**ADEGBOLA**

**V.**

**INSIGHT COMM. LTD**

COURT OF APPEAL (LAGOS DIVISION)

24TH DAY OF NOVEMBER 2016

CA/L/1007/2013

**LEX (2016) - CA/L/1007/2013**

OTHER CITATIONS

2PLR/2017/21 (CA)

**BEFORE THEIR LORDSHIP**

MOHAMMED LAWAL GARBA, JCA (Presided and Read the Lead Judgment)

SIDI DAUDA BAGE, JCA

UGOCHUKWU ANTHONY OGAKWU, JCA

**BETWEEN**

MR. BAYO ADEGBOLA

AND

1. INSIGHT COMMUNICATION LTD

2. STARCOMS LTD

3. DAAR COMMUNICATIONS PLC

4. PRIMETIME ENTERTAINMENT LTD

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE HOLDEN AT IKEJA (judgement delivered on 2 May 2013).

**REPRESENTATION/LAWYERS**

O. F. OSINEYE - for the Appellant.

KAYODE AJEKIGBE (with him, KINGSLEY AJOGUN and O. AJAMOBI) - for the 1st Respondent.

SHAUBU ALARAN (with him, M. T. USMAN) - for the 2nd Respondent.

K. N. NDUKWU - for the 3rd Respondent.

KELECHI ALAMAH - for the 4th Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ANTITRUST AND TRADE REGULATIONS – CONTRACT IN RESTRAINT OF TRADE:- Advertisement contract between a company and a model(s)/content developer(s) – Where it requires that model(s)/content developer(s) not take part in any form of advertisement for any rival player in the whole industrial segment for at least 12 months or more – Attitude of court thereto in its construction

COMMERCIAL LAW – AGENCY RELATIONSHIP:- Conditions precedent to the existence of an agency relationship – Types of - When would be deemed to legally in existence – Centrality of consent, express or implied, between two parties - Legal effect of an established agency relationship vis a vis third parties - Necessity of establishing the authority of the Agent – What would not suffice

COMMERCIAL LAW – AGENCY RELATIONSHIP:- Advertising agency – Unilateral representation that it is the agent of a contractually undisclosed advertiser/principal – How rebutted – Legal effect of

COMMERCIAL LAW – CONTRACT – BREACH OF:- Where alleged breach was in respect of a discharged, a spent, fully performed and so nonexistent contract as far as the parties thereto were concerned – Legal implications for claims based thereon – What claimant would need to show to succeed

COMMERCIAL LAW – CONTRACT – BREACH OF:-Time bound contracts – Where deemed discharged/spent on the basis of effluxion of time – Claim for breach thereto – How treated

COMMERCIAL LAW – CONTRACT – DAMAGES – SPECIAL DAMAGES:- How proved – Where evidence advanced in proof is not challenged or controverted – Standard of proof required to secure award claimed

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Image/brand/broadcast rights on television – Multiple contracts upholding same – Resolution of rights created on the basis of each contract – Applicability of principles of contract law thereto

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Advertising Agency – Separate contractual relationship with its advertising services clients distinguished from contracts between it and professional models/content developers – Legal effect

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Advertising Agency – Where represents itself to third party content developer/model as “agent” of its advertising services client – How proved – Where advertising services client had expressly contracted itself out of such agency relationship thereby setting up the advertising agency as a principal for every brief undertaken for the benefit of the client – Legal effect

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Right to exclusive use of advertising video/broadcast/materials created by content developers/models under exclusive contract – Where contract stipulated period of use of content - Use outside the period – Legal effect

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Distinction between right to physical possession of advertising video/broadcast/material and right to the use of it – Where right of physical possession is retained after right of use had elapsed pursuant to a contract – Where both right was initially secured from an agency which no longer has the right of use – Necessity of securing a new contract with the content developers – Effect of failure thereto

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Advertisement content developer/model - Loss of exclusive advertising contracts/revenue due to wrongful use of past advertisement work/product by a third party – Nature of damage(s) consequently suffered – Need to plead and prove same – Relevant considerations – Heads of court orders available as relief

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS:- Sponsorship events – Use of advertisement material supplied by event sponsors pursuant to the terms of sponsorship – Where material shown to have infringed right of a third party – Liability arising therefrom – Whether extends to event managers/owners

INTELLECTUAL PROPERTY LAW - MEDIA AND CREATIVE RIGHTS – ADVERTISING USAGES AND CONTRACTS: Contract for a term limited advertisement project- Exclusive contract between model and advertising Agency – Nature of initially entered into with a principal organisation – Subsequent contract on the same subject matter entered into with an advert agency on behalf of the main principal – Claim for breach of contract by alleged elongation of time during which advert was broadcast beyond the period contracted – How treated

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - ISSUES FOR DETERMINATION:- Power of appellate court to formulate – basis of

JUDGMENT AND ORDER – DAMAGES:- Principle of law that special damages needs to be specifically pleaded and strictly proved by a claimant - Where the evidence in support of special damages which were specifically pleaded with all the essential particulars is not challenged – Standard of strict proof that would sustain the claim – Whether is of minimum evidence that would satisfy the standard of proof on the balance of probabilities.

PLEADINGS – AVERMENTS:- Assertions made by way of pleadings which called for reply - In the absence of a reply or positive denial of same – Duty of court thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant, a professional model for commercial adverts on 3 May 2005 entered into an agreement with the 1st respondent for an advertisement known as *Starcomms Master brand television commercial* which was to run for a period of one year on television. The advert ran its cause. The appellant then entered into another agreement with DDB Lagos Ltd in February 2005, for television and print adverts which was to run for a period of two years for the sum of N5,000,000 (five million naira) on the telecommunication company for the period contractually agreed upon.

However, in March 2008, the advert featuring the appellant was shown on some television stations without his knowledge and consent. This led to the termination of his agreement with DDB Ltd.

The appellant instituted an action at the Lagos State High Court, sitting at Ikeja where he sought declaration of court and special and general damages for breach of contract. The court at the close of trial, dismissed the appellant’s claims. Dissatisfied, the appellant appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court dismissed the appellant’s claim, hence the appeal by the Defendant/Appellant.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

“3.1 Whether the trial court was right in holding that the 1st respondent acted as the agent of the 2nd respondent with respect to the subject matter of this case when in actual fact the contract between the 1st respondent and the 2nd respondent expressly states that the 1st respondent shall not be agent of the 2nd respondent in dealing with third parties.

3.2 Whether the learned trial judge erred in holding that the 1st respondent was not liable to the appellant for the breach of the contract between the appellant and the 1st respondent.

3.3 Whether the learned trial judge erred in law when he held that the contract which is the subject matter of the case was not breached on the ground that it did not contain any duration for which it was to be operational and the 2nd respondent had unlimited right to the use of the advertisement materials in issue.

3.4 Whether the learned trial judge erred in holding that the 2nd respondent had unlimited right to the use of the advertisement materials in issue when the contract between the appellant and the 1st respondent actually limited the use of the advertisement materials to 1 year duration.

3.5 Whether the trial court was right when it held that the appellant did not suffer any loss because the 2nd, 3rd, and 4th respondents were acting well within their rights in their use of the advertisement materials when in actual fact such use was a clear breach of the contract between the appellant and the 1st respondent and it actually caused losses to the appellant.

3.6 Whether the learned trial judge erred in law when he held that the appellant is not entitled to the reliefs sought when the evidence before the court showed there was a clear breach of the contract and the breach actually caused losses to the appellant.”

*AS ADOPTED BY COURT*

“Whether the High Court was right that the appellant did not prove his claims for breach of contract and rights by the respondents to be entitled to damages and injunction.”

DECISION OF COURT OF APPEAL

1. The 1st respondent/advertisement agency’s representation that it was entering into the contract agreement on behalf of its client/advertiser was unsupportable in the light of the fact it had entered into a written contract with the same client/advertiser under which the Agency was designated fully as a principal for all dealings with third parties for the benefit of the client/advertiser.

2. Thus, in dealing with third (3rd) parties for the service to be provided by the 1st respondent/Agency to the 2nd respondent/Client under their contract, the 1st respondent agreed to act as the principal and not as an agent of the 2nd respondent except where the 2nd respondent agreed that it falls within the responsibility of a company appointed by it.

3. The underlining principle of an agency relationship, a is that it arises from the consent, express or implied, between two parties for one to act for and on behalf of the other in regard of third parties.

4. An agency relationship is not created by a party alone telling a third party that he is acting for and on behalf of another party when the party had no authority to so act or that the action was later ratified by the party for whom he purported to act. A party cannot alone appoint itself an agent of another in its dealing or relationship with third parties without the requisite consent or authority of the party for whom or on whose behalf the action is said to have been done. There must be evidence of authority express or implied, from the party for whom or on behalf of who another party acts; (a principal) before an agency relationship can be said to arise or exist between the two.

5. In the present appeal, there was no evidence that the 2nd respondent did authorize, either expressly or impliedly, or later ratified that the 1st respondent was to act as its agent in the contract or other dealing with the appellant. The very opposite was proved.

6. The alleged breach of the contract happened or occurred long after the period specifically earmarked and agreed to by the parties thereto, had expired or lapsed, both between Appellant and 1st Respondent and as between the 1st Respondent and 2nd Respondent. It means that the alleged breach was in respect of a discharged, a spent, fully performed and so nonexistent contract as far as the parties thereto were concerned. It was not suggested that the terms and conditions and the rights and obligations created and agreed to by the parties in exhibit D2, were to outlive the duration of the contract and continue to bind the parties after the expiration of the period it was to last. It follows therefore, that where there was no existing, valid and enforceable contract which binds the parties thereto, there cannot possibly be a maintainable allegation of breach of any terms and conditions that can sustain a claim for damages for breach of contract.

7. The expiration of the period for which the contract was to run or be in force had effectively terminated and ended the legally enforceable rights and obligations of the parties thereto thereby ending the contractual relationship between them as embodied in the contract agreement. For all legal purposes, the expiration of the agreed period of time during which the contract was fully discharged by mutual performance and satisfaction between the parties, the life of the contract was extinguished and so dead.

8. The right to the exclusive use of the materials released by the 1st respondent, in respect of the contract between them was only vested in the 2nd respondent whilst the contract lasted and did not subsist after the termination of the contract by it. That was why the 1st respondent gave notice in exhibit D3, that should the 2nd respondent desire to use the materials after the expiration of the contract between it and the appellant, then it was necessary for the 2nd respondent to re-negotiate such use with the appellant before the use.

9. It is not the exclusive right of the 2nd respondent’s possession or ownership of the materials in question that is relevant for the purpose of the appellant’s claim, but rather, it is the right to the use of the materials after the termination of the contract with the 1st respondent by the 2nd respondent and the expiration of the period of the contract between the 1st respondent and the appellant.

10. The 2nd respondent had the duty to respect and not breach or abuse the right which was deriveable from the two contracts by failure, refusal or neglect to seek for and obtain the appellant’s prior consent or authority before releasing the materials for such further use in its sponsored event and programme.

11. The 2nd respondent breached the appellant’s right to the further use of the materials in question and is responsible and liable, as stated earlier, for the breach, to the appellant.

12. Special damages needs to be specifically pleaded and strictly proved by a claimant and where the evidence in support of special damages which were specifically pleaded with all the essential particulars is not challenged, the strict proof required is of minimum evidence that would satisfy the standard of proof on the balance of probabilities.

13. On the balance of probabilities, the appellant’s unchallenged evidence is cogent and sufficient to strictly prove the claim for the alleged loss of another exclusive contract due to the wrongful broadcast by the 2nd Respondent of the advertisement which right of use had been contractually terminated.

Appeal allowed

**MAIN JUDGMENT**

**GARBA JCA** (Delivering the Lead Judgment):

In a judgement delivered on 2 May 2013, the High Court of Lagos state sitting at Ikeja, had dismissed the appellant’s suit No. ID/1170/08 against the respondents, for failure of proof. The claims by the appellant were as follows:-

“1. Declaration that the acts of the 1st and 2nd defendants in causing and or authorizing the broadcast of the Starcomms Master TV brand Commercial which featured the appellant as a model, outside the agreed duration of the advert without the claimant’s consent is wrongful and constitutes a breach of the agreement between the claimant and the 1st and 2nd defendants in respect of the said TV Commercial.

2. Declaration that the 3rd and 4th defendants act of broadcasting the Starcomms master brand TV Commercial which featured the appellant as a model outside the agreed duration of the advert without the claimant’s consent is wrongful and constitutes a breach of the claimant’s right.

3. A sum of N25,000,000.00 (twenty five million naira) only as special and general damages against the defendants for the loss suffered by the claimant on account of the broadcast of the said TV commercial outside the agreed duration of the advert without the claimant’s consent.

4. A sum of N25,000.000.00 (twenty five million naira) from the 1st and 2nd defendants for the breach of the agreement of the said Starcomms Master brand TV commercial advert.

5. Perpetual injunction restraining the defendants and their prives from further broadcasting the said Starcomms Master brand TV commercial in any form.”

Dissatisfied with the dismissal of his claims, the appellant brought this appeal by the notice of appeal dated 29 July 2013 but filed on 30 July 2013, containing eight (8) grounds. As required by the rules of the court, learned counsel for the parties filed and exchanged briefs of argument in support of their respective positions in the appeal. In the appellant’s brief, filed on 20 December 2013, deemed on 23 February 2016, the following issues are said to arise for decision in the appeal.

“3.1 Whether the trial court was right in holding that the 1st respondent acted as the agent of the 2nd respondent with respect to the subject matter of this case when in actual fact the contract between the 1st respondent and the 2nd respondent expressly states that the 1st respondent shall not be agent of the 2nd respondent in dealing with third parties.

3.2 Whether the learned trial judge erred in holding that the 1st respondent was not liable to the appellant for the breach of the contract between the appellant and the 1st respondent.

3.3 Whether the learned trial judge erred in law when he held that the contract which is the subject matter of the case was not breached on the ground that it did not contain any duration for which it was to be operational and the 2nd respondent had unlimited right to the use of the advertisement materials in issue.

3.4 Whether the learned trial judge erred in holding that the 2nd respondent had unlimited right to the use of the advertisement materials in issue when the contract between the appellant and the 1st respondent actually limited the use of the advertisement materials to 1 year duration.

3.5 Whether the trial court was right when it held that the appellant did not suffer any loss because the 2nd, 3rd, and 4th respondents were acting well within their rights in their use of the advertisement materials when in actual fact such use was a clear breach of the contract between the appellant and the 1st respondent and it actually caused losses to the appellant.

3.6 Whether the learned trial judge erred in law when he held that the appellant is not entitled to the reliefs sought when the evidence before the court showed there was a clear breach of the contract and the breach actually caused losses to the appellant.”

For the learned counsel for the 1st respondent, two (2) issues were set out in the 1st respondent’s brief filed on 7 February 2014, deemed on 23 February 2016, as the issues calling for determination.

The appellant’s issues were adopted by learned counsel for the 2nd and 3rd respondents in the briefs filed on 15 March 2016 for the 2nd respondent and on 29 September 2014, but deemed on 23 February 2016, for the 3rd respondent. A lone issue was submitted for determination in the 4th respondent’s brief filed on 2 December 2015 and deemed on 23 February 2016.

A summary of the facts giving rise to the appellant’s claims would provide for a full appreciation of the case of the appellant in this appeal. As contained in the appellant’s brief, as a professional model for commercial adverts and promotional campaigns, the appellant, on 3rd May 2005 entered into an agreement with the 1st respondent for an advertisement known as Starcomms Master Brand television commercial for a period of one year on television. The advert was shown on some television stations for the period of one year agreed by the parties and thereafter in February 2005, the appellant had another agreement with DDB Lagos Ltd., for television and print adverts to run for two (2) years with the condition that he would not take part in any form of advert for any telecommunication company for the duration of the agreement. He was to be paid N5,000,000.00 (five million naira) for the agreement which was however terminated in March 2008, because an advert featuring the appellant as a model for the 2nd respondent was shown on some televisions which was done without his knowledge and consent.

A calm reading of the claims of the appellant as well as the statement of the material facts contained in the appellant’s brief, the crucial and concise issue that requires decision in the appeal is: -

“Whether the High Court was right that the appellant did not prove his claims for breach of contract and rights by the respondents to be entitled to damages and injunction.”

In the case of Sha v. Kwan (2000) FWLR (Pt.11) 1798, (2000) 8 NWLR (Pt. 670) 685 at 700, it was held by the Supreme Court that:-

“The Court of Appeal is at liberty and possess the jurisdiction to modify or reject all or any of the issues formulated by the parties and frame its own issues or, as pointed out above, to reframe the issues by the parties if, in its view, such issues will not lead to proper determination of the appeal.”

Similarly, in the later case of Chabayasa v. Anwasi (2010) All FWLR (Pt. 528) 839, (2010) 10 NWLR (Pt. 1201) 163 at 181, paragraphs A-B, the apex court had restated that:-

“the law permits an appellate court to ignore some or all issues raised in the briefs of argument and formulate its own issues, the way it deems them to be material once they are distilled from the grounds of appeal.’’

See also Opera v. D. S. (Nig.) Ltd (1995) 4 NWLR (Pt. 390) 440; Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130 at 157,(1990) 11 SCNJ 10; Uko v. Mbaba (2001) 4 NWLR (Pt. 704) 460. The sole issue framed above is derivable from all the grounds of the notice of appeal and encompasses the substance of the issues raised in the appellant’s brief. The appeal would be decided on the basis of the issue taking into consideration, the points of complaint canvassed under the issues in appellant’s brief. The case put forward by the appellant, in this appeal is that he had a contract with the 1st and 2nd respondents which was to last for one(1) year; from 2005 to 2006, which was breached by them after the expiration of the contract period. The appellant said the 1st respondent was a disclosed agent of the 2nd respondent in the contract and so liable for the breach along with the 3rd and 4th respondents who breached his right by the broadcast of the commercial outside the period of the contract thereby leading to the termination of his later contract with DDB Lagos Ltd. Since the claims of the appellant are based on breach of contract, the first point to be decided is whether the appellant proved a contract between him and any of the respondents which was breached.

From the averments in paragraphs 3, 4, 5, 6, 7 and 8 of the appellant’s amended statement of claim dated 4 February 2011 which were repeated in his statement on oath adopted as evidence at the trial, it is clear that the appellant’s direct contract for the advert in question was with the 1st respondent, who he said had informed him that it was for or at the instance of the 2nd respondent. The terms of the contract between the appellant and the 1st respondent, which was admitted by the latter, should contain the terms and conditions of the agreement between them. However, the appellant did not plead the contract document between him and the 1st respondent and did not list it as one of the documents he intended to rely on at the trial. Sufficient facts were pleaded in the appellant’s amended statement of claim as well as the 1st respondent’s statement of defence dated 23 October 2009 on the existence of the contract between the two of them and the contract document was listed as one of the documents to be relied on by the 1st respondent at the trial. It is at page 256 of the record of appeal and admitted in evidence as exhibit D2. At the beginning of exhibit D2, it was stated that:-

“An agreement made 25 April 2005 on behalf of the advertiser/client between Insight Communications of 17/19, Oduduwa Street, G.R.A., Ikeja, Lagos State (hereinafter called “the agency” which expression shall include its age... successors-in-title and assigns) of the one part and.

...............Dayo Adegbola...................................... (for himself/herself/themselves/and/or in loco parentis to of .....................Freelance ......................................... (hereinafter called “Artiste which expression shall include a minor acting through his loco parentis) of the other part. In consideration of the sum N150,000.00 (one hundred and fifty thousand naira) paid by the agency to the artiste (the receipt whereof the artiste hereby acknowledges) the parties herein agre... follow:”

This introduction of the contract agreement between the appellant and 1st respondent, referred to as the agency, shows that the 1st respondent was entering into the contract agreement on behalf of its client or advertiser, who was not named therein and so undisclosed. In addition, the exhibit D2 did expressly state, as one of the conditions thereof, by way of the appellant’s obligation under paragraph 4, that:-

“(e) The artiste shall not participate in any manner or towards the advertisement or promotion of any competing products to the one he has handled for the agency under this agreement from May 2005 to May 2006.”

Both the appellant and the 1st respondent who are parties to the above agreement have averred in pleadings and respective evidence that at the outset, the 1st respondent had disclosed that it was acting on behalf of the 2nd respondent, i.e. the advertiser/ client, in the agreement, who was not specifically named therein. The parties to exhibit D2 were ad idem that the agreement between them was entered into by the 1st respondent; the agency, on behalf of the 2nd respondent, who was the advertiser/client. With the free acceptance of the terms and conditions set out therein, including consideration and the voluntary signing of the agreement, a valid contract was executed between the parties. A contract in law, is a legally binding agreement between two (2) or more persons (natural and/or corporate) by which rights are acquired by one party in return for acts of consideration or forbearances, on the part of the others. The essential ingredients or elements of a valid legal contract that bind the parties thereto are:-

(a) a clear and precise offer;

(b) a clear, precise and unconditional acceptance of an offer;

(c) a consideration by way of acts or forbearance/s;

(d) intention on the part of the parties to create a legal relationship; and

(e) the requisite legal capacity to contract or enter into a legally binding agreement.

See Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 723; Orient Bank (Nig.) Plc v. Bilante International Ltd (1997) 8 NWLR (Pt. 515) 37; B.C.C. Plc v. Sky Inspect (Nig.) Ltd (2002) 17 NWLR (Pt. 795) 86, (2003) FWLR (Pt. 142) 109; Omega Bank (Nig.) Plc v. O.B.C. Ltd (2005) 8 NWLR (Pt. 928) 547; Metibaiye v. Narelli international Ltd (2009) 16 NWLR (Pt. 1167) 362.

As far as exhibit D2 is concerned, it was a valid legal contract or agreement entered into by the appellant and the 1st respondent which was binding on them, in law. The terms and conditions stipulated therein and agreed to freely by them, were to govern the legal relationship created thereby while the contract lasted between them. Since the terms and conditions set out in the contract are in plain and unambiguous language, the duty of the court in interpreting them in relation to any dispute, that may arise from the contract between the parties, is to ascribe and assign to them, their ordinary and clear meaning which would bring out the intention of the parties. U.B.N. Ltd v. Sax (Nig.) Ltd (1994) 8 NWLR (Pt. 361) 150, (1994) 6 SCNJ 1; U.B.N. Ltd v. Ozigi (1991) 2 NWLR (Pt. 176) 677; Dalek (Nig.) Ltd v. OMPADEC (2007) All FWLR (Pt. 364) 204, (2007) 7 NWLR (Pt. 1033) 402, (2007) 2 SC 305 ; Kaydee Ventures Ltd v. Minister F.C.T. (2010) All FWLR (Pt. 519) 1079, (2010) 7 NWLR (Pt. 1192) 171, (2010) SC 264, (2010) 1- 2 MJSC 129 . The law is firmly settled that a court cannot make a contract for the parties but has a duty to respect the sanctity of the agreement reached by them. Afrotect Tech. Services (Nig.) Ltd v. M.I.A. & Sons Ltd (2000) 82 LRCN 3459, (2000) 15 NWLR (Pt. 692) 730, (2001) FWLR (Pt. 35) 643, (2001) 12 SC (Pt. 11) 1, (2001) 12 SCNJ 298; Owoniboys Tech. Services Ltd v. U.B.N. Ltd (2003) FWLR (Pt. 180) 1529, (2003) NWLR (Pt. 844) 545; S.E.C. Ltd v. N.B.C.I. (2006) 7 NWLR (Pt. 978) 201; Co-operate Dev. Bank Plc v. Ekanem (2009) 16 NWLR (Pt. 1168) 585; P. M. Ltd v. The “M.V. Dancing Sister” (2012) 4 NWLR (Pt. 1289) 169, (2012) All FWLR (Pt. 618) 803, (2012) 1 SC (Pt. 1) 75, (2012) LPELR7848

From the tenor of the agreement, the contract was to run or be in force from May 2005 to May 2006, a period of one year, during which the appellant was not to participate in the promotion or advertisement of any competing product to the one for which contract was entered into by the parties.

The 2nd respondents, as the advertiser/client of the 1st respondent, on whose behalf exhibit D2 was entered into by the 1st respondent, has posited in pleadings; paragraph 10 of the 2nd defendant’s statement of defence dated 22 October 2008, and evidence in paragraph 12 of the statement on oath dated 24 October 2008 which was adopted at the trial, that the 1st respondent was not its agent for the purpose of exhibit D2 and that under its own contract with the 1st respondent, it was completely exonerated of all liabilities that may arise from the services required to 3rd parties on account of things to be done or omitted to be done. The agreement between the two, i.e., the 1st and 2nd respondents was put in evidence as exhibit D1 and a certified true copy thereof, is at page 316 to page 324 with schedule spanning pages 325 to 335 of the record of appeal.

The first paragraph of exhibit D1, after the recitals, is as follows:-

“1. The advertiser, a duly licensed telecommunications operator, has appointed the agency, and the agency has agreed, to act as its advertising and marketing consultant in accordance with the terms and conditions specified in this agreement or as may be agreed between the parties or directed by the advertiser.’’

Put simply, the 1st respondent has agreed with the 2nd respondent to act as its advertisement and marketing consultant in accordance with the conditions and terms specific in the agreement or as directed by the 2nd respondent

Then, in paragraph 5, the conditions for the service to be provided by the 1st respondent to the 2nd respondent under the agreement were set out and sub-paragraph (f) stipulated that:

“5(f) The agency acts as principal- and not in any way as “agent’ in dealing with third parties including, and not limited to suppliers, freelance artistes, photographers, actors and models, etc., except in circumstances and where the advertiser has agreed that it falls under the direct and responsibility of the advertiser’s appointed media buying company.”

The clear import of the above condition is that in dealing with third (3rd) parties for the service to be provided by the 1st respondent to the 2nd respondent under their contract, the 1st respondent acts as the principal and not an agent of the 2nd respondent except where the 2nd respondent agreed that it falls within the responsibility of a company appointed by it. Exhibit D1, by all the requirements of the law, qualifies as a valid contract between the 1st and 2nd respondent which created a binding legal relationship, since the essential elements or ingredients of a valid and enforceable contract are apparently met therein. The parties to exhibit D1 are, in the circumstances, bound by the conditions they freely agreed to/upon and stipulated in the agreement they entered into. Oshin & Oshin Ltd v. Livestock Feed Ltd (1997) 2 NWLR (Pt. 486) 162; Odudu v. Onyibe (2001) FWLR (Pt. 79) 1403,(2001) 13 NWLR (Pt. 729) 140. In the condition set out at paragraph 5(f) of the exhibit D1, clearly, the 1st respondent was to act on its own authority and responsibility in dealing with third (3rd) parties, including artistes such as the appellant, in providing the service contracted for not as an agent of the 2nd respondent except in respect of a company directly appointed by it. In other words, by their agreement, the 1st respondent had no authority of the 2nd respondent to act as its agent in dealing with other parties or third (3rd) parties in the provisions of the service under exhibit D1, save it was directly approved by the 2nd respondent. It was not the case of the 1st respondent in both pleadings and evidence that the appellant was the 2nd respondent’s directly appointed media company for which it was responsible. As seen earlier, the only basis for the claim of agency relationship by the 1st respondent was that it had in exhibit D2 with the appellant indicated that it was acting for and on behalf of the 2nd respondent, as the principal. However, as seen in the condition of its contract with 2nd respondent; exhibit D1, which predated and the foundation of exhibit D2, it had no authority to act as agent of the 2nd respondent for the purposes of its contracts or other dealings with third (3rd) parties such as the appellant. In the case of Pascutto v. Adecentro (Nig.) Ltd (1997) 11 NWLR (Pt. 529) 467 at 492, paragraphs 4-F, the Supreme Court has stated ways by which the relationship of principal and agent; agency in law, may arise. They are thus:-

(a) by express appointment;

(b) by virtue of the doctrine of estoppel;

(c) by subsequent ratification by the principal of a contract made on his behalf without any authorization from the principal;

(d) by implication of law in cases where it is urgently necessary that a person should act on behalf of another; and

(e) by presumption of law in the case of cohabitation. See also the case of Vulcan Gases Ltd v. G. F. Indust. A. G. (2001) FWLR (Pt. 53) 1, (2001) 9 NWLR (Pt. 719) 610, (2001) 5 SC (Pt. 1) 1 , cited and set out in 3rd respondent’s brief where in addition, the apex court stated the basis of an agency relationship as follows:-

“Agency therefore, exists between two persons when one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents to so act. The authority thereby created is called actual authority; express or implied. It is said that the simplest way in which agency arises, both between principal and agent and as regards third parties, is by an express appointment, whether written or oral, by the principal.’’

The case of Freeman & Lockyer v. Buckhurst Park Prop. (Mangal) Ltd (1964) 2 QB 480, was referred to where at page 502, Diplock, LJ said:-

“An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usage of the trade, or the course of business between the parties.”

The underlining principle of an agency relationship, as postulated in the above authorities is that it arises from the consent, express or implied, between two parties for one to act for and on behalf of the other in regard of third parties. An agency relationship is not created by a party alone telling a third party that he is acting for and on behalf of another party when the party had no authority to so act or that the action was later ratified by the party for whom he purported to act. There must be evidence of authority express or implied, from the party for whom or on behalf of who another party acts; (a principal) before an agency relationship can be said to arise or exist between the two.

In the present appeal, once again, there was no evidence that the 2nd respondent did authorize, either expressly or impliedly, or later ratified that the 1st respondent was to act as its agent in the contract or other dealing with the appellant. All that was said (was) that the 1st respondent had disclosed to the appellant that it was acting for the 2nd respondent and so appellant knew that it acted as an agent of a disclosed principal.

This argument is however not tenable because by the binding agreement/ contract entered into with the 2nd respondent; exhibit D2 with eyes wide opened, the 1st respondent had no authority to act as the agent of the 2nd respondent in its dealings or agreements with third (3rd) parties such as the appellant. By the said contract, the 1st respondent was to act as the principal in its dealings with third parties such as the appellant and in the absence of cogent evidence to show that the 2nd respondent had subsequently approved directly or ratified that the 1st respondent should act as its agent in the agreement between the 1st respondent and appellant, the 1st respondent cannot be heard and allowed in law, to resile from the condition in exhibit D2 that it shall act as principal and not as agent in its relationship or dealings with third (3rd) parties such as the appellant. Since the 2nd respondent was admittedly not a party or privy to the contract between the appellant and the 1st respondent, there must be facts and evidence that the requisite authority, outside exhibit D2, was given by the 2nd respondent for the 1st respondent to act as its agent and not the principal, in its dealings with third parties such as the appellant. The absence of such vital facts and evidence has rendered the claim by the 1st respondent that it acted as an agent of the 2nd respondent in its dealings or contract as in exhibit D2, with the appellant, a third party as far as exhibit D2 was concerned, only imagined and baseless in law. By the express condition 5(f) in exhibit D1, which binds 1st respondent, the 1st respondent knew at the time it entered the contract in exhibit D2 with the appellant, that it had no authority from the 2nd respondent to act as its agent in dealing with the appellant and that it was to act as the principal in the contract.

The recital in exhibit D2 and that the 1st respondent indicated to the appellant that it was acting on behalf of the 2nd respondent, did not constitute the necessary authority to create an agency relationship between the 1st and 2nd respondent for the purpose of the contract in exhibit D2. A party cannot alone appoint itself an agent of another in its dealing or relationship with third parties without the requisite consent or authority of the party for whom or on whose behalf the action is said to have been done. That was the position the 1st respondent had foisted on itself in its contract with the appellant and the High Court erred in law in the finding that the 1st respondent acted as an agent of the 2nd respondent for the purpose of the contract with the appellant. There was no proof of such agency relationship between the two in respect of the said contract for which the 2nd respondent can in law be held responsible or liable on the alleged breach thereof.

The consequence of this position is that the 1st respondent, who purported to have acted as agent of 2nd respondent in the agreement with the appellant without the requisite authority to do so, acted as the principal in line with the condition 5(f) of exhibit D1, and was responsible and liable for any breach of such agreement, to the appellant.

In this pleadings and evidence, the 1st respondent had claimed exclusive right to the use of and copyright of the advertisement materials in which the appellant featured under their contract. If there was a breach of the contract in respect of the use of the advertisement, to which the 1st respondent claims exclusive right, it should take and bear responsibility and liability to the appellant.

It may be recalled that I have stated that the contract between the appellant and the 1st respondent, exhibit D2, was indicated to run or last for a period of one year, i.e., from May 2005 to May 2006. [During the] period, the appellant was not to participate in any other advertisement in competition to the one provided for in the contract. All the terms and conditions giving rise to the rights and obligations of the parties spelt and set out in the contract were binding on them whilst the contract lasted or was in operation. Such terms and conditions as well as the rights and obligation created thereby would only be in force and binding on the parties during the life time or period that the contract was to be in existence or was to exist; that was between May 2005 and May 2006.

It was not the case of the appellant that the 1st respondent breached any of the terms and conditions or the rights and obligations contained in their contract during the agreed period that the contract was to last or exist or be in force between them. The case of the appellant was, and still is, that the alleged breach of the contract happened or occurred long after the period specifically earmarked and agreed to by the parties thereto, had expired or lapsed. Straightforward, that the breach occurred after the expiration of the contract between the appellant and 1st respondent. The averment in paragraph 10 of the amended statement of claim referred to earlier, shows that the advertisement for which exhibit C2 was entered was ran until the expiration of the agreed one (1) year period. Paragraphs 11-16 of the same pleadings show that the alleged breach of the contract between the appellant and 1st respondent occurred in year 2008, long after the existence or when the said contract between them had ceased to exist, as agreed. It means that the alleged breach was in respect of a discharged, a spent, fully performed and so nonexistent contract as far as the parties thereto were concerned.

It was not suggested that the terms and conditions and the rights and obligations created and agreed to by the parties in exhibit D2, were to outlive the duration of the contract and continue to bind the parties after the expiration of the one (1) year period it was to last. Reading of the terms and conditions as well as the rights and obligation created and agreed to by the parties in exhibit C2m expressly reveal that the contract was to last and operate for a period of one year and not beyond. The claim for breach of a contract presupposes the existence of a valid contract between the claimant and the defendant, the terms and conditions of which were allegedly breached by the latter, to found the claim. It follows therefore, that where there was no existing valid and enforceable contract which binds the parties thereto, there cannot possibly be a maintainable allegation of breach of any terms and conditions that can sustain a claim for damages for breach of contract. In these premises, the 1st respondent could not have breached terms and conditions of a contract that expired, was discharged and fully performed by the effluxion of the time agreed to by the parties for it to run and last.

I should emphasize that there was no condition or any indication in the contract between the appellant and the 1st respondent, that it was to last for more than the period of one (1) year stipulated and agreed on by the parties or that the rights and obligations created therein would or were to remain in force and binding on the parties even after the expiration of the one (1) year period. The expiration of the period for which the contract was to run or be in force had effectively terminated and ended the legally enforceable rights and obligations of the parties thereto thereby ending the contractual relationship between them as embodied in the contract agreement. For all legal purposes, the expiration of the agreed period of time during which the contract was fully discharged by mutual performance and satisfaction between the parties, the life of the contract was extinguished and so dead. None of the parties would later and subsequent to the death of the contract, be heard to make any claim for breach of any terms or conditions in the expended contract against the other. The 1st respondent was therefore not liable for breach of a contract that was no longer in force and binding on it. The next point for decision is whether the 2nd respondent had the right to use the advertisement materials which were used for the performance of the contract between the appellant and the 1st respondent after the expiration of the said contract. It would be remembered that the contract between the appellant and the 1st respondent was entered into by them on the basis of the earlier agreement/contract in exhibit D1 between the 1st and 2nd respondents for advertisement and marketing consultancy services to be proved by the 1st respondent. Exhibit D1 was to last for three (3) years from the date of execution of the contract. However, the contract was admittedly terminated by the 2nd respondent before the expiration of the period provided therein. The provisions of paragraph 5 (b) - (e) of exhibit D1, stipulating conditions for services to be provided by the 1st respondent, are as follows:-

“(b) The copyright, performing right, broadcasting right and other rights whatsoever existing in any part of the world in relation to works, exposure, material or anything whosoever produced for the advertiser by the agency, its servants or agents of any other person shall be vested in the advertiser.

(c) The advertiser or any party authorized by the advertiser shall be entitled to use in any part of the world any material prepared by the agency on its behalf. This is however subject to the payment of fees mutually agreed by both parties before the works is commissioned.

(d) The agency shall not at anytime during and after the tenure of this agreement, destroy any documents or advertising material hold for the advertiser without prior consent in writing of the advertiser. All documents and other matter relating to the product of the advertiser held by the agency shall become the immediate property of the advertiser on the termination of this agreement from whatever cause.

(e) The advertiser will accept responsibility for the contents or any material only provided the agency obtains the advertiser’s prior approval and no variation is made by the agency or otherwise after such approval prior to the publication or usage of such materials.”

Put communally and shortly, the right to the use of all the materials to be obtained and used by the 1st respondent in the provision of the services under the agreement, was vested in the 2nd respondent, who was to accept responsibility for the content of the materials for publication and use, approved by it. It is common ground between the 1st and 2nd respondents that after the termination of the contract, the 1st respondent released all the materials used for the contract with the appellant to the 2nd respondent, on demand, with the notice that in case the materials were to be used after the expiration of the appellant’s contract with the 1st respondent, there was the need to re-negotiate the terms with the appellant. See the letter dated 8 August 2006, admitted as exhibit D3 in evidence at the trial. So the 2nd respondent had possession of the materials released to it by the 1st respondent after the termination of the contract between them and also had the exclusive right claimed to use the said materials. However, the right to the exclusive use of the materials released by the 1st respondent, in respect of the contract between them was only vested in the 2nd respondent whilst the contract lasted and did not subsist after the termination of the contract by it. That was why the 1st respondent gave notice in exhibit D3, that should the 2nd respondent desire to use the materials after the expiration of the contract between it and the appellant, then it was necessary for the 2nd respondent to re-negotiate such use with the appellant before the use.

The 4th respondent in paragraphs 5-11 of the 4th respondent’s defence dated 19 October 2009 made the following averments: -

“5. The 4th defendant in response to the statement of claim avers that on or about February 2008, she was appointed the event manager and public relations consultant for the 10th anniversary celebration of Kennis Music Limited.

6. The 10th anniversary celebration of Kennis Music Limited was sponsored by the 2nd defendant.

7. The sponsorship deal between Kennis Music Limited and the 2nd defendant limited included among other terms, due acknowledgement of the 2nd defendant as the sponsor of the 10th anniversary celebration of Kennis Music Limited on the airwaves.

8. The 4th defendant further avers that it is customary in the entertainment industry to acknowledge sponsors of events such as the one mentioned above, by running clips of the sponsor’s television commercials.

9. It was to this end that the 2nd defendant through its Public Relations Agency gave Kennis Music Limited, a clip of the Starcomms television commercial.

10. It was the clip of the Starcomms television commercial that was passed on the 4th defendant in her capacity as event manager and public relations consultant to Kennis Music Limited for use of the airwaves.

11. The 4th defendant admits paragraph 17 of the statement of claim only to the extent that a clip of the Starcomms television commercial was shown on her programme called “Primetime Africa” in furtherance of paragraphs 6, 7 and 8 above.”

The import of the above deposition of facts is that the 2nd respondent, as sponsor of the Kennis Musics’s 10th anniversary celebrations, gave the materials released to it by the 1st respondent on the advertisement wherein the appellant featured, for use by the 4th respondent in the celebrations and that the 4th respondent, used the materials in its programmer called “Primetime Africa”. This supports the case put forward by the appellant that he and other people indeed, saw the advertisement on the said programme shown by the 4th respondent. Nowhere in the statement of defence by the 2nd respondent was the case disclosed in the above averments of the 4th respondent on the release of the materials used and shown on the Primetime Africa Programme, denied or in any manner challenged. If it intended to dispute the averments, the 2nd respondent had the legal duty to do so in their pleadings since they directly made assertions which called for reply from it. In the absence of the reply or denial from the 2nd respondent, these averments are deemed correct and admitted by it. In consequence whereof, these averments are sufficient proof that it was the 2nd respondent who released the said materials for use by the 4th respondent in the programme which was shown and seen by the appellant and other people.

The 2nd respondent did not make a case that it had renegotiated with the appellant for the use of the materials in question after it had terminated the contract with the 1st respondent under which it was vested with the right to the use of the materials for the duration of three (3) years the contract would have lasted. With the termination of that contract, the 2nd respondent no longer had the right to the exclusive use of the materials released to it by the 1st respondent in respect of the advertisement featuring the appellant. It is therefore wrong in law for the High Court to have held that the 2nd respondent had the unlimited right to the exclusive use of the materials in question after its termination of the contract with the 1st respondent which vested it with that right and after the expiration the contract between the 1st respondent and the appellant, which produced the materials. It was in recognition of that want or lack of right on the part of 2nd respondent that the 1st respondent notified the 2nd respondent that in case it desired to use the materials released to it after the aforenamed event and period, the 2nd respondent should renegotiate such use with the appellant. The appellant’s case is that the advertisement featuring him shown on the programme of the 4th respondent, was used without his knowledge, consent or authority (see paragraphs 23 and 28 (2) of the appellant’s amended statement of claim mentioned earlier)

The 1st respondent’s case that it was not aware or consented to the use of the materials by the 2nd respondent without the required re-negotiation with the appellant, was not disputed or even challenged. On its part, the 2nd respondent has not even pretended that it had any negotiation with, consent or authority of the appellant to use the materials at the material time as it was notified and advised by the 1st respondent with who it had a contract for the production of such materials. In the above circumstances, it is clear that the 2nd respondent decided on its own to use or release for use by the 4th respondent, the materials released to it by the 1st respondent without the necessary consent or authority of the appellant and without the knowledge of the 1st respondent.

I should perhaps point out that it is not the exclusive right of the 2nd respondent’s possession or ownership of the materials in question that is relevant for the purpose of the appellant’s claim, but rather, it is the right to the use of the materials after the termination of the contract with the 1st respondent by the 2nd respondent and the expiration of the period of the contract between the 1st respondent and the appellant. I have shown that none of the two (2) contracts provided that the right to the use of the materials was to last forever or at least beyond their respective life span. The right to such use was limited to the one(1) year duration of the contract between the appellant and the 1st respondent which had expired, and to the time the 2nd respondent terminated the contract between it and the 1st respondent. The 2nd respondent could not eat its cake and still have or keep it by terminating the contract which vested it with the exclusive right to the use of the materials whilst the contracted lasted and still cling to and claim entitlement to such right under the contract. The 2nd respondents stands alone in responsibility and liability for the unauthorized use of the materials of the advertisement featuring the appellant. The 3rd and 4th respondent only showed the materials released to them by the 2nd respondent in the usual course of their businesses by which they did not have a legal duty to inquire whether the 2nd respondent had the requisite authority to the use of the materials as sponsor of the Kenny Music 10th anniversary celebrations. The 1st respondent had discharged its own obligation in respect of the materials by releasing same to the 2nd respondent with the notice that any further use of the materials should be negotiated or re-negotiated with the appellant since the negotiated period for the use had expired. This position shows that after the expiration of the contract period between the 1st and 2nd respondent, by the latter, the right to the use for the materials produced for the purposes of the two (2) contracts, resided with the appellant and his consent or authority was required and necessary for any further use by anyone who desired to do so later.

The 2nd respondent had the duty to respect and not breach or abuse the right which was deriveable from the two contracts by failure, refusal or neglect to seek for and obtain the appellant’s prior consent or authority before releasing the materials for such further use in its sponsored event and programme. From the state of the pleadings and evidence before the High Court, the 2nd respondent has breached the appellant’s right to the further use of the materials in question and is responsible and liable, as stated earlier, for the breach, to the appellant. Now, the appellant has pleaded and gave evidence of the loss which he said he suffered as a result of the breach of the right to the further use of the materials by the 2nd respondent. The claim for the loss is in special damages for a contract he said he had with another company for another advertisement which was terminated because of the materials shown in the 2nd respondent’s sponsored programme. In paragraph 26 of the amended statement of claim and in the statement on oath adopted as evidence at the trial, the appellant has itemized the loss in special damages which he suffered and the 2nd respondent did not even attempt in its case, to dispute the loss. The law is that a claim for special damages has to be specifically pleaded and strictly proved by a claimant. Strabag Construction Co. (Nig.) Ltd v. Ogarekpe (1991) 1 NWLR (Pt. 170) 733; Sosan v. H.F.P. Engr. (Nig.) Ltd (2004) 3 NWLR (Pt. 861) 546; Daniel Holdings Ltd v. U.B.A. Plc (2005) All FWLR (Pt. 277) 895, (2005) 7 SC (Pt. II) 18, (2005) 7 SCNJ 1. The specific pleadings required for special damages is for the particulars of the damages or loss suffered which is within the special knowledge of the claimant, to be distinctly and specifically set out so as to give adequate notice of their nature to the defendant and the court. The strict proof required is cogent and sufficient evidence of the damages/ losses, such as would make quantification certain and easy. See: S.P.D.C. (Nig.) Ltd v. Tiebo VII (2005) All FWLR (Pt. 265) 990, (2005) 3 - 4 SC 154, (2005) 4 SCNJ 39; Arabambi v. Advance Beverages Industries Ltd (2006) All FWLR (Pt. 295) 581; Xtoudos Services. (Nig.) Ltd v. Taisei (W.A) Ltd (2006) All FWLR (Pt. 333) 1640; Admin v. N.B.C. Ltd (2010) All FWLR (Pt. 527) 690, (2010) 9 NWLR (Pt.1200) 543, (2010) 3-5 SC (Pt. III) 155. The law is also known that where the evidence in support of special damages which were specifically pleaded with all the essential particulars, is not challenged, the strict proof required is of minimum evidence that would satisfy the standard of proof on the balance of probabilities. Buildwell Plants Equipt. Nigeria Ltd v. Roli Hotels Ltd (2006) All FWLR (Pt. 314) 238; Ajero v. Ugorji (1999)10 NWLR (Pt. 621) 1 , (1999) 7 SC (Pt. 2) 58 at 76; Egbunike v. A.C.B. Ltd (1995) 27 LRCN (Pt. 219) 224, (1995) 2 NWLR (Pt. 375) 34, (1995) 2 SCNJ 58 at 78.

In the present appeal, the appellant has tendered the contract entered into by him with another company but which was terminated as a result of the use of the materials in which he appeared without his consent or authority. The contract was admitted in evidence as exhibit C5 and it shows that the appellant was to be paid N5,000,000.00 (five million naira) for two (2) years the contract was to last. He was paid N500,000.00 (five hundred thousand naira) as mobilization out of the contract sum, which he had to refund when the contract was terminated. This evidence proves that the appellant lost the contract that was terminated because of the 2nd respondent’s breach of his right to the further use of the materials in question, which was wrongful and the loss is attributable directly to that act of the 2nd respondent. On the balance of probabilities, the appellant’s unchallenged evidence is cogent and sufficient to strictly prove the claim for the loss of the said contract and is for that reason, entitled to the damages claimed in paragraph 26(a) for the loss against the 2nd respondent. As for the losses stated in paragraph 26(b); loss of associated earnings in terms of endorsements and other promotions, and in paragraph 27, no particulars were specifically pleaded, to make them readily ascertainable and quantifiable and no evidence was adduced to strictly prove the appellant’s entitlement to them, on the balance of proof of probabilities. These heads of special damages do not therefore meet or satisfy the requirement of the law that they be specifically pleaded and strictly proved by the appellant. The heads of claim fail. In the circumstances, with the finding that the appellant’s right was breached wrongfully by the 2nd respondent, he is entitled to the injunction claimed to restrain the 2nd respondent and its prives from further abuse or breach of the right to the use of the materials in question. In the result, the High Court was wrong in law to say that the appellants did not suffer any loss as a result of the action of the 2nd respondent, in particular. In the final result, the sole issue raised is hereby resolved in favour of the appellant to the effect that the High Court was wrong to have found that the appellant did not prove the breach of his right by the 2nd respondent to be entitled to damages and injunction. For that reason, the judgment of the High Court delivered on 2 May 2013 dismissing the appellant’s case, is hereby set aside. In its place, judgment is hereby entered in favour of the appellant against the 2nd respondent in the following terms:

1. That the sum of N5,000,000.00 (five million naira) is awarded in favour of the appellant against the 2nd respondent as special damages for the wrongful breach of his right to further use of the advertisement materials used in the Starcomms master brand television commercial.

2. That the heads of claim for special damages in paragraphs 26(b) and 27 of the amended statement of claim fail and are dismissed.

3. That costs of prosecuting the appeal assessed at N100,000.00 (one hundred thousand naira) are awarded in favour of the appellant against the 2nd respondent.

**BAGE JCA:**

I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Mohammed Lawal Garba JCA.

I agree with the reasoning and conclusion reached therein and have nothing extra to add.

I abide by the consequential order made in the lead judgment.

**OGAKWU JCA**:

I was privileged to read in draft, the leading judgment of my learned brother, Mohammed Lawal Garba JCA. All the questions thrust up by the sole issue distilled by the court for determination in the appeal have been punctiliously analysed and incisively dealt with in his lordship’s characteristic and trademark sapience. I agree with the reasoning and conclusion that the appeal has substance and merit and ought to be allowed. Having also read the records of appeal and the briefs of argument files and exchanged by the parties, I avow my concurrence with the reasoning and conclusion reached in the leading judgment. I have nothing further to add to the erudition manifest in the leading judgment.

Therefore, I also allow the appeal. The judgment of the High Court of Lagos State in suit No. ID/1170/2008: Mr. Dayo Adegbola v. Insight Communication Limited & Ors. Delivered on 2 May 2013 is hereby set aside. I abide by the consequential orders made in the leading judgment, including the order as to costs.

Appeal allowed