the respondent K4,200,000.00 for loss of business for the three months.

This matter would have been resolved fairly early and quickly. The appellant readily admitted liability and proceeded to offer settlement, part of which was accepted by the respondent. As observed further, the respondent took advantage of that admission and pressed for much more. With that attitude the opportunity to expeditiously settle the matter was lost. In such a situation there is no justification to award interest.

I continue to stress that this matter would have been resolved without reaching this far had the respondent been ready for an amicable settlement. Amicable settlement of disputes remains cardinal in our system of justice. It is in fact a constitutional principle. It preserves relationships, which was critical in the instant case. It also mitigates the cost of litigation in addition to saving time for all involved in a matter. The appeal has largely succeeded and for the sentiments that I have expressed, costs for the appeal are for the appellant.

Twea, JA
I also agree that the appeal must be allowed.

Mzikamanda, JA
I also agree that the appeal should be allowed.

Ansah, JA
I would also allow the appeal.

Chipeta, JA
The appeal should be allowed.

Chikopa, JA
I would also allow the appeal.

Kapanda, JA
I will also allow the appeal.

Mwaungulu, JA

Précis

My Lords, the appeal on the single issue remaining between the parties, loss of business, however styled, must, as all of us agree and the Honourable the Chief Justice states in his judgment, be allowed. Counsel, however, raise very cardinal points about the award and how it was arrived at that it is necessary that I should express an opinion purely because of long years sitting *nius prius* (as registrar and judge) and on appeal on assessment of damages – and costs. In this regard, the judgment of the Court below was, to say the least, most problematic. Appeals to this court from decisions of the Court below as court of first instance are by rehearing. This Court reviews all pleadings, the evidence,

the submissions and the judgment of the Court below in the light of the appeal, the grounds and submissions of counsel.

On the practice and the law, it must be surprising that, while the matter was on appeal, the payment into court was, as happened in the Court below, disclosed to your lordships to influence our decision. Of course, liability was conceded. The Court below and this Court were still assessing damages which were the gravamen of whatever remained on the action, the appellant having conceded liability. The payment into court should not, therefore, have been disclosed until final disposal by this Court's judgment on assessment of damages and before the order for costs.

The Court below either misunderstood the cause of action or failed, in the omnibus award, to appreciate the appropriate measure of and heads of damages generally and in on defamation and breach of contract, in particular. The action from the writ of summons and the pleadings was for damages for breach of contract and defamation and loss of business due to breach of contract and defamation.

Failure to plead specific damages – loss of profit or business – should not, on the nature of the action, take the course suggested by the appellant. The appellant argues a broad view or what Rimmer, LJ, in Whalley *v PF Development and ANR (*Neutral Citation Number: [2013] EWCA Civ 306), called a "disciplinarian" approach and overlooked the "broad-axe" approach on assessment of damages now confirmed by the United Kingdom Supreme Court of Appeal in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others (Appellant) Sainsbury's Supermarkets Ltd and others (Respondent) v MasterCard Incorporated and others* [2020] UKSC 24.

Moreover, the defamation, an imputation of criminality and in writing, was actionable *per se*. The respondent was under no obligation to plead special damages. The respondent, however, pleaded the action and disclosed what the appellant was to expect in the witness statement. The appellant neither applied for further and better particulars nor to expunge from the evidence or at the hearing the evidence the respondent gave in court. The Court, therefore, properly, considered the matters.

The evidence on the solo issue – damages for loss of business – was incorrect and not of the nature that a court could use without the risk of injustice of under-compensation or overcompensation. The threshold, whatever evidence there was, was not one that a court could even estimate the damages. The respondent had not discharged the onus, all the while on him, to prove losses of business or profit. The respondent, however, would be entitled to nominal damages for loss of business.

The Court below made an omnibus damages award for breach of contract and defamation. Consequently, it never assessed, damages on breach of contract. If there was settlement for damages for defamation, it was for (general) damages. Clearly, the court below was to assess damages for loss of business from the breach of contract and shrinkage of business following the defamation. The Court below never assessed damages based on the heads of damage both in contract or defamation tort. The omnibus award for future losses never provided for accrued damages and was computed without regard to that future awards are paid well before they are earned. Moreover in awarding damages for future loss the court below never considered the two heads of damages in contract or the four heads of damage for defamation to ensure fair compensation.

Damages for breach of contract subject to compound interest up to the date of judgment of the court below. The respondent will be awarded the sum of K6, 000, 000 as nominal damages for loss of business for defamation. This sum is not subject to interest. K1,
522, 041 is awarded as an estimate of damages for breach of contract. This sum is subject the interest rate of 1% above the base rate – 13% – compounded for ten years. On the whole, therefore, the award of K1, 519, 916, 200.65 is set aside. Costs will be in the cause.

Facts

The facts necessary to resolve this matter are unsophisticated and, in so far as they resolve the matters on appeal in this case, are summarised from what we now know from proceedings in the Court below. The appellant and respondents are both businesses. The appellant, a medical aid provider with an astounding pedigree, agreed with an ambitious dental clinic, the respondent, under which the former paid the respondent medical expense clients covered under its insurance scheme. The contract was determinable on three months'' notice from either party. On 28
July 2010, the appellant, alleging fraud or bill inflation, for a second time, terminated the contract without notifying the respondent.

The action

On 19 September, 2013, the respondent commenced these proceedings. From the judgment of the Court below, parties' submissions in the Court below, the evidence, the judgment of the Court below, the grounds of appeal and the appellant's and respondents submissions, the Court below had a very simplistic view of the issues raised – even if we accept the payment into court. It may be important, therefore, to mention the causes of action in the writ of summons and reconsider the respondent's pleadings and witness statements. The general endorsement read:

> The plaintiffs claim is for damages for defamation and loss of business emanating from the defendants unlawful termination of the agreement between the Plaintiff and the Defendant and from the Defendant's publication of imputation of fraud on the part of the Plaintiff and costs of the action."

The respondent, according to this pleading, has two strands of damages. The first strand deals with damages for defamation. The second strand deals with damages for "loss of business emanating from [1] the defendants unlawful termination of the agreement between the Plaintiff and [2] the Defendant and from the Defendant's publication of imputation of fraud (the parentheses are added).

The respondent's action therefore was for breach of contract and defamation on both actions for which the respondent claimed damages for loss of business. Paragraph 4 of the statement of claim pleads the contract cause of action:

In or around July, 2010, the defendant, unilaterally and unlawfully, terminated the agreement between the Plaintiff and the Defendant.

Paragraph 5 of the statement of claim pleads the defamation:

> Further, in their newsletter issue number 3, 2010, the following words were defamatory to the Plaintiff ...

Paragraph 9 of the Statement of claim read:

> In further consequent thereof, following the unilateral termination of the agreement by the Defendant, the Plaintiff has lost business.

The reliefs the respondent sought from the appellant are in Paragraph 11 of the statement of claim: damages for loss of business, defamation and costs of the action.

The respondent on 1 October, 2013, made a witness statement which he filed with the statement of claim. In Paragraph 6 of the witness statement the plaintiff said:

> As a dental practitioner, I was to run my practice up to 2023 when I would have reached my retirement of 65, having been born in 1958 – CM2 is a copy of my passport page showing my age.

In paragraph 7 of the witness statement the plaintiff further states:

> Prior to the defendants terminating the contract, my payments from them, kept increasing steadily. This is largely due to increase in number of the patients. I am one of the most senior dentists. I have been a dentist for over 30 years. For example, in 2004, I received K5, 686, 807.50 from the defendant. In 2005, I received K13,011, 490.00. In 2006, I received K11, 987, 868.50. In 2007,

> I received K14, 444, 217.00. In 2008, I received K24, 213, 800.00. In 2009 I received K24, 822, 340.00. And in 2010 I received K36, 528, 922.00 – CM3 (i) to (vii) are copies of income received and supporting documents.

The respondent further served a statement from an accountant. The accountant in paragraph 4 says:

> Calculations exhibited herein as AK3 as true reflection of loss of business by the Plaintiff. As will be seen from AK3, from the time of termination to assessment, the Plaintiff would have lost K529, 184, 597.37. If interest is factored in, the amount comes to K1, 293, 519,984.07. If one takes the whole period to 2023, which the plaintiff claims would be his year of retirement, the loss K8,564,629, 585.32.

In the witness statement, therefore, the second respondent's witness includes a claim for interest.

The judgment on assessment

The Court below, in its reasoned judgment, rejected the interest computation because it was not pleaded and, in any case, interest, to the Court below, is not paid on damages. The court determined that *Kilembe v Total Malawi Ltd* (2014) Civil Appeal No 17 (unreported) was not applicable. In *Kilembe v Total Malawi* this Court, limited payment of damages to three months'' notice for termination of a service contract stipulated in the contract. The Court below distinguished *Kilembe v Total Malawi Ltd* as restricted to leases and specific contracts. The Court below, therefore, proceeded to assess damages based on ordinary breaches of contract in *Hedley v Baxendale* (1854) 9 Exch 341. In *Hedley v Baxendale* the court determined that damages for breach of contract are those fairly those arising naturally or those that the parties reasonably contemplated. The Court below, however, relied on a statement by Lord Upjohn in *The Heron II* [1967] All ER 686, followed in the Court below in *Hashmi v DHL Express* (2005) Civil Cause No 423 (HC) (Bt) (unreported); *Gestetner Ltd v Malawi Revenue Authority* [2008] MLR (Comm) 332; *Glens Waterways Ltd v Attorney General* (2009) Commercial Case No 49 (HC) (Comm) unreported:

> But in contract the parties have only to consider the consequences of the breach of the other, it is fair that the assessment of damages should depend on their assumed common knowledge and contemplation and not foreseeable but most unlikely consequences.

In Glens *Waterways Ltd v Attorney General, the* Court below stated:

> I have always understood the traditional approach of the law to be that a person of the law who is in breach of contract is liable for all the damage that flows naturally from according to the ordinary course of events or that which was within the contemplation of the parties at the time at of making the contract. Further, as I know it,where there is special damage not arising from the ordinary course of events, the defendant can only be liable where he had knowledge of the facts giving rise to the damage. However, later cases have restricted the test. They have held that the foreseeability test is for the law of torts, but, that in contract; the test is the actual contemplation of the parties having regard to their knowledge of the facts, especially on the part of the defendant.

The Court below relied on this principle and own cases of *Nkhumbalume v Blantyre City Council* (2010) Civil Cause No 88 (HC) (Bt) (unreported) and *Newspaper Ltd v Simango* (2011) Civil Cause No 6 (HC) (PR) (unreported) to allow increases in revenues yearly.

The Court below found the accountant as an expert and heavily relied on his evidence for the order drawn. The Court below, however, rejected interest on the projected figures. It, technically, added a 36% increase year on and arrived at the figure of K1, 519,
916, 200.65 up to when the respondent was 60 – the civil service retirement age. It rejected the respondent's assertion that the retirement age for him was 65 years. This was the actual award of the Court below:

> The evidence which has not been disputed is that the plaintiff's income was increasing by 36.7% annually from 2004 to 2010. According to the evidence of PW2, the plaintiff projected income from 2011 to 2015 is K529, 184, 593.37. In Malawi the retirement age is 60 years of birth. The plaintiff has argued that he would have retired in 2023 which would have been 65 years of birth. I do not consider this realistic. I will, therefore, use the conventional retirement age in the public service. This means that he has up to 2017 to 2018. In short, future loss will be for 2017 and 2018. From 2016 to 2018, the plaintiff's projected income is K990, 731, 605.28. In short, this Court awards the plaintiff projected K1, 519, 916, 200.65.

Grounds of Appeal

In this judgment, given the number of grounds of appeal, cases cited before us and intensity of the issues, legal or factual, it is cumbersome to rehearse, let alone summarise, the grounds of appeal and submissions. These will be considered, if necessary, as the general issues, legal or factual, arise in the judgment. The grounds of appeal will not be considered and seriatim or

separately. The judgment, however, will first terse out the procedural and conclude with substantive issues. These, all this notwithstanding, are the grounds of appeal:

a) The honourable assistant registrar, having made a finding that the contract between the parties herein was determinable by either party on a three months' notice, erred in both law and fact in failing to find that the amount of damages payable to the respondent for the breach of the said contract, was the loss for the period of three months in which the Appellant should have given notice of termination;

b) The honourable assistant registrar erred in both law and fact in awarding the respondent damages for loss of business covering the period effective from the date of termination of contract to the date of the Respondent's retirement as opposed to the three months termination period;

c) The honourable assistant registrar erred in both law and fact in finding that the Malawi Supreme Court of Appeal decision in the case of *Frank Kilembe v Total Malawi Limited (* SCA Civil Appeal Cause No. 17 of 2014) which, inter alia, provides that the principle of compensation for the length of time that one would have been in business up to retirement age does not apply to cases of breach of contract, was not applicable in this matter;

d) That loss of business being special damages, the honourable assistant registrar erred in both law and fact in awarding any damages to the Respondent as these damages were not specially pleaded;

e) In view of the fact that the respondent continued in his business after the termination of the contract between him and the appellant, the honourable assistant registrar erred in both law and fact in failing to find that the appropriate damage suffered by the respondent was loss of profits rather than loss of business;

f) The honourable assistant registrar erred in both law and fact in awarding the respondent damages in the sum of MK519,916,200.28 which was excessive in the circumstances and in any case was against established legal principles;

g) The honourable assistant registrar erred in both law and fact in failing to make a deduction for tax from the damages awarded to the respondent;

h) The honourable assistant registrar erred in both law and fact in failing to find that the respondent should have produced his accounts to prove his actual loss rather than to rely on projections;

i) The honourable assistant registrar erred in both law and fact in finding that the estimates and calculations done by the Respondent's witness, one Kamphoni, were reliable evidence in proving his loss;

j) The honourable assistant registrar erred in both law and fact in failing to order that the amount which was paid into court by the appellant in respect of the claim for loss of business, which amount was paid to the respondent by the court, be deducted from the amount awarded as damages The appeal is against the whole judgment of the Court below. Grounds (a) to (c) cover damages for breach of contract. Ground (d) covers pleading of special damage. Ground (e) covers the loss of business, which, according to the appellant, must really be claim for profits. Grounds (g) to (i) cover the amount and the manner of arriving at the award. Ground (j) covers the final order on payment into court.

Reliefs sought

Reliefs sought align with this characterization – covering the heads as stated. The appellant seeks the following reliefs:

i) That since the contract between the parties was determinable by either party on a three months' notice, any damages payable to the Respondent are and should

be restricted to a period of three months representing the termination notice period;

ii) That the lower court was wrong in awarding damages to respondent based on a calculation o f loss from date of termination of contract to the respondent's retirement age;

iii) That the decision in the case of *Kilembe v Total Malawi was* applicable in this matter and should have been followed by the Court below;

iv) That the award was excessive and against established legal principles;

v) That since the respondent's business did not stop after the termination of the contract, the damages claimed should have been for loss of profit rather than of business;

vi) That the plaintiff failed to specially plead loss of business the same being special damages and that as a consequence thereof no award should have been made;

vii) That any damages payable to the respondent were and should be reduced by an amount representing his tax liability;

viii) That the amount paid by the appellant into court which the court paid to the Respondent, be deducted from any amount that this Court may find due to the Respondent

ix) That costs here and below be for the appellant

Reasoning

The order of the Court below only awards for future loss. The order does not state whether the future loss is for breach of contract or defamation. Just as it does not cover or discuss the heads of damage in breach of contract. The word 'income' is loosely used. The sums given by the respondent and his witnesses were gross sales. This Court, as stated earlier, proceeds by way of rehearing where, like here, the appeal is from a judgment of the Court below as court of

first instances. Rehearing comports that this Court sits in the position of the court of instance and examines the pleadings, rehears, subject to credibility, the evidence of the parties, the parties' submissions in the Court below and reviews the judgment of the Court below for reasoning on the facts and the law in the countenance of the grounds of appeal and the parties' submissions on appeal.

Payment into Court

There has been no change in practice up to the Courts (High Court) Civil Procedure Rules, 2017, to the old and persevering procedure on payment into Court. Order 27 of the Courts (High Court) (Civil Procedure) Rules, 2017, provides:

> (1) Until judgment has been given, the Court at the trial of the proceeding shall not be informed about any payment into Court.
>
> (2) Once judgment has been given, the Court shall be made aware of the payment into court.

In this Court, vide section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule of the Supreme Court of Appeal Rules, Part 52.
22 of the Civil Procedure Rules, 1998, England and Wales applies:

> (1) Unless the appeal court otherwise orders, the fact that a Part 36 offer or payment into court has been made must not be disclosed to any judge of the appeal court who is to hear or determine— (a) an application for permission to appeal (b) an appeal; until all questions (other than costs) have been determined.
> (2) Paragraph (1) does not apply if the Part 36 offer or payment into court is relevant to the substance of the appeal.
> (3) Paragraph (1) does not prevent disclosure in any application in the appeal proceedings if disclosure of the fact that a Part 36 offer or payment into court has been
> made is properly relevant to the matter to be decided.

Part 56.22 of the Civil Procedure Rules, 1998, applied in the Court below when the respondent, Dr. Makandia t/a Oracare Dental Clinic, commenced these proceedings on 19 September, 2013 against appellant, Registered Trustees of the Malawi Medical Aid Society of Malawi.

This Court, much like the Court below, should not, therefore, have known about the payment in court in the Court below or, if a fresh one was made on appeal, this Court. This matter does not fall in the exception. The payment into court was not, on appeal, relevant to the substance of the appeal. The appellant is not challenging the award in the payment into court but the actual award made by the Court bellow. In the end, there was a procedural lapse remediable, subject to Order 3, rules (5) and (6), under Order 1, rule 4 and Order V, rule I of the Supreme Court of the Supreme Court of Appeal Rules.

The rationale of the rule that payments into court should not be brought to the attention of the trial or appeal court stems from the purpose and effect of a payment into court and the risk to a fair trial. A payment into court, is foremost, a tool – consistent with the principle of national in section 13 (a) (l) of the Constitution – to excite resolution of disputes, including political disputes, aliunde the courts. Secondly, a payment into court aims at reducing for the defendant to a claim the incidence of costs and interest payments should the claim succeed. Moreover, acceptance of a payment into court is not a decision on the merits and, therefore, cannot be prayed *res judicata* in subsequent actions. It is important, therefore, that such payment, in any form, shape or size, should not influence a trial or appeal court in a fair resolution of the matter. Disclosure of a payment in court goes to fairness and, ultimately, to justice in the trial. A court might, as was the case here, try to assess damages based on the payment into court. Disclosure of payment, however, is equally, just like anything in the rules, an irregularity that must weighted against the interests of justice. Order 5, rule 1 of the Supreme Court of Appeal Rules, requires, where rules are flouted, such a course:

> Non-compliance on the part of an appellant with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the Court considers that it is in the interests of justice that non- compliance be waived or the appellant given a further opportunity to comply with the Rules. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given.

Disclosure of payments into court, during trial or appeal, is such a gross affront to fairness that a court – in this case the Registrar of this Court – and parties must adroitly ensure compliance with the non-disclosure rule. In this regard, for this court, the duties of the Court and the parties to the overriding principle in Part 1 of the Civil Procedure Rules, 1998, England and Wales, behoove perspicacity and tenacity. Part 1.1 of the Civil Procedure Rules, 1998 – applicable under Section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule 34 the Supreme Court of Appeal Rules – requires that a Court make it its overriding objective enabling the court to deal with cases "justly." There is a real and inherent prospect of injustice where a court learns that a defendant or respondent has actually paid money into court. The Court may be prejudiced to think that there is a latent acceptance of liability. In this case damages could be tailored based on the payment into court when more or less would, without such knowledge, be the just outcome.

A court, in this case, the registrar, must ensure that justices handling the appeal do not know about the payment into court. Dealing with a case justly comport, under Part 1.2 of the Civil Procedure Rules, 1998, England and Wales, parties are on an equal footing (1.2 (a)) and the case is dealt with expeditiously

and fairly (1.2 (f). Where, therefore, there is a payment into court, the registrar must, to ensure fairness, hastily prevent judges knowing about it. There is a duty under Part 1.3 of the Civil Procedure Rules, 1998, England and Wales, requiring parties to help the Court to fulfil the overriding objective and generally to inform the Court of any failure to comply with the rules. In this Court, "appellant" and "respondent," do not, under section 2 of the Supreme Court of Appeal Rules refer to parties alone; they include the parties' legal practitioners too.

Under Order 5, rule 1 of the Supreme Court of Appeal Rules, there are only two options really; waive the irregularity or allow for compliance. The latter cannot avail. The judges have already been informed of the payment into court. Compliance will be meaningless. Seven justices sat on the matter. Reconstituting a different panel is near to impossible. The question is whether, it is in the interests of justice to waive the noncompliance. Interests of justice require considering all the circumstances of the case. In this respect, it requires considering the matter itself, the circumstances of the parties, the consequences of the rule, the position of the court, the nature of the appeal and consequences of waiving or not waving the rule. These would be similar considerations where the court wants to waive the rule itself under Order 1, rule 4 of the Supreme Court of Appeal Rules which provides that "[t}he Court may ... direct a departure from these Rules in any other way when this is required in the interests of justice."

It would really be unreasonable, unjust and unconscionable not to waive the rule or the noncompliance here. The matter on appeal is an award which, by all consideration, is wrong in principle and amount. The amount is too large as, by just depositing in a savings account, to guarantee profits to the respondent and an unreasonable annuity for no work up to death and after death. The circumstances are that the appellant would have to draw a lot of money – and they have little of it – and virtually finance the respondent until doomsday.

The award, if saved, would, at the bank interest of 5%, guarantee the appellant an annuity of K75, 995, 810 per annum. This is 3 to 4 times the respondent's average annual sales to the appellant and 125 times the respondent's annual net profits (income) from the appellant. The award clearly was made without considering that the appellant was paying future losses in the present. If the losses were considered purely on sales – and this cannot be, as we see shortly – the multiplier used ranges at 63. Generally speaking, the multiplier never exceeds 20. The multiplier, if profits are used, would, at 1,500, be wholly excessive and oppressive. That is 75 times the normal 20. The Court below never tested the award according to the principle of future losses. It certainly a case of overcompensation – an injustice a court must, at all costs, avoid. The consequences of not waiving would be to shut out the appellant who as, we see shortly, has a case with a very good chance of success. The appellant,

therefore, is right in ground (f) of appeal and relief (iv) that the award was excessive and contrary to principle.

The court, even assuming that the parties were wrong, should and could have, under the overriding principle and management of a case, detected the non-compliance. The respondent, moreover, was under a duty to inform the Court of the appellant's non- compliance. Part 3:10 of the Civil Procedure Rules, 1998, broadens the powers under Order 1, rule 4 and Order 3, rule 34:

> Where there has been an error of procedure such as a failure to comply with a rule or practice direction— (a)the error does not invalidate any step taken in the proceedings unless the court so orders; and (b)the court may make an order to remedy the error.

The Court, therefore, is not invalidating the proceedings. The appropriate order is, therefore, to proceed with the appeal despite the non-compliance. After all, it is not the award in the payment into court that is at askance. It is, rather, the award of the court that is challenged on broader principles, some procedural. At the end of the day damages are in Kwachas and tambalas and can be objectively ascertained despite this error.

The appellant did not raise this matter as a ground of appeal. This Court, when making this order, is aware of 0rder 3, rule 2 (5) and (6) of the Supreme Court of Appeal Rules. Order 3, rule 2 (5) provides:

> The appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just.
>
> (6) Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant: Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.

The omission, however, almost goes to jurisdiction and the Court can regard it, even after parties have closed arguments. In any case, this Court is not allowing this appeal resting on this ground. The Court below and this Court were wrong in treating the payment into court. The appellant, however, was equally wrong in raising the payment into court directly in the grounds of appeal (j) and relief (viii).

This Court, therefore, will rehear the case without any reference to the payment into court. It will operate as if there was no agreement as to the K5, 000, 000 paid in court. All reference to the payment into the court below is expunged.

The appellant – despite questions about pleadings – was aware of the whole respondent's case unfolding. The cause of action can be in the pleadings

The cause of action – the claim for loss of business was in fact in the pleadings and the witness statements and, therefore, the appellant was aware of the case before it. The appellant raises two aspects of pleadings on which this Court should dismiss the appeal. The appellant contends that the respondent did not plead loss of business or loss of profits, something the respondent should have done for special damages, with particularity. The appellant, therefore, relying on *Attorney General v Mumba* 1984 Z.R 14 (SC) ; *Venetian Blind Specialists Ltd v Apex Holdings Ltd* (2007) MLR 422); *Malawi Railways Ltd v Nyasulu* (1992) Civil Appeal No 13 (MSCA) (unreported); *Phiri v Daudi* [1992] 15 MLR 404; *Govati v Monica Freight Services (Mal) Ltd* ([1993] 19 (2) MLR 521; *Wood Industries Corporation Ltd v Malawi Railways Ltd; Chikaoneka v Indefund Ltd* (2002 - 2003] MLR 4); *Manica (Malawi) Ltd v Mrs. D Mbendera t/a P.E. Stationery* (2002) Civil Appeal No 176 (MSCA) (unreported); argues, with quite some consternation and objection from the respondent, that the assessment award should be dismissed *in limine* for defying pleading rubrics. The respondent's argument is pleadings go to liability which, in this case, was admitted. Reverting to pleadings at assessment of damages is, therefore, impermissible. The respondent relies on this statement in *Chimphakati v Ampex Ltd and another* ((2012) Civil Cause No 440 (HC) (PR) (unreported):

> According to Order 18 of RSCA, the issue of costs is something that is determined at liability level. In the present case, judgment was subsequently entered awarding costs to the plaintiff. There was no issue as regards the extent of the costs. At this level, the duty of the court is to determine the amount of damages awarded to the plaintiff not to vary the extent of liability as contained in the judgment. I will, therefore, not entertain the issue of liability as insinuated by the defendant.

The statement in *Chimphakati v Ampex Ltd and another* accurately states the principle on an assessment of special damages. A court, at assessment of damage, should, at all costs, avoid matters in pleadings already closed by the judgment whether the judgment is after trial, in default, admission or consent. A court, however, must look at the pleadings where it is necessary for assessing damages otherwise damages could be assessed that are not covered by the pleadings. The rules are not contradictory. They address different aspects. The

question, therefore, becomes whether the matter is and should be covered by pleadings. The sequel question is whether matters must only be covered in pleadings.

As to the former, the causes of action must be pleaded and with particularity, clarity and alacrity. The appellant referred to Order, rule 21 of the Courts (High Court) (Civil Procedure) Rules,
2017. This action, however, commenced in 2013. The applicable
is, therefore, Part 16 of the Civil Procedure Rules, 1998, England
and Wales.

Teleologically, pleadings are necessary to alert what the other should and will expect from one's action or defence. It behooves the pleader, therefore, to mention the cause of action and with sufficient particularity. What is important, therefore, is that, before the trial or hearing, the other party knows what to meet at the trial or hearing. In this regard, the respondent, contrary to the appellant's ground (e) and relief (iv) pleaded for loss of business in the statement of claim (generally) endorsed on the writ and paragraph (6) of the served statement of claim. The appellant in the submissions in the Court below seemingly argues that the respondent only failed to prove the losses rather than that the respondent never pleaded for loss of business ground (e) and relief (iv) in the grounds of appeal are otiose in so far as pleading for loss of business are concerned. The respondent, therefore, pleaded loss of business.

The claim for loss of business was also in the witness statements

It is this requirement, apart from anything else, that underpins the sequel rule of pleadings well captured in a passage quoted by Bullen & Leake, Pleadings, cited by the Honorable the Chief Justice, that special damages could be either in the statement of claim or the particulars (under Part 7 of the Civil Procedure Rules, 1998). In the passage cited issues need not necessarily in the pleadings. They could be in the pleadings or particulars or both. In Pleadings, Bullen and Leake, 12th Edition, at page 60, the authors say:

> Whenever the plaintiff has suffered any 'special damage' this must be alleged in the statement of claim with all necessary particulars, and the plaintiff will not be allowed at the trial to give evidence of any 'special damage' which is not claimed explicitly in his statement of claim or particulars.

In *Whalley v PF Development and ANR* [2013] the defendant sought to thwart the plaintiff's action because the latter never pleaded a cause of action. The plaintiff had, however, served particulars and the defendant called evidence. Said Lord Justice Rimmer:

> The respondents' position is that the judge was right not to award any more to the claimants than she did. They say that, to the extent that the claimants were asking for damages of a greater order, they were advancing an unpleaded claim for special damages and that is why the judge refused to consider the greater claim. In answer, the claimants confess and avoid. They admit the claims were not pleaded but they point out that they were fully explained in their evidence served in support of the inquiry in accordance with the court's directions. The defendants were in no sense taken by surprise with regard to the claims, indeed they had responded to them in their own evidence and there was therefore no sound reason why the judge should not have considered the claims on their merits. In this regard, the respondents specified the claims in the witness statement and the appellants – through their only witness – responded, albeit selectively, to the witness statement.

Pleadings, of course, must disclose a cause of action with specificity, but, particulars and uncertainty in pleadings can resolve beyond and after the pleadings. At the time of the passage in Pleadings cited, witness statements were not vogue. A party, however, on request or on motion, could supply further and better particulars. Where, like now, witness statements are served either with or shortly after commencement of actions, absence of pleadings or defects in the pleadings are resolved through witness statements or, at any rate, during disclosure (*Whalley v PF Development and ANR* (Neutral Citation Number: [2013] EWCA Civ 306; *Lisle-Mainwaring -v- Associated Newspapers Ltd* [2017] EWHC 543 (QB); *Al-Medenni v Mars Ltd [2005] EWCA Civ 1041; Loveridge v Healey [2004] EWCA Civ 173*. The modern rule is expressed in many cases. Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A said:

> The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.

In *Whalley v PF Development and ANR* the England and Wales Court of Appeal deprecated the rather disciplinary approach of the High Court in refusing hearing a plaintiff who, having not pleaded, yet served evidence: I agree with the judge and with Mr Davis that strictly heads (i), (ii) and (iv) did need to be the subject of an express pleading. But I respectfully disagree with the judge as to the perhaps somewhat disciplinarian line that she took in this respect. We were not referred to any authority to the effect that in an inquiry as to damages under a judgment in default the ambit of the inquiry is limited by the ambit of the original pleading as to damages, nor was any such submission made to us. I understood Mr Davis to recognise that even after the default judgment, it would have been open to the claimants to seek to amend their Particulars so as to widen their claims for damages. In the event, they did not take that course. What instead happened is that the court gave directions for a trial as to quantum, including directions for the sequential service of evidence, and such evidence was sequentially served. Mr Whalley's second statement made crystal clear the heads of damage that the claimants were claiming and Ms. Thomason in her evidence did not suggest that it was not open to the claimants to advance such claims

> ... The point is that, by their June 2011 evidence in support of the quantum claim, the claimants had given the respondents full notice of the nature of the heads of loss that they were asserting. The respondents were not
> taken by surprise, or at any rate no suggestion to that effect appears ever to have been raised. They took no steps to strike out those parts of Mr Whalley's evidence that were claiming to advance heads (i), (ii) and (iv) and the claims under those heads were argued on the merits
> before the judge.

There is no authority cited to us that on a judgment on admission or by consent recourse must not be had to the pleadings. Just as the respondent's and its witness statements clearly stipulate the case the respondent had against the appellant.

There is always as well the danger in too much detail. There must be a balance. In *Three Rivers District Counsel v Bank of England (No 3)* [2003] 2 AC 1) Lord Hope said:'

> In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, 33-34 Saville LJ said:
>
> The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required.

> This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it.

In this case, the claim for loss of business was actually pleaded. Whatever issues were lacking, the respondent's and the accountants statements provided particulars of what the appellant expected from the action. Once again the ground of appeal about the respondent not pleading for loss of business is untenable. Loss of business is part of the respondent's witness statement and the other witness' witness statement.

Interes
t

The respondent's and the respondent's witness witness statements covered interest. The respondent discusses interest in paragraph 4 of the statement of claim. The respondent's witness discusses the computation and the basis of the interest rate chosen – the National Bank of Malawi lending rate. There is no doubt that the appellant was aware of what was coming. The appellant called a witness to counter the accountant, albeit, the accountant concentrated, by choice, only on the contract. The adequacy of the information is considered later. Moreover, as we see later, the defamation here is actionable *per se*. The respondent was under no obligation to plead special damages or interest. The respondent pleaded general damages and could, therefore, despite not pleading special damages, under a claim for general damages, adduce evidence of loss of business and profit and interest. Interest, as we see shortly, is claimable under the second limb in *Hedley v Baxendale* and should, therefore, be specifically pleaded. The appellant's contention that the respondent had not pleaded interest is, therefore, perfunctory. *The distinction between special and general damage is not very consequential*

The requirement to plead special from general damages is not, to my mind, a critical observation. The duty to plead and clearly and the need for particulars is part of a rule, a necessary one, that arises from the need for the other party to know what the other will bring to the people. To this principle, it is not important to make the distinction. In *Perestrello v United Paint Co* [1969] 1WLR 570, Lord Donovan said:

> If a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into

court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case.

> The question to be decided does not depend on words, but is one of substance" (per Bowen L.J. in Ratcliffe v Evans [1892] 2 QB 524
>
> ,

All, therefore, depends on the circumstances of the case. Whether or not damages should be pleaded depends on the circumstances of the case.

Damages for breach of contract

The problems in this matter, as we see shortly, are partly due to the pleadings. The general endorsement on the writ mentions "damages for defamation and damages for loss of business." The formulation does, however, state that damages are for tort (defamation) and breach of contract. A claim for loss of business is possible on an action in the tort of defamation and breach or breach of contract. The term loss of business is, as we see later, equally problematic. The statement of claim, as the quoted excerpts demonstrate, is for separate causes of action – breach of a contract and defamation. The breach of contract is essentially, terminating the contract without three months'' notice as stipulated in the contract. Conversely, there would not have been a breach of contract if the appellant, in compliance with the contract, had given the respondent three months'' notice.

The only damage the respondent is entitled to for breach of contract is for the three months'' notice. This result is a matter of law, not a matter of fact. The parties never created an eternal or life-long relationship. Either party could terminated the contract by giving three months' notice. The principle of damages in contract is to compensate the party who, on account by breach of contract by another, repudiates the contract (*Wertheim (Sally) v Chicoutimi Pulp Co* ([1911] AC 301). In *Robinson v Harman* ([1843-60] All ER 383), Park B, said:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with regard to damages, as if the contract had been performed.

Where, therefore, a contract is determinable by notice, the effect of this rule is that, if there was no breach by notice, the party not in breach would be restored to the contract and then the party in breach would lawfully, without breach of contract, give notice or pay money in lieu of notice. This was the law at common law until the landlord and tenant and master and servant relationship became more statutory by tenancy and employment legislation. This Court applied this

principle in *Kilembe v Total Malawi Ltd* (2014) Civil Appeal 17 (MSCA) (unreported). The appellant is, therefore, right in ground (c) and relief (3) that *Kilembe v Total Malawi Ltd* applies.

There is no reason, therefore, why the principle should not apply to the facts of this case where a service contract was, like in *Kilembe v Total Malawi Ltd,* determinable by notice. This measure of damages is on four walls with the principle in *Hadley v Baxendale*:

> 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 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 where communicated by the plaintiffs 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. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants.

The twin rule by Alderson, B, is the true and correct law on damages for breach of contract. The first rule compensates for what truly is the direct loss from breach of contractual obligations
– the substratum of the agreement. In this case, the substratum of the contract is a contract that, by agreement between the parties, the respondent is to provide dental service for a period determinable by three months'' notice by either party. The contract is not for an indefinite period. Termination of a contract by notice is neither breach nor unlawful. The period of notice, as this Court said in *Kilembe v Total Malawi Ltd* noted, is the period determined by the parties to allow for cooling losses that the breach imposes, it is the measure of their damages, by their choice and agreement. It is the damage that naturally flows from termination of the

contract by either party without the necessary notice. The twin rule refers to compensation for losses, in the knowledge of the parties, which could be incurred from that breach.

The test for the second limb in *Hadley v Baxendale* has been adumbrated and perfected in subsequent cases as both counsel strongly argued before your Lordships. It covers situations, not like the present, where, for example, known to the parties, it was clear that the purchase of the chattel was going to be used for purposes of another contract. The second limb in *Hadley v Baxendale* allows for such loss to be recovered. The respondent has not established such a circumstance. The closest the respondent come to establish this is that the appellant's clients desisted from using the services. This loss, however, is exactly the consequence of giving notice. It was not in the contemplation of the appellant that lawfully giving notice under the contract would result in liability for clients who, for one reason or the other, decide, because of their relationship with the appellant, not to use the respondent.

The clients were the *sine qua nona* the contract was entered. The clients were independent from the appellant. Consequently, from a contractual perspective, it is not established, by evidence, that the respondent was entitled to damages under the second limb of the rule in *Hadley v Baxendale.* The respondent were entitled to losses under the first rule in *Hadley v Baxendale*, to wit, losses incurred in the three months'. The Court below overlooked these losses completely and, as we see shortly, the compensation on the first limb in *Hadley v Baxendale* were – except as to interest, discussed later – not clearly and properly curved out in the evidence of losses from the respondent and the expert witness called on his behalf. Under the contract, therefore, the respondent, apart from the claim for interest, failed to prove damages beyond those he was entitled to under the first limb in *Hadley v Baxendale.* The appellant, therefore, is right that *Kilembe v Total Malawi Ltd* applied to assessment of damages in this case. Ground (c) and relief (iii) in the notice of appeal are apposite.

Damages for defamation

The appellant admitted liability for defamation. The defamation, as the pleadings show, suggested criminality and was in writing. The defamation was, therefore, actionable. Such defamation is actionable per se and, unlike ordinary slander, does not require proof of special damage (*Independent Print Ltd v Lachaux* (2019 UKSC 27; *Axton Fisher Tobacco Co v Evening News Co* (183 S.W 269 (4) (1916). ass. 339, 118 N. E. 647 (1918). In *Hodges v Cunningham*, 161 Miss. 395, 135 So. 215 (1931), the Court said:

> At common law, any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt, or ridicule, degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, is

> actionable per se. The epithet actionable per se has a historical connotation unnecessary for discussion here. What is consequential, however, is that, where the defamation is actionable per se, the victim of the defamation is relieved from pleading and particularizing special pleadings.

Special damages must be pleaded with particularity and proved. Where, therefore, the defamation is not actionable *per se,* it is a requirement that, where there is special damage, pleadings must be made with certainty, giving date and place (*Pascone v Morning Union Co.*, 79 Conn. 523, 65 Atl. 972 (1907). It is insufficient then, without more, to plead loss of patronage or business of a certain amount (*Halliday v Maryland Casualty Co.*, 115 Miss. 56, 75 So. 764 (1917); *Tower v Crosby*, 214 App. Div. 392, 212 N. Y. S. 219 (1925). It is equally insufficient to state that the plaintiff will suffer a profit of certain amount (*Halliday v Maryland Casualty Co.*, 115 Miss. 56, 75 So. 764 (1917); *Tower v.*
Crosby, 214 App. Div. 392, 212 N. Y. S. 219 (1925). On the other hand, where it is impossible to ascertain with particularity the loss of business or diminishing of a business, a general plea would suffice. In *Ratcliffe v. Evans,* [1892] 2 Q. B. 525, the court accepted a general statement where the plaintiff could not specifically provide the detail. Bowen, L. J. said:

> In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.

No obligation to plead special damages in defamation actionable per se

These proclivities, as is the case here, spared a victim of defamation actionable per se. The Court is prone to award damages, on a plea of general damages, to the plaintiff just based on the wrong which, in all respect injurious not only to the victims reputation but to all spheres proof (*Starks v Comer*, 190 Ala. 245, 67 So. 440, (1914); *Barnett v McClain*, 153 Ark. 325, 240 S. W. 415 (1922). The court, just like where the plaintiff in a defamation not actionable per se has passed threshold, proceeds to assess general damages. This often happens, however, even if a plaintiff does, albeit it is not necessary, plead and provide particulars of special damages. Then the court proceeds on awarding general damages.

The compensatory nature of damages in defamation

The purpose of damages in tort is not any different from that for breach of contract. It is based on compensation or restoration (*Watson, Laidlaw, & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649). It is better expressed generally by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; (1880)
7 R (HL) 1, 7: Page 67, whose statement is repeated by the United Kingdom Supreme Court in *Sainsbury's Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellant) Sainsbury's Supermarkets Ltd and others (Respondent) v MasterCard Incorporated and others (Appellant)*:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Where defamation is actionable per se where special damages are not pleaded, the court may order evidence to be given instead

The Court may order, where there was no pleading, the plaintiff give evidence in court on loss of business. In *Corsello v Emerson Bros., Inc.*, 106 Conn. 127, 137 Atl. 390 (1927), a defendant newspaper published that a lawyer obtained a false affidavit for charging an officer of indecent assault. The court held the defamation actionable per se and ordered the plaintiff, the matter having not pleaded, to give evidence of diminution of business of the law practice. A lawyer, accused of belonging to a Ku Klux Klan, was in *Poleski v Polish American Pub. Co.,* 254 Mich.15, 235 N. W. 841 (1931) allowed to give evidence of aggregate profits lost in his real estate business. In *Williams v Printing Co.*, 113 Va. 156, 73 S. E. 472 (3) (1913) it was evidence of a general decline in business. The respondent, in this case, who was not supposed to plead for special damages at all, actually pleaded for and particularised damages for loss of business. The appellant actually, as he should have, gave evidence in the witness statement and without objection – which was not necessary – in the trial. The respondent, on all that is on this record, is entitled to general damages – which includes damages for loss of business or profits.

Heads of damages in defamation – loss of business is a head of damages in defamation and is distinct from other heads

There are essentially four heads of general damages for defamation: injury to health; injury to reputation (*Craney v Donovan*, 92 Conn. 236, 102 Atl. 640); diminishing business, patronage or custom (*Corsello v Emerson*

Bros., Inc., 106 Conn.127, 137 Atl. 390 (1927); *Poleski v Polish American Pub. Co.*, 254
Mich. 15, 235 N. W. 841 (1931); injury to feelings (*Pion v Caron*, 237 Mass. 107, 129 N. E. 369 (1921); *Baker v Winslow*, 184 N. C.1, 113 S. E. 570 (1922); *Viss v Calligan,* 91 Wash. 673, 158 Pac.1012 (1916). These heads cover damages in the future (*Craney v Donovan*, 92 Conn. 236, 102 At. 640(11) (1917); *Elms v Crane*, 118 Me. 261, 107 Atl. 852 (1919). Specifically, where, like here, the defamation is actionable per se, the plaintiff need not plead diminishing business, patronage or custom. The Court assesses damages on all heads where, like here, they occur.

Damages for Injury to reputation

On this head the court awards for pain and suffering. Where the defamation redounds in a threat or actual harm to limb or body the court will compensate. Suffering, however, is mental. The court, moreover, will award for the shrinking of a person's status, dignity and standing in society. Damages here are at large. There is, moreover, no reason for examining comparative awards. On the other hand, in very similar circumstances, consistency must be sought not as a matter of rule but practice more especially if awards are made by a judge not a jury. It is, however, important to regard awards of superior courts – on appeal or first instance. Superior courts, from time to time, set limits and new thresholds of damages for defamation.

In this matter, if we ignore, which we must, the payment into court, the Court below never awarded damages on this head. The appellant was not supposed to mention the payment into court before the Court below right in the submissions before damages were assessed and the judgment delivered. The Court below erroneously made an order on it which is the basis for ground (j) and relief (i) of the grounds of appeal. The appellant repeated the error before us. The court below, therefore, was supposed to assess damages on this head rather than rely on the payment into court. The Court below did not. This Court cannot assess damages on this head because, by the appellant's error in this regard, the money was paid to the respondent. There is no cross-appeal on this head of damage precisely for the same reason. The court will not want to intervene if the money paid into court was paid out on that understanding. Ground (j) and relief (ix) are, therefore, untenable.

Loss of business

The only head remaining on a claim for defamation is the claim for damages for loss of business, patronage or custom. As we have seen, the Court below discussed and actually awarded damages for breach of contract – only that the award was subsumed in the omnibus award. The respondent, as demonstrated, ingenuously claims this under both contract and tort (defamation). The respondent, of course, based on the contract, suffered loss of business, but, only for the time that the appellant never gave notice. The respondent, therefore, under the contract, is entitled to be compensated for this

period. On the other hand, the respondent's contention is that the alleged defamation shrunk patronage and custom which caused loss of business. This damage or loss is recoverable under a claim for defamation and not necessarily under contract. The claimant has only to demonstrate loss of custom or patronage and prove loss of revenue (profit) emanating from such shrinkage.

Loss of business or loss of profits and assessment

Loss of business and loss of profits are not one and the same thing. They are different things. Each can be claimed singly. They can be claimed together. Loss of business can result in loss of customers, clients or patronage. It can be loss of the business completely. The business, whether or not completely lost may have to be evaluated. The apt way, however, of assessing damages for lost business is loss of income or revenue – profits. Shrinkage of custom, patronage cannot be evaluated in terms of numbers. It cannot be evaluated in terms of volume of sales – money received. For volume of sales exclude the cost of acquisition of goods and services. In *Greer v Alstons Engineering Sales and Services Trinidad and Tobago* [2003] UKPC 46 the United Kingdom Privy Council noted this statement from the Trinidad and Tobago Court of Appeals where Mr Justice Jones JA, with whom the Chief Justice and Mr Justice Lucky, JA, agreed, said:

> He failed to produce any documentation in support of these claims and furthermore these sums were all gross. In order for net loss to be assessed, there must be evidence about the expenses incurred in earning that income. In this case there was evidence that whenever the backhoe was rented out, it was rented out with a driver. There was, however, no evidence as to what the cost of that driver was to the appellant, nor was there evidence of the amount spent on fuel and oil or maintenance or any other incidental expense necessary for the operation of the backhoe. In the light of this state of affairs, I hold that the learned trial judge was correct in refusing to award the damages claimed.

Loss of profits, therefore, are a better way of measuring loss of business in a continuing and going concern. Ascertaining or assessing damages – once profits are ascertained – is a matter for calculation in terms of past, present and future losses. The appellant is, therefore, right in ground (e) and relief (v) that the appellant should have proved profits beyond loss of business.

What are grotesque in the appellant's arguments are contentions that failure to designate losses as profits the respondent never pleaded loss of business and that the respondent never proved profits either. The respondent, most surely, pleaded loss of business. What may be problematic, however, is that the respondent, in the evidence obscured the loss of business emanating from the breach of contract – failure to give notice – and loss of business caused by shrinkage of customers because of the defamation. Loss of business was pleaded and stated succinctly and punctiliously in the witness statements and

ably canvassed in the evidence and parties' submissions in this Court and the Court below. Proof of profits, however, goes to proof of losses in business. In that regard, there is sufficient (circumstantial) evidence, as we see shortly, to prove profits. Ground (e) and relief (v) in the grounds of appeal are, therefore rejected.

Past, present and future losses

Past and present losses, unlike future losses, are easy to compute. They are accrued and can, therefore, be easily ascertained. Future losses, however, are more complicated. The assessor must regard that, unless paid by installments for their entire duration, compensation in money is being made before it is earned. In such cases and for lengthy and large awards the court might require expert evidence from an actuary or economist to assist a court and parties (*Sainsbury's Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellant) Sainsbury's Supermarkets Ltd and others (Respondent) v MasterCard Incorporated and others (Appellant)*. Courts, however, can, once the losses are ascertained revert to the traditional multiplier or multiplicand approach. It is not, however, all the time that future losses have to be calculated.

Guess estimate

Where, therefore, the information is poor or it is difficult to ascertain the actual loss, a court, as we have seen, may have to award by estimation. The compensatory principle is essentially an estimation of damages and, concerning damages, there is, therefore, no need for precise mathematical certainty or accuracy. The court, however, for purposes of the compensatory principle must avoid the injustices of over compensation and under compensation. In *Sainsbury's Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellant) Sainsbury's Supermarkets Ltd and others (Respondent) v MasterCard Incorporated and others (Appellant)* the Court said:

> But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the Civil Procedure Rules that legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved: *Devenish Nutrition Ltd v Sanofi-Aventis* SA [2007] EWHC
> 2394 (Ch); [2009] Ch 390, 408, para 30 per Lewison J.
> 218
> .

Parties not to be deprived of damages because of difficulties in proving them

The Court continued:

> In *Livingstone v Rawyards Coal Co* (above) Lord Blackburn in speaking of getting "as nearly as possible" to the sum which would restore the claimant, recognised that the court's task in achieving reparation is not always precise. Similarly, Lord Shaw in *Watson Laidlaw & Co Ltd* (above, at 29 to 30) spoke of restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe" and of the attempt of justice "to get back to the status quo ante in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed". When the court deals with claims for personal injury, loss of life or loss of reputation, it has to put a monetary value on things that cannot be valued precisely. But the task of valuing claims for purely monetary losses may also lack precision if the compensatory principle is to be honoured, particularly when one is dealing with complex trading entities such as the merchants in these appeals. We see this for example in AAM's alternative case which seeks to assess the loss of profit caused by the volume effect where the overcharge was passed on to their customers in the form of higher prices. Such a claim is likely to depend in considerable measure on economic opinion evidence and involve imprecise estimates.

The United Kingdom Supreme Court, however, acknowledged that the principle European Union Damage Directives was a reflection of the common law principle. So much so that, where there is uncertainty about the loss estimate, a court must, where there is proof of damage, make, from proven facts, a guess estimate. Said the Court:

> As we have said, the relevant requirement of EU law is the principle of effectiveness. The assessment of damages based on the compensatory principle does not offend the principle of effectiveness provided that the court does not require unreasonable precision from the claimant. On the contrary, the Damages Directive is based on the compensatory principle. The European Commission has issued "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (2019/C 267/07) ("the 2019 Guidelines") in accordance with a power conferred by article 16 of the Damages Directive. The 2019 Guidelines make clear (para 12) that the compensatory principle "underlies the entire Damages Directive and must be understood as requiring that a person entitled to claim compensation for the harm suffered must be placed in the position in which that person would have been had the infringement not been committed". It goes on to state that pass-on may be invoked

> by an infringer as a shield against a claim for damages and by an indirect purchaser as a sword to support the argument that it has suffered harm (paras
> 18-19). 221. Article 12.1 of the Damages Directive requires member states to ensure not only that both direct and indirect purchasers who have suffered harm should be able to claim full compensation but also that compensation exceeding the harm caused by the infringement of competition law is avoided. Article 12.5 states: "Member states shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on." 222. Similarly, in article 17.1 the Damages Directive states: "Member states shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member states shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available." Page 75
> 223. In discussing those articles of the Damages Directive, the 2019 Guidelines (section
> 2.3, paras 30-35) recognise that the national courts in addressing the issue of pass-on will have to resort to estimates.

Consequently, a court should not avoid compensation because a party cannot accurately establish losses. Said the Court

> In para 33 the 2019 Guidelines state that the principles of equivalence and effectiveness mean, as regards the power to estimate, that "national courts cannot reject submissions on passing-on merely because a party is unable to precisely quantify the passing-on effects". *The starting point is available information*

The estimate, however, must hinge on good, reliable and foundation. The Court continued:

> The power to estimate "requires national courts to, firstly, base their assessment on the information reasonably available and, secondly, strive for an approximation of the amount or share of passing-on which is plausible" (para 34). The 2019 Guidelines note that several member states already have rules which correspond to the power to estimate which the Damages Directive envisages and (in footnote 39) refer to Lord Shaw's statement in Watson, Laidlaw & Co Ltd (above) that harm may be quantified "by the exercise of a sound imagination and the practice of the broad axe", and to the

> application of that statement by the Court of Appeal in *Devenish Nutrition Ltd* ...

The court, therefore, proceeds on the basis of what the England Court of Appeal said in the case *sub nomine* a broad axe:

> The broad axe principle is applicable where the claimant has suffered loss as a result of the defendant's culpable conduct but there is a lack of evidence as to the amount of such loss. There is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant.

The principle involves "restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe" and of the attempt of justice "to get back to the status quo ante in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed".

In this case the available evidence was inadequate for estimating damages for loss of business

In this case, no doubt, there were problems with the information available for assisting the Court below to assess damages. The appellant and respondent, properly, in my judgment, relied on the evidence of the parties and experts to garner evidence. It was possible, going by the evidence of the respondent, from the register, to ascertain patronage and number of customers – matters very critical to a claim for loss of business, patronage and custom. The respondent, however, chose a different method to establish the losses other than proving by loss of business, patronage or custom. Proof of patronage, custom or loss of business of a going concern is not a very useful guide to proving the respondent's losses. The respondent decided to establish losses by assessing patronage and custom through the amount the appellant paid for services to the appellant's clients.

There are problems with this approach. First, the figures are sales figures. They do not include the cost of affording the service. For, certainly, the respondent's figures must disclose the cost of consumables and labour and other paraphernalia for providing dental services to the appellant's clients. Sales figures would, therefore, be a misleading guide. Moreover, using these figures would have an overlap problem.

The clients represented in the appellant's payments to the respondent went to the surgery precisely because of the agreement between the appellant and respondent. These would not go to the respondent's surgery precisely because

there is no longer a contract between the appellant and the respondent. Their absence, therefore, was contemplated by the contract. Using them for post contract assessment would be tantamount to awarding damages for breach of contract beyond what the appellant should pay as damages for contract. These figures cannot be used for the defamation claim either.

Using figures involving clients who came to the surgery for purposes of the defamation claim would, on the facts of this case, have a causal problem. The patients' absence from the surgery would be caused because of breach of contract – not because of the defamation. Of course, others – not the appellant's clients – will shun the surgery if they learn that the respondent is overcharging or fraudulently inflating claims.

The problem is that the respondent only gave the current number of those attending – 3 per a day. The respondent does not inform the assessor how many patients previously were coming daily as to ascertain the difference. Just as the respondent does not demonstrate that how many of the daily patients belonged to the appellant. The diminution of clients would affect the business based on the size of the appellant's client. Certainly, if the appellant's clients were larger than those who were not, the diminution in the patients at the surgery would have been caused by breach of contract – not the defamation. The converse is also true. If patients other than the appellant's clients outnumbered the appellant's clientele, surely, the decline in numbers would have been caused by the defamation. The problem for this Court is that we do not know whether the latter is true.

Moreover, even if it was true, that the respondent laid no evidence of profits leaves the court to assess damages – at least of future loss – is an unsure premise. There is a real risk of over compensation or under compensation, both unjust outcomes. The court must be wary of causing injustice based on overcompensation or under-compensation where that is caused by paucity or complete lack of evidence.

The onus of proving the loss of business or profits lay, as it should be, on the respondent. That, on the balance of probabilities, has not been discharged. The Court below assessed the damages ordered on the wrong criterion and paucity of evidence to establish the correct criterion. The award was, therefore, wrong on the facts and law and, as earlier demonstrated, in principle. The foundational and available information was such that this Court cannot, on appeal, estimate the losses suffered by the respondent as to base the appellant's liability or the respondent's entitlement with or without overcompensation or under-compensation. The difficulty, however, does not comport that the respondent should not be awarded damages. The respondent could and should be awarded nominal damages where, like here, the loss is acknowledged but the evidence as to amount is wanting (*The Owners of No 7 Steam Sand, Pump Dredger v The Owners of SS "Greta Holme" (The "Greta Holme")* [1897] AC 596 and

The Owners of the Steamship "Mediana" v The Owners, Master and Crew of the Lightship "Comet" (The "Mediana") [1900] AC 113) – and nominal damages does not mean small, per Lord Halsbury LC in the latter case. I would award nominal damages of K3, 000, 000 OR K6, 000, 000 for loss of business. The approach of the Court below in assessing damages created a different problem.

There was an omnibus award covering damages for breach of contract and future loss of business from diminution of patronage and custom

The Court below, in its judgment, in its assessment of damages did not, based on the writ of summons and the statement of claim, distinguish, between damages based on contract, to which the rule in *Hadley v Baxendale* applies, and tort, to which the rule in *Livingstone v Rawyards Coal Co* applies. The Court below, as a consequence, made an omnibus award to cover the period of notice and future losses. Clearly, the respondent were entitled to damages for breach of contract from the appellant's termination of the contract without the three months'' notice. This was a clear head of damage under the action. This Court, which on appeal operates by way of rehearing, must disgorge the anomaly in assessing the damages and the omnibus award. The appellant is right in grounds (a), (b), (c) and (f) and reliefs (i), (ii), (iii) and (vi) of the grounds of appeal that the Court below erred in fact, principle and law in the awards and the method of arriving at them.

Damages for breach of contract – loss of business

Albeit, the respondent did not introduce the profits, the evidence of annual sales is cogent enough based on which this Court can on good judgment and the broad axe principle, estimate a profit and hence estimate the damages in contract. It might be useful, therefore, not to use the respondent's average annual sales for the period on which there is evidence for reasons expressed earlier. The respondent's sales in 2010 – the year of termination – were K36, 528, 922. Net profit margins of up to 20% of sales are considered high and good:

> Net profit margin is the percentage of revenue remaining after all operating expenses, interest, taxes have been deducted from a company's total revenue. A good margin will vary considerably by industry and size of business, but as a general rule of thumb, a 10% net profit margin is considered average, a 20% margin is considered high (or "good"), and a 5% margin is low
>
> (https://www.tide.co/blog/business-tips/net-profit- margin/)

The good and high net profit margin will be used because the respondent's business was rising annually at around 37%. As said before, K36, 528, 922.00 will be used. This includes costs and profits. Therefore, K36, 528, 922.00

represents 120%. The costs would be 100% which are K30, 440, 768.00. Profits, therefore, are K6, 088, 154.00 annually and K507, 347.00 per a month. For the three months'' notice, therefore, profit or income is K1, 522, 041. The award for damages for breach of contract in this case, therefore, is K1, 522, 041.00, the three months' profits for the time notice should have been given. These damages were not paid. The money was withheld from the respondent as a business concern or, which is the same thing, the respondent borrowed from banks at commercial rates to expend. Conversely, the appellant, instead of borrowing at interest, used the money to profit in the business as a going concern. The respondent must be compensated through interest.

Against interest, the appellant, first, submits that interest is not chargeable on damages. The law now is that, without the statute, which is just an enabling provision, interest, pleaded or not, will, at the discretion of the court, be charged on damages in contract and tort and, again at the discretion of the court, charged at a compound or simple interest rate. In any event, the appellant in the witness statement claimed interest and the respondent answered to the claim. There was no surprise, therefore, on the interest question.

Since the decision of the House of Lords, now the United Kingdom Supreme Court, in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL), [2008] 1 AC 561, adopting the minority view of Goff and Woolf, LJJ, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A C 669, apart from statute, in the case of Malawi, section 11 of the Courts Act, interest can, just as at equity, at common law, interest awards are in the discretion of the Court both as to whether at simple or compound rate and the date of commencement of interest payment. The difficulty of the defect in the common law, as opposed, to equity, to award interest law was underscored in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* by Lord Goff:

> One would expect to find, in any developed system of law, a comprehensive and reasonably simple set of principles by virtue of which the courts have power to award interest. Since there are circumstances in which the interest awarded should take the form of compound interest, those principles should specify the circumstances in which compound interest, as well as simple interest, may be awarded; and the power to award compound interest should be available both at law and in equity. Nowadays, especially since it has been established (see *National Bank of Greece S.A. v. Pinios Shipping Co. No. 1. The Maira* [1990] 1 A.C. 637) that banks may, by the custom of bankers, charge compound interest upon advances made by them to their customers, one would expect to find that the principal cases in which compound interest may be awarded would be commercial

> cases. Sadly, however, that is not the position in English law. Unfortunately, the power to award compound interest is not available at common law. The power is available in equity; but at present that power is, for historical reasons, exercised only in relation to certain specific classes of claim, in particular proceedings against trustees for an account. An important I believe – the most important - question in the present case is whether that jurisdiction should be developed to apply in a commercial context, as in the present case.

In all speeches, Goff, Browne-Wilkinson, Slynn, Woolf and Berwick, LJJ, deprecated *Page v Newman* (1892 9 B & C 378 and *London, Chatham and Dover Railway Company v South Eastern Railway Company* [1893] AC 429; and *President of India v La Pintada Compania Nacigacion SA* [1985] 1 AC 104, 127C) which restricted payment of (compound) interest only if part of a contract or authorized by statute. There was, therefore, no reason why the wider discretion in equity should not apply to the common law. Their Lordships underscored that cases of equity generally relied on for the proposition were but only instances where the equitable principle was used and were, therefore, not foreclosing instances where the principle could apply. Lord Goff said:

> I shall begin by expressing two preliminary thoughts. The first is that, where the jurisdiction of the court derives from common law or equity, and is designed to do justice in cases which come before the courts, it is startling to be faced by an argument that the jurisdiction is so restricted as to prevent the courts from doing justice. Jurisdiction of that kind should as a matter of principle be as broad as possible, to enable justice to be done wherever necessary: and the relevant limits should be found not in the scope of the jurisdiction but in the manner of its exercise as the principles are worked out from case to case. Second, I find it equally startling to find that the jurisdiction is said to be limited to certain specific categories of case. Where jurisdiction is founded on a principle of justice, I would expect that the categories of case where it is exercised should be regarded not as occupying the whole field but rather as emanations of the principle, so that the possibility of the jurisdiction being extended to other categories of case is not foreclosed.

Equally, legislation authorizing payment of interest in certain cases were to address deficiencies in the law and equity and, therefore, not restricting the court's jurisdiction to award interest at common law or equity. Section 11 of our Courts Act, therefore, is similarly placed. While Woolf and Goff, LJJ, were ready to broaden the application off the principle, the majority, thought that the leap would require legislative intervention. It is, however, in *Sempra Metals Ltd v*

Inland Revenue Commissioners [2007] UKHL), [2008] 1 AC 561 where the House of Lords, in tandem with equity, advanced or developed the common law position. Nicholls LJ, after noting developments on interest payment in equity, common law and legislation, said:

> I must emphasise that limiting the scope of the restrictive common law exception in this way does not lead to a result which conflicts with the legislation, or with the underlying legislative policy, for two reasons. First, section 35A of the 1981 Act is not an exhaustive code. It is not intended to be an exhaustive code. Section 35A does not displace any jurisdiction the courts themselves have to award interest. This is made plain by subsection (4). Courts of equity, for instance, have long exercised a jurisdiction to award interest, including compound interest, in certain circumstances. Likewise with the Late Payment of Commercial Debts (Interest) Act 1998, now amended by the Late Payment of Commercial Debts Regulations 2002 (SI 2002 No 1674). This Act implies into certain types of contracts a term to the effect that a qualifying debt carries interest in accordance with the provisions of the Act. But a debt does not carry interest under a term implied by the Act if, or to the extent that, a right to demand interest on it, which exists by virtue of any rule of law, is exercised: section 3(3).
>
> Secondly, section 35A is concerned with interest on debts and damages. The section says nothing about theprinciples to be applied by a court when assessing the amount of damages for which it gives judgment. The section does not preclude a court from taking interest losses into account when awarding damages for breach of contract. This has long been the general understanding. This is shown by the string of reported cases where interest losses have been recovered as damages in claims for breach of contract or in respect of torts, or would have been so recovered if the losses had been proved. These interest losses have included losses calculated on a compound basis where appropriate. Among the cases are *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] 1 QB 864, *Swingcastle Ltd v Gibson* [1991] 2 AC 223, *Nigerian National Shipping Lines Ltd v Mutual Ltd* [1998] 2 Lloyd's Rep 664, *Hartle v Laceys* [1999] 1 PN 315, and *Mortgage Corporation v Halifax (SW) Ltd* [1999] 1 PN 159.
>
> For these reasons I consider the court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort.

For a long time, I held the view that interest was only payable at equity or under legislation. I actually decided the first case on it – as Registrar! The Supreme Court approved my judgment. The Constitution enjoins us to develop the common law generally and the common law of Malawi in particular. There is obtuse unrealism in the position that there can be a limitation to the power of the court to award interest and that the interest can only be simple and not compound. This Court recently developed the principles further. It is bad law to hold that a court cannot award interest except at equity or by legislation and that the interest can only be simple. The appellant's contention that interest is not payable on damages is anachronistic; so is the argument that interest must be pleaded.

A claim for interest need not be pleaded

Specifically, interest in contract is payable as damages under the rule in *Hadley v Baxendale* 9 Exch 341 (obiter by the Court of Appeal in *Trans Trust SPRL v Danubian Transport Co Ltd* [1959] 2 Q B 297; approved by the Court of Appeal in *Wardsworth v Lydall* [1981] 1 WLR 598; and approved by the House of Lords in *President of India v La Pintada Compania Nacigacion SA* [1985] 1 AC 104, 127C). All these cases determined that the claim for interest was under the second limb foreseeable damage in the rule in *Hadley v Baxendale.* In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* the House of Lords, per Lord Woolf, held that it was foreseeable damage under the first limb. The distinction was, of course, consequential because a claim of interest, if general damages, had to be specifically pleaded. Interest would need not be pleaded if it is general damages. Nicholls, LJ, in *Sempra Metals Ltd v Inland Revenue Commissioners* thought the distinction illogical. The distinction, moreover, was unimportant because, even with rules that required pleading interest, Part 27 of the Civil Procedure Rules, 1998, both in the England and Wales and Trinidad and Tobago, neither a claim for interest nor the facts and matters relied upon such a claim need be pleaded and a court will award interest even if not pleaded. In *De Souza v Trinidad*
Transport Enterprises Ltd and Nanan (No 2) (1971) 18 WIR 150, 152A, Mr Justice Hassanali, said:

> A claim for interest need not be pleaded. The discretionary power of the court under the provisions of s. 26 of the Supreme Court of Judicature Act 1962 is exercisable whether or not there is a claim for interest in the pleadings (*Riches v Westminster Bank Ltd* [1943] 2 All ER 725). Further, as Lord Denning, MR said in *Jefford v Gee* ([1970] 1 All ER at p 1211):
>
> > 'A claim for interest is not itself a cause of action. It is no part of the debt or damages claimed, but something

> apart on its own. It is more like an award of costs than anything else. It is an added benefit awarded to a plaintiff when he wins a case ... '"
>
> The Court of Appeal (sub tit *Trinidad Transport Enterprises Ltd and another v De Souza* (1973) 25 WIR 511) upheld the judge's decision without commenting on the pleading point.

The United Kingdom Privy Council in *Greer v Alstons Engineering Sales and Services Trinidad and Tobago* [2003] UKPC 46 approved this at paragraph 15, holding:

> The same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded. The respondents' argument on this score therefore fails.

Consequently, a deficiency in pleadings for claim of interest does not, as is contended by the appellant, prevent a court from awarding interest.

Interest awards are in the discretion of the court

The discretion to award interest at common law involves deciding whether interests should be paid at all and, if it should be awarded, at what rate and when should payment of interest commence. Lord Goff discusses the exercise of the discretion in *B.P. Exploration Co Ltd v Hunt* [1979] 1 WLR 783. Interest is awarded, not as a punishment, but, because the claimant is deprived of use of the money wrongfully held by the other (854G). It can be presumed, more especially for a business enterprise, that the holding party used the money to enrich oneself. Conversely, the claimant, more especially, if in business, would have to borrow
– at compound rate – while funds were held by another. To order interest at a simple rate makes no business sense. At page 846C he said:

> Interest will generally run from the date of accrual of the cause of action in respect of money then due or loss which then accrues; and in respect of loss which accrues at a date between accrual of the cause of action and judgment, from such date.

At page 846E he says:

> [T]he power to award interest is discretionary, and there is certainly, no rule that interest will invariably run from the date of the loss. It is no part of my task to attempt to define the circumstances in which the court will depart from the fundamental principle; indeed,

since the discretion to award interest is unfettered, it would be improper to do so."

Finally, Lord Golf said at 847D:

> [T]he mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will generally not preclude such an award. Golf, LJ, describes instances where interest may not run from the date the cause of action arose: where the defendant is not aware of the claimant's claim; where the defendant is guilty of delay in prosecuting the claim; and where it is unjust to proceed on the earlier date.

In this case, the cause of action arose on 28 July, 2010. The respondent commenced the proceedings after three years, 19 September, 2013. In *Derby Resources AG v Blue Corinth Marine Co Ltd (No 2)* (The Anthony Harmony) [1998] Lloyd's Report 425, 427, Colman, J., said:

> In cases where delay and the degree of fault are so substantial that the predominant cause of the plaintiff being out of his money can be seen to be failure to prosecute the claim than the defendant's maintenance of his defence, it is not difficult to see that the policy should be that a successful plaintiff should not be compensated for the loss of the use of the money. However, in order for it to be said that the plaintiff's fault has displaced the defendant's fault as the predominant cause of the plaintiff being kept out of money, the delay in question would have to be very substantial and not merely relatively short periods of weeks or months' during which in commercial litigation lulls in activity inevitably occur and the plaintiff's fault would have to be very substantial, as where an action has inexcusably been allowed to go to sleep for years.

Claymore Services Ltd v Nautilus Properties Ltd [2007] EWHC 805 (TCC) (20 March 2007) URL: http://www.bailii.org/ew/cases/EWHC/TCC/2007/805.html was a case where, after reviewing formidable statements in *BP Exploration and Co (Libya) Limited v Hunt (No. 2)* [1979] 1WLR 783; *Birkett v Hayes* [1982] 1WLR 816; *Metal Box Co Limited v Currys Limited* [1988] 1 WLR 175; *Costs Allen v Sir Alfred McAlpine & Sons Limited* [1968] 2 QB 229 *Wright v British Railways Board* [1983] 2 AC 773; *La Pintada Compagnia Navigacion SA v President of India* [1983] 1 Lloyds Rep 37; *Athenian Harmony (No. 2)* [1998] 2 Lloyd's Law Reports 425; *Kuwait Airways Corporation v Kuwait Insurance Company SAK* (Commercial Court transcript 19 April 2000); *Quorum AS v Shramm* (2001) 19 Construction Law Journal 224; and *Adcock*

v Co-operative Insurance Society [2000] LIRLR 657, Jackson, J, said: From this review of the authority, I derive three propositions:

> (1) Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest.
>
> (2) In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable for present purposes when, after making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.
>
> (3) When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay.

Metal Box Co Limited v Currys Limited is important. There, trial commenced 4 years after cause of action and by the time of judgment, the delay was nine years and two months'. The period, not the interest, was reduced to seven years. In this case, proceedings commenced within three years. Proceedings will take nine years if, and only if, the judgment is delivered this year. I reduce the period to 10 years.

The interest rate at which to compound the interest ranges from one to three percent – the usual noninflationary interests – above the base rate and the onus for more rests on the one claiming (*Claymore Services Ltd v Nautilus Properties Ltd; Way v Latilla* [1937] 3 All ER 759; *Metal Box Co Limited v Currys Limited; Re Duckwari* [1999] 2 WLR 1059; *Kuwait Airways Corporation v Kuwait Insurance Company SAK* (Commercial court transcript 19th April 2000), [2000] EWHC 191; *Shearson Lehman Hutton Inc v MacClaine Watson & Co. Ltd.* [1990] 3 All ER 723; *BP Exploration Co (Libya) Limited v Hunt (No 2)* [1979] 1WLR 783; and *Tate and Lyle Food and Distribution Limited v Greater London Council* [1982] 1 WLR 149. In this case, partly because of the delay, the appropriate rate is 1% above the base rate – 13%.

The statutory rate is not used because that refers to interests on judgments. In *Claymore Services Ltd v Nautilus Properties Ltd* Jackson J., said:

> Ms Ansell had cited two cases in which the court awarded interest at Judgment Act rates. These are *Pinnock v Wilkins & Sons* Times Law Reports 29th January 1990 and *Watts v Morrow* [1991] 1 WLR 1421. In *Pinnock* the plaintiff suffered injuries in a road traffic accident. He recovered damages against solicitors for mishandling his personal injuries litigation. The trial judge awarded interest at the Judgments Act rate on the basis that but for the solicitors' negligence, Mr Pinnock would have obtained a judgment carrying interest at that rate. The Court of Appeal upheld that award.
>
> In *Watts v Morrow* the plaintiffs recovered damages against a surveyor for a negligent survey report, on the basis of which the plaintiffs had purchased a house. The Court of Appeal declined to interfere with the judge's award of interest at the Judgments Act rate. The question of interest was only briefly discussed and the rationale of the Court of Appeal's decision appears to be that they should not interfere with the judge's exercise of discretion: see Ralph Gibson L J at pages 1443 to 1444 and Bingham L J at page 1446. It should be noted that Bingham L J had certain reservations about the use of the Judgments Act rate in that case.
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> It is significant that neither of those two cases was a commercial case. In the first case there were special reasons why the Judgments Act rate was appropriate. In the second case at least one member of the Court of Appeal had reservations about using the Judgments Act rate, but the Court of Appeal was unwilling to interfere with the trial judge's exercise of discretion.
>
> In my view neither of those cases suggests that it is appropriate to use the Judgments Act rate in a commercial case such as the present. The Judgments Act rate does not reflect the loss to the claimant from being kept out of its money. The rate stipulated in section 17 of the Judgments Act can only be changed by Parliament, through the mechanism of a Statutory Instrument. That is not a speedy process. Indeed, the Judgments Act rate has only been changed once in the last 20 years. During that period there have been substantial changes in the rate of inflation and in the cost of borrowing. The Judgments Act rate is fixed for the benefit of unpaid judgment creditors. It is not normally an appropriate rate of interest to award in the context of a dispute between two businesses.

> For all of the above reasons I reject Ms. Ansell's contention that interest should be awarded in the present case at the Judgments Act rate.

The Court below, albeit claimed, never awarded for damages of contract. These were not future losses. These were losses for which the Court below should have awarded as accruing from the date of the breach. They were not future losses and, if the Court below had assessed according to damages to proper causes of action and necessary heads, could not have been treated omnibus. The respondent was entitled to them and they were wrongly considered by the Court below.

Profits – as opposed to gross sales – have been worked out as K1, 522, 041. The base rate is 12%. The amount will be compounded for 10 years at the base rate plus 1%. Compounding can be on a daily, weekly, monthly, quarterly, half yearly and one year. The discretion has really been among quarterly, half yearly and one year. The amounts are K5, 507, 820.77; K5, 363,132.26; and K5, 166, 670.74, for quarterly, half yearly and yearly, respectively. I, in my discretion, award K5, 507, 820.77 for loss of business under the contract. I, for difficulties, the appellant had in establishing or proving loss of business from the defamation, award nominal damages for K6, 000, 000.

Costs

The question of costs has been of concern as I was reasoning throughout this judgment. First, the case, given the different procedural problems, was properly in this Court because it provided a possibility of a rehash on aspects of process, procedure and substantive law on this branch of law. Moreover, the matter, given the amounts awarded and the rights infringed, was so important to the parties. This panoply would, however, have been avoided if parties and the Court were focused on the importance of the overriding principle that demands that we aim at speed and fairness and minimizing the resources, both material and human. Mores so, the parties have not complied with the cost procedure in this Court.

The procedure in this Court – and the Court below, up to the amendment to the Courts Act and the subsequent Courts (High Court) (Civil Procedure Rules, 2017 – is for each party to present a bill of costs to the trial judge (s), in this case to the Justices to have, so to speak, the first bite so that the judge, after perusing it, should decide on the matter or defer to the Registrar.

The award of the Court below of K1, 519, 916, 200.65 is set aside. There will be an award for K11, 507, 820.77 substituted therefor. I would, therefore,

THE HON. JUSTICE D F MWAUNGULU SC
JUSTICE OF APPEAL

THE HON. JUSTICE A D KAMANGA SC,
JUSTICE OF APPEAL

partly, albeit substantially, allow the appeal and order, therefore, that each party bears own costs.

Kamanga, JA
I will also allow the appeal.

Pronounced in open court at Blantyre this 26th day of April, 2022.

THE HON. A K C NYIRENDA SC
CHIEF JUSTICE

THE HON. JUSTICE E B TWEA SC
JUSTICE OF APPEAL

THE HON. JUSTICE [DR] J M ANSAH SC
JUSTICE OF APPEAL

THE HON. JUSTICE R R MZIKAMANDA SC,
JUSTICE OF APPEAL

THE HON. JUSTICE A C CHIPETA SC
JUSTICE OF APPEAL

THE HON. JUSTICE L P CHIKOPA SC,
JUSTICE OF APPEAL

THE HON. JUSTICE F E KAPANDA SC
JUSTICE OF APPEAL