IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER,J.S.C.; TSEKOOKO,J.S.C.; KAROKORA, J.S.C.; MULENGA, J.S.C.; AND KANYEIHAMBA, J.S.C.)

CIVIL APPEAL NO.3 OF 1998

B E T W E E N

BANK OF UGANDA...APPELLANT

A N D

1. FRED WILLIAM MASABA)
2. FRANCIS KIYIGA)
3. GEOFFREY KAHAIJA KIRABIRA)
4. SEMAKULA KAYISO PETER)...........................RESPONDENTS
5. KIWANUKA FREDRIC)
6. JAMES MUKUWA)

**(Appeal from the judgement of
the Court of Appeal
at Kampala
(Manyindo, DJC; Berko, J; Twinomujuni, J;)
dated 23.4.1998 in consolidated
Civil Appeal No.23of 1998 and Civil Appeal No.45 of 1998).**

JUDGEMENT OF ODER, JUSTICE OF THE SUPREME COURT.

The respondents in this appeal were employees of the appellant Bank of Uganda. The 1st respondent successfully sued the appellant in the High Court in Civil Suit No.633 of 1995. The other five respondents also successfully sued the appellant in another suit in the High Court, namely Civil Suit No.725 of 1995. The two suits were based on similar facts. The remedies prayed in them were also similar. The suits were tried separately, the 1st respondent's suit being disposed of first, in his favour. The other suit was tried subsequently. It was also decided in favour of the other respondents.

The appellant as the unsuccessful party appealed to the Court of Appeal against the High Court decisions in both cases, but separately. The Court of Appeal consolidated and heard the appeals together. It dismissed the appeals. The appellant has now appealed to this court against the dismissal.

The facts of the case may be stated briefly as follows:

> On 1.11.1994 the appellant's Governor wrote to all its employees, offering them a voluntary retirement scheme. The main reason for the scheme was that the appellant wanted to reduce its number of employees because it was facing financial difficulties. The letter made certain representations to its employees, intended to induce them to voluntarily retire. The letter was exhibit P.4 in the first respondent's case, and exhibit P.2 in the other respondent's case. It stated, inter alia:
>
> "To facilitate the resettlement of staff who will elect to leave the Bank under the early retirement and/or voluntary termination of services scheme, the Board of Directors has decided to pay the following compensation package:
>
> 1. One month's gross salary per year of service.
> 2. Early retirement.
>   (a) 6 months gross salary for those 50 years and older, with 15 or more years of service.
>   (b) 3 months of gross salary for those 45 years and older, with 10 or more years of service.
>
> 3. Long Service:
>   2 months gross pay for those with 10 years service and aged 50, increasing by 2 months per year to a maximum of 12 months at the age of 55.
>
> 4. Adjustment allowance:
>   Provident Fund contributed by both the employee and Bank, three months pay in lieu of notice and accumulated leave will also be paid as an additional settlement.
>
> 5. Staff indebtedness to the Bank:
>
>   The Bank shall have the right to off-set all personal loans, other than housing loans, granted to employees leaving the Bank under this compulsory package. However, any housing loan, which is currently secured by hypothecation of Mailo Land Certificate or Lease deposited with the Bank, shall be registered as a Legal mortgage loan to be repaid over a period to be agreed between the Bank and each employee concerned before departure."

The respondents individually applied to the appellant to retire on the basis of the terms and conditions specified in the Govenor's letter of 1.11.1994. Payments of their respective retirement packages were processed and made to the respondents. However, when they received the payments the respondents were shocked to discover that their respective housing loans had been deducted from their retirement packages. Due to the

deductions, they were left with little or no money to start retirement life. They were virtually penniless.

Consequently, the respondents sued the appellant in the suits already referred to in this judgement. In the suits they alleged that they were induced to retire voluntarily by the representations made to them, and which the appellant knew to be false and untrue or which the appellant made to the respondents recklessly, not caring whether the representations were true or false. As a result of the appellant's representations, the respondents allegedly lost their employments and earnings, lost promotions and salary increments, lost investments from such salaries, and lost full compensation and or business prospects. It was also alleged that the respondents were wrongfully subjected to housing loans deductions. By reason of the foregoing, the respondents allegedly suffered loss and damage. The suits then prayed for, inter alia, general and special damages. Special damages included refund of the housing loans deducted from their retirement benefits.

The appellant resisted the suits, pleading, inter alia, that the respective housing loan agreements between the appellant and the respondents provided that the loan agreements would remain operative only as long as the respondents remained in the appellant's employment. The respondents having voluntarily retired from such employment the appellant was entitled to recover the housing loans from the respondents retirement packages. The appellant also denied that the Governor's letter of 1.11.1994 (exhibit P.2 and P.4) constituted agreements between the appellants and the respondents. It did not, therefore, amend or alter the terms of the housing loan agreements between them.

Similar issues at the trial in both cases were:

(i) Whether the defendant's circular complained of in the plaint were false representations.

(ii) Whether there was a contract between the plaintiffs and the defendant for housing loans not to be deducted.

(iii) Whether there was a breach of contract.

(iv) What was the quantum of damages?

In both cases the learned trial judges answered the issues in the positive, found for the respondents, and held that the appellant had made false representations to the respondents and was in breach of contracts arising out of the respondent's acceptance of the voluntary retirement scheme. Judgements were entered for the respondents for general and special damages and for refund to the respondents of the housing loans which had been deducted from their retirement packages. General damages of shs.7m/= and shs.10m/= were also awarded to the 1st respondent and, collectively to the last five respondents respectively.

The appellant appealed to the Court of Appeal and lost the appeal. Hence this appeal. Seven grounds of appeal are set out in the memorandum. The first ground is to the effect that the learned Justices of Appeal erred when they held that negligent misrepresentation was pleaded as required by law; that it was relied upon and that it was proved against the appellant in the High Court. The second ground is that the learned Justices of Appeal misinterpreted and wrongly applied the principle of negligent misrepresentation when the same was not applicable to the facts of the appeal before them.

I shall first consider the two grounds of appeal together, because they turn on the issue of negligent misrepresentation.

The appellant made a lengthy written statement of its arguments of the grounds of appeal. This was done under rule 93 of the Rules of this court. The arguments are similar to those that were put forward to the Court of Appeal.

Under the first ground it is contended that the last five respondents did not properly plead misrepresentation, as no particulars of the alleged misrepresentation were given. It is said that the error was even worse in the 1st appellant's suit, because the plaint did not give the slightest indication of misrepresentation, and still less, particulars of the alleged misrepresentation. This was contrary to the requirement of order 6 rule 2 of the Civil Procedure Rules. It is contended that this court has consistently held that a party must plead particulars of misrepresentation under distinct heads. An example of such a holding is found in the case of *Stephen Lubega v Barclays Bank, Supreme Court Civil Appeal No.2/92* (unreported). The case of *Okello Okello v Uganda National Examination Board, Supreme Court Civil Appeal No.12/98* (unreported) is also relied on in this regard.

In the instant case it is contended by the appellant's learned counsel that failure to plead particulars of misrepresentation disentitled the 1st respondent to a finding based on misrepresentation. As it happened, the Court of Appeal erred not to have distinguished the two cases and to have made a blanket finding of negligence in favour of all the respondents. The learned trial judge in the 1st respondent's case did not deal with representation at all, nor referred to the appellant's submission on the point. It is contended that the other respondents' plaint similarly failed to plead particulars of the alleged misrepresentation, which should have been done in order to put the appellant on notice of what was relied on; fraud or negligent misrepresentation. Paragraph eight of that plaint is criticised for having fallen short of the legal requirement of pleading fraud or negligent misrepresentation. Consequently, negligent misrepresentation was neither proved nor relied on in the respondents' case.

Written statements of arguments in reply to the appellant's written submissions were also filed by the respondents' learned counsel. One statement contained the reply for the second, third, fourth, fifth and sixth respondents. The first respondent's reply was made in a separate statement. Under the first ground of appeal the five respondents' arguments in reply are that negligent misrepresentation was pleaded, not only in paragraph eight, but also in paragraphs six, seven and nine of the plaint. Read together, it is said, the four paragraphs clearly indicate that the respondents relied on negligent misrepresentation. It

is contended that the pleadings therein were proper, because they had been adopted from Bullen and Leake and Jacobs Precedents of Pleadings, 12th Edition, pages 454 and 455, which this court has cited with approval in previous decisions, for instance, in the case of *Interfreight (U) Ltd. V East African Development Bank, Civil Appeal No.3/93 (SCU)*(unreported). It is also contended that negligent misrepresentation was proved by the evidence of Geoffrey Kashaija Kirabira (PW1) and Francis Xavier Tinkasimire (DW1), and by what the appellant's Governor informed the respondents in his letters of 21.9.1994 (exhibit P.6), 1.11.19994 (exhibit P.2) and 19.12.1994 (exhibit P.7), addressed to the respondents regarding the voluntary retirement scheme.

Under the second ground of appeal it is contended for the last five respondents that the appellant's Board of Directors was in such a legal position that the respondents could reasonably rely upon its judgement or ability to make a careful inquiry before the respondents were offered terms of the voluntary retirement. In the circumstances, the Board of Directors had a duty to the respondents to use reasonable care in preparation of the voluntary termination scheme. The representation was from the employer to the employees. The Board was therefore, required by its position to exercise skill and judgement in designing the voluntary termination scheme. The Board's decision and the Governor's communication thereof to the respondents were made in the course of business; not in a domestic or social relation. The appellant's misrepresentation, therefore, entitled the respondents to bring court action in tort as well as in contract. The warranty to the respondents was that housing loans would not be deducted. The appellant gave the warranty without reasonable care. It was broken, exposing the appellant to liability in damages. As for negligent misrepresentation, the appellant, by negligent misstatement, induced the respondents to enter into the voluntary termination scheme. The appellant is, therefore, liable in damages. For these submissions, the respondents relied on *Hedley Byrne & Co. Ltd. V Hellev & Partners Ltd. (1964) AC 465; Edwards v Skyways Ltd. (1964) 1 WLR 349; Esso Petroleum Co. Ltd. V Customs Exercise Commissioners (1976) 1 WLR p.4,* and *Material Life and Citizens Assurance Co. Ltd. & Anor v C.R.E. Evaff (1971) AC 793.*

In reply under grounds one and two of the appeal the first respondents' written submissions adopted the arguments of the second, third fourth, fifth and sixth respondents. He also adopted his own submissions in the lower court on the same points.

Although it is rather lengthy, it is necessary, in my view, to begin by setting out the respondents' pleadings which have received so much criticism from the appellant. The relevant paragraphs of the first respondent's plaint in his case, Civil Suit No.663/95, are as follows:

> "6 That while the plaintiff was in employment he obtained a housing loan from the defendant
>
> 7. The plaintiff avers that he had a repayment schedule of the said loan with the defendant, which was agreed upon to last till the year 2009. Annexture "A ".
>
> 8. ....

9. The plaintiff avers that sometime in November, 1994, the Governor passed a circular to Members of Staff inviting them to apply for early retirement in consideration of large sums of money which they would use to set up business for a living as soon as they left the Bank Annextures "B " and "C".

10. The plaintiff shall further aver that the Bank undertook not to deduct the existing housing loans from the retirement packages.

11. The plaintiff having been induced by the said circular asked for retirement and expected to obtain a package of over shs.12,000,000/= (shillings twelve million) with which to start a new life and in consideration of which he volunteered to retire early as requested by the defendant.

12. The plaintiff shall aver that as soon as the defendant's Governor received the retirement letter, they gave him a package of shs.2,400,000/= (shillings two million four hundred thousand) only and contrary to their representations to the plaintiff and in breach of agreement deducted over shs.10,000,000/= (shillings ten million) from the package being housing loan.

13. ....

14. The plaintiff further avers that in spite of the unlawful deductions of shs.10,000,000/= from his retirement package, the defendant is also holding the Certificate of Title of his home as security till the balance of the loan is fully paid......

15. The plaintiff shall aver that the actions of the defendant amounted to a breach of contract and misrepresentation which has caused him financial loss."

At the trial of his suit, the first respondent's evidence as PW1 was consistent with what was stated in his plaint. The gist of his evidence was that as an employee of the appellant he received a housing loan on specified terms, contained in a loan agreement made between him and the appellant. Some of the terms were that the loan would be recovered in 158 instalments from the first respondent's salary, beginning February, 1984 until May 2009. In 1994, the appellant's Governor invited its employees to apply for voluntary retirement on the terms set out in the letter of 1.11.1994. This is the letter, parts of which have been reproduced earlier in this judgement. The first respondent in his testimony emphasised the fifth paragraph of that letter, and said that it was one of the important factors, which made him sign the appellant's voluntary retirement scheme. The importance of the letter (exhibit 4 in the first respondent's case) was that he was supposed to negotiate with the appellant about repayment of the loan. The loan had been secured by hypothecation of his Certificate of Title. However, as it turned out he was never called to negotiate the mode of repayment of the loan. Instead, the appellant simply deducted shs.10,068,600/= from his employment package without further recourse to him. This respondent further testified that if the fifth paragraph of exhibit P.4 had not been included in the letter he would not have accepted to retire under the voluntary termination scheme, because he still had 14 years to serve in the appellant's employment.

It is, indeed, trite law that where a party relies on misrepresentation in support of his claim in a Civil Suit, the party must plead it. The law is to be found in rules and decided cases. Order 6 rule 2 of the Civil Procedure Rules provides:

> "In all cases in which a party pleading relies on misrepresentation, fraud, breach of trust, willful default or undue influence, and in all cases in which particulars may be necessary such particulars with dates shall be stated in the pleadings".

There are several decided cases in which this court has held that the requirements of these rules are mandatory. For example, *Stephen Lubega vs Barclays Bank, Civil Appeal No.2 of 1992 (SCU)*(unreported); *Okello Okello v Uganda National Examination Board, Civil Appeal No.12 of 1987 (SCU)*(unreported).

In the instant case I am satisfied that the first respondent's pleadings set out in his plaint satisfied the requirements of Order 6 rule 2 of the Civil Procedure Rules as regards pleading particulars of misrepresentation. The paragraphs of the plaint reproduced above when read together leave no doubt that the first respondent's case against the appellant was founded on breach of contract and misrepresentation, the gist of which is that the first respondent as the appellant's employee had a housing loan from the appellant. Repayment of the loan was governed by terms set out in a loan agreement. One of the terms was that the loan was repayable by instalments until the year 2009. In representations made by the appellant in annexture P.4 the appellant offered the respondent a voluntary retirement scheme. The scheme contained terms which were intended to attract the first respondent to accept to voluntarily retire before the official age of retirement. One of the attractive terms was that the housing loan owed by the first respondent would be registered as a legal mortgage loan, to be re paid over a period to be agreed between the appellant and the first respondent. In consideration of the said terms the first respondent accepted to voluntarily retire. However, contrary to the terms of the voluntary retirement scheme offered to the first respondent, the appellant deducted the housing loan from his retirement package. This meant that the subsequent conduct of the appellant after writing exhibit P.4 indicated that the representation regarding the housing conveyed by that document was false. Such conduct was also a breach of contract.

In the circumstances, my view is that the first respondent pleaded misrepresentation with sufficient particulars.

I have already recapitulated the evidence which the first respondent adduced to prove misrepresentation as pleaded in his plaint. There can be no doubt, in my opinion, that the evidence so adduced amply proved the misrepresentation complained of in the plaint. The learned trial judge so found, and the Court of Appeal agreed with that finding, rightly so in my view.

I turn now to the appellant's criticism of the other respondents' plaint as not having properly pleaded misrepresentation in H.C.C.S. No.725 of 1995. The relevant parts of the pleadings are in the following paragraphs of the plaint.

> "4. At all material times the plaintiffs have been employees of the defendant as pensionable staff eligible for retirement at 55 years and had each obtained

housing loans from the defendant payable in installments for 15, 17, 15, 13, 20 and 12 years respectively.

5. In or about the month of September, 1994 the defendant conceived an idea of reducing its work-force by a voluntary termination scheme in which its employees would apply to voluntarily leave their employment and receive attractive compensation packages in consideration thereby.

6. In order to induce the plaintiffs to apply for voluntary retirement the defendant made the following representations and statements to the plaintiffs namely:

   (a) The defendant would pay to each of the plaintiffs a compensation package from which housing loans would not be deducted.

   (b) Legal mortgages would be registered on account of the said housing loans, which would be paid over a period to be agreed between the parties.

7. The said representations were contained in a circular of the Governor of the defendant dated 1st November, 1994 and its photocopy is annexed here to as "A".

8. The defendant at the time it made or caused to be made the said representation knew them to be false and untrue or made them recklessly not caring whether they were true or false, and were made in order to induce the plaintiffs to apply for voluntary retirement and terminate their employment.

9. ....

10. The plaintiffs then discovered from another circular of the defendant dated 24th January, 1995 that each of the said representations were untrue in that:

   (i) Housing loans were to be fully offset from the compensation packages;

   (ii) No legal mortgages were to registered; and

   (iii) Housing loans were not to be paid over a period of time to be agreed between the parties but instantly offset from the compensation package without their consent. Photocopy of the said circular is annexed hereto as "B".

11. On the discovery of the above truth the plaintiffs sought to withdraw their applications for voluntary retirement but the defendant rejected their pleas, and they were not heard in contravention of natural justice.

12. The plaintiffs were terminated in their employment on the basis of the said applications for voluntary retirement and were paid compensation packages less the housing loans; and the plaintiffs contend that the said packages were much less than the values by which each of them was induced by the said representations.

13. By reasons of the matters aforesaid the plaintiffs have lost their employment and earnings therefrom................. and were subjected to instant repayment of the said housing loans, and have thereby suffered loss and damage.

The appellant's criticism of the five respondent's pleadings is similar to those labelled at the first respondent's pleadings.

It is submitted for the appellant that these five respondents' plaint pleaded misrepresentation only in paragraph 8 thereof; and that the pleading in that paragraph was not adequate for purposes of negligent misrepresentation, because particulars thereof were not given so as to give notice to the appellant. It is clear from the pleadings in the plaint, it is contended, that the appellant did not know whether it was facing fraud, negligence or ignorant, but careless, misstatement. If the respondent sought to rely on negligence, it is said, they ought to have indicated in what way the appellant was careless. According to the appellant, a similar submission in this connection was made before the Court of Appeal but the learned Justices of Appeal ignored the submission. The judgement of the learned Justice of Appeal, Twinomujuni, JA, it is said, is indicative of this error.

For these submissions the appellant also relied on the provisions of Order 6 rule 2 of the Civil Procedure Rules and the cases of *Stephen Lubega vs. Barclays Bank (Supra)* and *Okello Okello vs Uganda Examination Board (supra).*

As in the case of the first respondent it was contended for the appellant that negligent misrepresentation was neither proved nor relied on by the other five respondents. None of the respondents chose to rely on negligent misrepresentation. Therefore none of the respondents adduced any evidence of negligence against the appellant. It is contended by the appellant that no where in the pleadings or in the evidence of these respondents is there even a hint that the appellant was negligent. So it is contended.

In this regard, the Court of Appeal was criticised for making a finding on negligence which, it is said, was uncalled for. Reliance by the Court of Appeal on the case of *Hedley Byrne & Co. Ltd. Vs Heller & Partners (supra)* is also criticised as erroneous because, first, the learned trial judges in both suits did not make any finding as regards negligence. Second, the Court of Appeal's holding on negligence is not supported by any evidence. There is no scintilla of evidence it is said, that when the appellant issued the circular inviting the respondents to apply for voluntary retirement it is stated that the housing loans would not be deducted knowing that this was false or not caring whether it was accurate or not.

To prove their case regarding misrepresentation the five respondents gave evidence at the trial of their suit (H.C.C.S.No.725/95). The effect of their evidence was that it was the terms of the voluntary termination scheme as specified in the Govenor's letter of 1.11.1994 (exhibit P.2) which induced them to accept to voluntarily retire. The part of the letter which was most relevant to the issue of misrepresentation was the fifth paragraph thereof. They relied on the appellants' representation that the housing loan would not be deducted from their voluntary retirement package. Repayment of the

housing loan would be secured by mortgaging their respective pieces of land comprised in their Certificates of Title, which were in possession of the appellant at the material time. The loans would be repaid over a period to be negotiated by the appellant and the respondents. The respondents accepted the terms of the voluntary termination scheme, and individually applied to retire. However, to their surprise the appellant went back on its words and issued two circulars which went counter to the terms set out in earlier the letter of 1.11.1994 (exhibit P.2). These subsequent circulars were dated 19.12.1994 (exhibit P.7) and 24.1.1995 (exhibit P.3). P.7 said, inter alia:

> "...Regarding determination of the next amount payable to each retrenchee, the Ministry of Finance which provide money for payment of staff retrenchment costs, has ruled that every retrenchee must settle in full all his her debts owed to the Bank before being permitted to retire under the voluntary programme. The Management has, therefore, deducted from the gross amount due to you all the debts you owe to the Bank including the housing loan and arrived at the net amount of the cheque as summarised below."

This circular, (exhibit P.7), was addressed to each of the respondents showing deductions of the personal and housing loans made and the balance payable to the respondent concerned.

Exhibit P.3, dated 24.1.1995, said in part:

> "At the Board of Directors' Meting held on 13th this month, the Directors considered and eventually accepted the remaining 74 applications for early retirement under V.T.S. to pay compensation to the staff concerned, taking into account the following procedures:
>
> (i). The first traunche of compensatory payment will be subjected to deductions towards repayment of personal and building loans owed by each applicant to the Bank. Where the amount of the first traunche of compensation is not sufficient to repay one's personal and/or building loans in full, the Bank will still retrench the applicant and retain his or her land certificate as security until full payment of the unpaid balance."

The meaning and effect of the respondents' oral and documentary evidence I have referred to is clear. The appellant unequivocally made representations to the respondents that if they retired voluntarily, their housing loans would not be deducted from their voluntary retirement packages. However, not long afterwards, the appellant's circulars to the respondents not only cancelled the representations but actually made contrary representations. Contrary to what had been said in paragraph 5 of exhibit 2 (or exhibit 4), exhibit P.3 said that the voluntary retirement packages were subject to deduction of the building loans owed to the Bank by the respondents. Where the retirement package was not sufficient to repay the housing loan the respondent concerned would still be retired and his or her Certificate of Title to land, of which the appellant had possession, would be used to secure the unpaid balance. Exhibit P.7 blamed the Ministry of Finance for the decision that the respondents' housing loans would be deducted from their voluntarily retirement packages. In my view, it is inconceivable that the appellant made such unequivocal representations to the respondents with regard to their housing loans without first inquiring from the Ministry of Finance whether the representations made to

the respondents could be implemented or not. It can be safely assumed, in my view, that the appellant knew before hand that the money to finance the respondent's voluntary retirement packages would come from the Ministry of Finance. One is left to wonder why the appellant did not find out first from the Ministry of Finance whether or not funds were available to effect the voluntary retirement scheme so far as the respondents were concerned. The appellant owed a duty of care to the respondents to ascertain the position before it made the representations in question. It did not do so and, consequently acted in breach of its duty of care to the respondents as their employer on a matter over which only it (the appellant) had special knowledge. Further, in my view, the only possible inference which can be drawn from the facts of this case is that at best the appellant made to the respondents the representations in question recklessly and not caring whether they were true or false; or at worst the appellant made them knowing them to be false and untrue. The respondents were induced by, and relied on, the misrepresentations to their peril.

The misrepresentations were made negligently in breach of the appellant's duty of care to the respondents.

It follows, therefore, that misrepresentation is applicable to the instant case. The learned Justices of Appeal are criticised for having (allegedly) misinterpreted and wrongly applied the principle of negligent misrepresentation because, it is said, the same was not applicable to the facts of the present case. In view of what I have already said in this judgement this criticism, with respect, is unjustified. On the basis of well-known authorities which have persuasive value to this court the appellant was liable for the misrepresentations which they made to the respondents negligently as I have already said in this judgement. See *Hedley Byrne's Co. Ltd. v Heller & Partners Ltd. (1964) All E.R.465; Edwards vs. Skyways Ltd. (1964) 1 WLR. 1078* and *Esso Petroleum Co. Ltd. v Mardon (1976) 2 All E.R.5.*

What Lord Denning, M R said at page 16 in *Esso Petroleum Co. Ltd. vs. Mardon (1976) 2 All E.R, 5* appears to me to make an acceptable summary of the principle. He said on page 16:

> "It seems to me that Hedley Byrne, properly understood covers this particular proposition: If a man who has or professes to have special knowledge or skill, makes representation by virtue thereof to another be it advice, information or opinion – with the intention of inducing him to enter a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages. This proposition is in line with what I have said in *Candler vs. Crane Christmas & Co (1951) 1 All E.R.426 at 433,* which was approved in *Mutual Life & Citizens' Assurance Ltd. v Evatt (1971) 1 All E.R.150*. And judges of the Commonwealth have shown themselves quite ready to apply Hedley Byrne between contracting parties. See, in *Canada Sealand of the Pacific Ltd. vs. Ocean Cement Ltd. (1973) DLR (3d) 625;* and, in *New Zealand, Capital Motors Ltd. vs. Beecham (1975) 1 N2 LR 576."*

In the instant case the relevant letter and circulars (exhibits P.2, P.3 (or P.4) and P.7) were all written by the Governor as the appellants Chairman of the Board of Directors and Chief Executive. When he wrote the letter and circulars he did so in those capacities. The respondents were and had been employees of the appellant for many years. They therefore, had no reason to doubt the promises made to them by the Governor. They were entitled to believe and accept that what their employment boss, the Governor, told them in writing was true and would be honoured by the appellant. In those circumstances the respondent owed them a duty to tell them the truth regarding their terms of voluntary retirement. As I have already said that duty of care was breached by the appellant. I am, therefore, in full agreement with Twinomujuni, JA when he said in his judgement:

> "It is clear to me that the misrepresentation was relied upon by the respondents with disastrous consequences. I am of the view that on the principles discussed above, the appellant was very negligent in promising what was not in their power to fulfill. The respondents acted on the promise and suffered sever damages. Even if no contract had been entered into between the parties, the respondents are entitled to damages in tort for negligent representation."

In the circumstances, I have no doubt that the first and second grounds of appeal must fail.

The third ground of appeal is that the learned Justices of Appeal erred in holding that the appellant was bound by its statement that the building loans would not be deducted from the Voluntary Retirement Scheme's package because of the doctrine of estoppel by which the appellant was bound not to deny the truth of the statement. The fourth ground of appeal is that the learned Justices of Appeal erred when they held that a contract between the appellant and the respondents, the terms of which were that the building loans would not be deducted, was proved to exist at the trial.

I shall deal with these grounds together since they both appear to have arisen from one issue considered and answered by the Court of Appeal. That issue was whether there was a binding contract between the parties, which included a stipulation that the housing loans would not be deducted from the Voluntary Retirement package of the respondents. Moreover, in my view, the third ground is merely an aspect of the fourth ground. It is only if there was a contract between the parties that the question of whether the appellant was bound by its circular of 1.11.1994 (exhibit 2 and 4) arises.

Under the third ground of appeal, the Court of Appeal is criticised for holding that the appellant was bound by the terms of this offer, which induced the respondents to retire, and for saying that the respondents could rely on the rule *in Hughes vs. Metropolitan Railways (1877) 2 AC 439* and *Central London Property Trust Limited vs. High Trees Ltd. (1947) K.B.130.* These cases, it is contended, are relevant only to the equitable principle of estoppel. Estoppel does not found a cause of action. It can only act as a defence. Similarly, it is said, Section 113 of the Evidence Act does not create a cause of action. The section only disentitles a person to deny the truth of what he has represented in circumstances where the representee has relied on the representation.

Under the fourth ground of appeal it is submitted that it was against the weight of evidence for the learned Justices of Appeal to have held that the appellant's circular stating that building loans would not be deducted from the retirement benefits was an offer. It is contended that the circular was not an offer but an invitation to treat, and that offer came from the respondents when they applied to voluntarily retire and contracts, (if at all) resulted in the acceptance of the applications by the appellant. As the appellant's Board of Directors reserved the right to accept or reject the respondent's applications, or accept them in a varied form, it meant that the respondents' applications were offers to the appellant.

The first respondent's reply in respect of these grounds was that the letter of 1.11.1994 amounted to the appellant's offer to the respondents, and not an invitation to treat; still less was it an invitation to the respondents to enter into negotiations with the appellant. It is contended that exhibit P2 (and P4) amounted to a clear and definite offer not requiring any further negotiations. Evidence of Fred William Masaba (PW1) and Tinkasimire (DW1) in H.C.C.S. 663/95 (Court of Appeal Civil Appeal No.23/97) proved that the offer was intended to bind both the parties. The intention of the parties and their conduct was to create a legally binding relationship and the letter (P.2 or P.4) was treated as an offer. It is further contended that there were two distinct contracts, namely, a contract to terminate employment and a mortgage agreement which was prior in existence. Elements of the latter were that money had been lent to the respondents and the respondents had delivered their Certificates of Title to the appellant Bank. All that remained to be done was for the appellant to call the respondents to execute legal mortgages. The existence of an equitable mortgage was not in dispute.

With regard to the appellant's criticism that the learned Justice of Appeal erred in holding that the appellant was bound by its statement that housing loans would not be deducted because of the doctrine of estoppel, it is submitted by the respondents that the learned Justices of Appeal had been misunderstood. The gist of their decision, it is contended, is that the appellant was liable for breach of contract and not for estoppel. The letter P.2 (or P.4) was understood by the appellant and the respondents to be an inducement to enter into contract under the Voluntary Retirement Scheme, and was intended to bind the parties, as it was not given in a social or domestic relationship, but was given in the usual business relationship of master and servant. In the circumstances, it is said, the respondent was entitled to argue that the appellant was estopped from going back on its promise namely an undertaking not to deduct the housing loans from the respondent's retirement package.

Under grounds three and four of the appeal, the submissions for the last five respondents before us made points similar to those put forward for the first respondent. Only some details differ, which, in my opinion, are not necessary to review separately. I do not, therefore, intend to do so here.

The learned Justices of Appeal found that the appellant's letter of 1.11.1994 to the respondents amounted to an offer, which was intended that the respondents should accept and act on. The respondents did accept the offer by applying to voluntarily retire on the

terms offered to them in the circular. The learned Justice of Appeal, Twinomujuni, JA, made the finding in the following terms:

> "On the issue whether there was a binding contract between the parties which included a stipulation that the loans on housing would not be deducted, the trial judges easily held that there was such a contract and I would agree.
>
> The respondents were still young people with a lot of years of service ahead of them. The youngest of them still had twenty years of service and the oldest still had at least twelve years to go. The appellant's offer contained in the Governor's offer referred to above induced the respondents to retire because of the attractive package which included a promise that the housing loan would not be deducted. They accepted the offer and agreed to retire on the terms offered in exhibit on page 14 of this judgement. Indeed they retired but the appellant failed to fulfil or pay the whole retirement package as he had promised. There is no doubt that all the respondents retired following this arrangement. It is not true, as Prof. Sempebwa would have it that the Voluntary Retirement Scheme did not go through and that therefore the appellant resorted to terminate their employment under the original contract of employment (P.132) with the Bank. All the evidence on record is overwhelmingly against the submission. This being the case the appellant was bound by the terms of their offer, which induced the respondents to retire. The respondents could rely on the rule in *Huges vs. Metropolitan Railways (1877) 2 AC, 439* on the basis of which Denning, J; as he then was, in the case of *Central London Property Trust Ltd. vs. High Trees Ltd. (1947) KB 130* formulated the following principles:
>
> > "That where parties enter into an arrangement which is intended to create legal relations between them and in presence of such arrangement one party makes a promise to the other which he knows will be acted upon by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow to act inconsistently with it even thought the promise may not be supported by consideration in the strict sense."
>
> In other words, a promise intended to be binding and intended to be acted upon and is in fact acted upon should be binding. This equitable principle has been incorporated in our Evidence Act.''

In the passage of his judgement I have just referred to the learned Justice of the Appeal, Twinomujuni, JA, found that a binding contract was made between the appellant and the respondents by which the respondents would retire voluntarily and their housing loans would not be deducted from their Voluntary Retirement package. I have no hesitation in agreeing with that position. This was a contract in which the appellant's offer made to the respondent in its letter of 1.11.1994 was that if they agreed to retire voluntarily they would receive a package of certain payments in return. The package included a promise that the respondent's outstanding housing loans would not be deducted from the Voluntary Retirement package. The appellant intended that the offer should be accepted by the respondents, creating a binding contract and relationship. It was not an invitation to treat. Nor was it an invitation to commence negotiations between the parties. In my view the appellant's circular was an offer consisting of a definite promise to be bound provided that the terms therein were accepted by the respondents. The respondents did, in fact, accept the appellant's offer. They did so by applying to voluntarily retire on the

terms set out in the appellant's letter. They were induced by the terms of the offer, which appeared to be attractive to them. At that stage there was a binding contract, supported by mutual considerations. The appellant stood to gain by reducing its liability of maintaining a large number of employees. This intention was clearly stated in the appellant's circulars. The respondents on the other hand stood to gain by retiring early with a fairly generous retirement package as, according to the appellant's promise to them, the housing loans would not be deducted from the Voluntary Retirement package, but the loans would be repaid over a period to be agreed between the parties. In my view evidence adduced by both sides at the trial clearly proved the existence of a contract. For example, Fred William Masaba (PW1 in H.C.C.S.No.663/95) testified that:-

> "......I was invited to apply for Voluntary Retirement. The Governor of the Bank of Uganda invited me to retire early voluntarily. He did so in a written document on 21.9.94. It was addressed to all employees. It invited the eligible members of staff to apply for voluntary employment (Annex B of plant). This was followed by another one of 1st November, 1994 setting up the terms of the compensatory package to be offered. In the circular paragraph 5 about the staff indebtedness to the Bank was one of important factors, which made me sign a voluntary retirement from the Bank. I signed a document which was kept by the Personnel Officer. I just gave my names and signed for having accepted what the Bank had offered that they would not deduct my building loan. I was supposed to negotiate with the Bank over the mode of repayment of the loan secured by a hypothecation of the Title Deed."

The evidence of Geoffrey Rashaija Kibirabira (PW1 in H.C.C.S.725/95) was to the same effect.

To me, the evidence of PW1 shows that he accepted unequivocally the appellant's offer in paragraph 5 of the letter of 1.11.1994. He did not suggest any modification thereof. He accepted it as it was. The evidence also shows that the respondents would not have left the appellant's employment voluntarily at that stage but for the terms of the appellant's offer.

In his evidence, in cross-examination, Tinkasimire said, inter alia:

> "The terms of Voluntary Retirement were made generous to attract candidates for Voluntary Retirement (refers to clause 5 of exhibit P1v)".

This evidence also tends to show that what were offered to the respondents were generous terms intended to attract the appellant's employees to accept. The respondents accepted the offer, giving rise to a binding contract of voluntary termination of service. That contract was different from the original contract of service between the appellant and the respondents. It was a new contract which, in my opinion, may be regarded as a contract within a contract. The appellant could have terminated the respondents' employment under the original contract of service, but they chose not to do so. They instead chose to terminate the respondents' service by another arrangement. That arrangement was the contract of voluntary termination of service. They cannot, therefore, be heard to say now that the respondents' services were terminated under their contract of employment.

The appellant acted in breach of the contract in question, giving rise to the suits in the present case. It did so by deducting the respondents' housing loans from their Voluntary Retirement benefits. This was contrary to their promise which constituted an offer to the respondents, which they had accepted.

In the light of the foregoing it is my respectful view that the learned Justices of Appeal have been unjustifiably criticised as having held that the respondents' cause of action was based on the equitable doctrine of estoppel. Indeed, the doctrine of estoppel as explained in the High Trees case (supra); and in *Everden vs. Guildford City Association Football Club Ltd. (1975) 3 All ER* has been applied in Uganda by section 113 of our Evidence Act, and decided cases, such as *Nurdin Bandali vs. Combank Tanganyika Ltd. (1963) E.A. 303* and *Century Automobile vs. Hutchings Biemen Ltd. (1965) E.A. 304.* Briefly, the doctrine is that if parties who have entered into definite and distinct terms involving certain legal results, certain penalties or legal forfeiture afterwards by their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. Three elements which must be present for the doctrine of equitable estoppel to operate are, first, a clear and unequivocal representation; second, an intention that it should be acted upon; and, third, action upon it in the belief of its truth. Another important nature of the principle of equitable estoppel is that in its application it is used as a defence and not to found a cause of action.

In the instant case, when the Court of Appeal referred to the doctrine of equitable estoppel, as stated in High Trees case, (supra) it is clear that it did not mean that the respondents' cause of action was based on that principle. To my mind, what the learned Justices of Appeal must have meant is that a contract having been reached as a result of the respondents' acceptance of the offer made by the appellant to them with such clear terms, the appellant was bound by that contract, breach of which by the appellant would render it liable to the respondents for that breach. The appellant should not be allowed to renege on it.

In the circumstances, I am of the opinion that grounds three and four of the appeal should fail.

The complaint in ground five of the appeal is that the learned Justices of Appeal failed to assess properly and take into account that the housing loans cannot be refunded without provisions for its repayment. The background to this complaint is that in their suits the respondents claimed and prayed for refund of the housing loans as special damages. The gist of their case in this regard was that the appellant had wrongly deducted the building loans from the respondents' retirement benefits. The appellant did so in breach of the contract, which was made between them and the appellant. In the 1st respondent's suit, (H.C.C.S.633/95) the learned trial judge found for him in respect of refund of the housing loan in the following terms:

"I now proceed to discuss the fourth issue, whether any loss was occasioned by the defendant to the plaintiff. In the first place we have to look at the benefits that were to accrue to the plaintiff under the voluntary termination scheme. He was entitled to the payment stipulated in Exhibit P.Iv as well Exhibit P.v., plus an arrangement for the payment of his housing loan. He lost the sum of shs.10m/= being his retirement benefits which the defendant deducted to repay his housing loan. He certainly is entitled to payment of the balance of his package of shs.10m with interest at the current bank rate."

However, the learned trial judge did not make a specific order for payment of the sum of shs.10m/= by the appellant to the 1st respondent. He did so in a ruling which he subsequently made after an application by the 1st respondent under section 101 of the Civil Procedure Act for an order seeking a correction of the slip in the learned trial judge's judgement. In the end the order for payment of the shs.10m/= was embodied in the Decree, approved by the learned counsel for the appellant in the following terms:

"IT IS HEREBY ORDERED AND DECREED as follows:

The defendant pay the plaintiff shs.10,000,000/= (shillings ten million as repayment of his housing loan plus interest at the current bank rate."

In the case of the last five respondents (H.C.C.S.725/95) the learned trial judge said regarding the housing loans:

"(a) That all the deductions for housing loan recovered from the plaintiffs be paid back to the plaintiffs with interest at bank rates of 30 percent in full".

This was followed by an order in respect of each of the respondents and the sum of the amount of the money of the housing loan, which the appellant had deducted from his retirement benefit. In this connection the learned trial judge then concluded:

"It must be noted however, that the housing loan was to be paid in a period to be agreed upon by the parties. See P.2. That is between the bank and the plaintiffs. The court cannot make an order on this arrangement because the court could not make any contract for the parties. I did, however, note that the bank made some representations which induced the plaintiffs to voluntarily retire and opted for the voluntary termination scheme which the bank unilaterally changed to the detriment of the plaintiffs and went ahead and made the housing loan deductions."

No order was made as to when the housing loans were to be repaid by the respondents to the appellant.

Under ground five of the appeal the appellant's submission was that the learned Justices of Appeal failed to assess the importance of the appellant's submission that the court should not order the appellant to include housing loans into the retirement package when there is not provision for repayment as had been envisaged by the parties. The learned Justice of Appeal, Twinomujuni, JA is criticised for allegedly suggesting that repayment of the housing loans was subject to making of another contract, giving rise to two contracts – one to terminate employment and another, a mortgage agreement. This, it is

contended, is tantamount to the court ordering the parties to the negotiating table, which is unattainable. It is because a Common Law Court does not make a contract for the parties. The court cannot superintend the making of such a contract. Enforcement of the Decree in H.C.C.S 725/95 that, *"No order is made when the housing loans are to be paid by the plaintiffs to the Defendant"* is therefore, very difficult, it is contended. On the one hand the appellant can only comply with the court order if it is protected by a mortgage agreement incorporating payment by the respondents. On the other hand, the respondents cannot enforce the court order lawfully when they have not undertaken by a binding agreement that they will pay in the period desired by the appellant. In the circumstances, it is said, the only fair verdict is to refrain from making an order whose enforcement depends on further agreement of the parties.

The respondents' reply under the fifth ground of appeal briefly, is that there was no need for the trial court to mention that the housing loans had to be repaid, because paragraph five of exhibit P.2 (or P.4) had provided for execution of a legal mortgage and provision for the appellant to agree with the respondents on a period of repayment before the respondents left the appellant's employment. While it is conceded that the court could not in any way force the parties to agree on the period for repayment of the housing loans, it is contended that the court rightly ordered the appellant to refund the deducted housing loans. It is further said that as the appellant has custody of the respondents' Certificates of Title to Land, it would not be prejudiced as regards repayment of the housing loans. The appellant is an equitable mortgagee and could call the respondents to execute legal mortgages at any time. The appellant had a duty to ensure that the respondents did not leave its employment before agreeing with them on when to repay the housing loans.

With respect, I think that the complaint that the learned Justices of Appeal failed to take into account the appellant's submission that the housing loan cannot be refunded without provision for repayment has no merit. In my view, the learned Justices of Appeal must have had such a submission in mind in view of what Twinomujuni, J.A, said in the following passage of his judgement.

> "I am very much alive to the fact that the offer stated that housing loans would be repaid over a period to be agreed. I am also aware of the holding in *May & Butcher vs. R (1934) 2KB 354,* where the court stated:
>
> > 'To be a good contract there must be a concluded bargain, and concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement of the parties.'
>
> However, the situation in the present case is distinguishable from that in the case of *May & Butcher vs. R* because it is clear from the evidence on record that the parties envisaged that there would be two agreements namely, the contract to terminate employment (the voluntary retirement package) and the mortgage agreement. The parties accomplished the first contract (despite the partial breach by the appellant) and they are yet to finalise the second. The grounds of appeal based on the submissions that the contract was never pleaded or proved and that there was no binding contract between the appellant and the respondents must therefore fail".

What the learned Justice of Appeal said in the passage of his judgement, to which I have just referred appears to me to be one of the reasons why the Court of Appeal did not reverse the decisions of the trial courts which ordered the appellant to refund the deducted housing loans to the respondents. While this court would not order the appellant and the respondents to enter into a legal mortgage agreement stipulating how and within what period the housing loans should be repaid, it would call upon the appellant to honour the promise it made in this connection in exhibit P.2 (or P.4). The appellant already has possession of the respondents' Certificates of Title to Land as security for the loans. Consequently, it is an equitable mortgagee in respect of the housing loans. According to the respondents' evidence, the period for repayment of the loans had already been stipulated under the terms on which the respondents were granted the housing loans. The respondents were already repaying the loans by instalments under such terms before the offer of the voluntary retirement. The appellant and the respondents should, therefore, make the equitable mortgages now existing between them into legal mortgages for purposes of repayment by the respondents of the housing loans to the appellant on the terms and conditions and for the period which the respondents were already repaying the housing loans before the voluntary retirement scheme was implemented, the respondents' respective Certificates of Title to land already in the possession of the appellant being the collateral securities for repayment of the housing loans in question.

For these and other reasons I think that the trial courts were justified in ordering the appellant to refund to the respondents the housing loans it had deducted from the respondents voluntary retirement benefits; and the Court of Appeal was justified in declining to reverse that order.

Another reason for ordering refund of the housing loans are that the appellant acted in breach of clear terms of a contract made between it and the respondents by deducting the housing loans from their voluntary retirement package. In their suits the respondents prayed for refund of the deducted housing loans as special damages. Having succeeded in establishing that the appellant had acted in breach of the contract, they were entitled to the remedies prayed for, the main one being refund of the deducted housing loans.

In the circumstances my view is that ground five of the appeal should fail.

Ground six of the appeal complains that the learned Justices of Appeal erred when they held that the trial judges properly directed themselves on the quantum of damages.

In awarding general damages to the 1st respondent the learned trial judge in that case (H.C.C.S.633/95) said, inter alia:

> "In the first place, he is entitled to general damages because he was put under extreme hardship. This is a man who trusting in the word of his employers, volunteered to retire at an early age of 41 to start a fresh calling utilising retirement benefits. Instead of facilitating his settlement as promised in circular exhibit P.1v the defendant with held his money. He has related all the hardships he suffered as a result of that treatment. His wife deserted him. His children are out of school and, to use his words, he has since retirement lived like a pauper. He felt let down and I do not hesitate to award him a sum

of shs.8 m/= discounted to shs.7m/= owing to the fact that it will be paid to him together with interest from the date of this judgement till payment in full, as well as taking into account imponderables."

In the last five respondents' case, (H.C.C.S.725/95) the learned trial judge awarded them general damages in the following terms:

> "The plaintiffs suffered damages and were entitled to some kind of remedy. I would award them general damages of shillings ten million (10 million) collectively and interest on general damages at court rates."

The appellant's submission under ground six is that the learned trial judge in the 1st respondent's case (H.C.C.S.633/95) awarded damages for disappointment and mental torture which loss could not be reasonably foreseen. Damages are awarded for loss arising from breach. The purpose is to put the plaintiff in the position he would have been in had the contract been performed. It follows, therefore, that normally damages for breach of contract are not awarded for disappointment and mental suffering as a natural result of breach. It is submitted that the natural loss arising out of failure to pay money is not damages but interest unless the plaintiff could prove extra loss that the defendant could reasonably foresee as likely to arise. It is submitted that what the learned trial judge said in H.C.C.S. 633/95 in the passage of his judgement which I have set out above, was a misdirection. This is because the 1st respondent did not prove any foreseeable loss at the trial. The evidence he adduced was unduly exaggerated, it is contended. He planned to construct six houses out of shs.10m/=. This should have been disbelieved by the learned trial judge, it is contended. The trial judge ought to have ordered that the outstanding housing loan should be paid to the 1st respondent plus interest at commercial rate from termination of services to the date of judgement and nothing more.

For the 1st respondent, it was submitted in reply that the learned Justices of Appeal came to the correct decision and were right not to interfere with the quantum of damages. Damages awarded must be based on loss suffered as a result of the contractual breach and or misrepresentation. Contrary to the appellants' submission, it is contended, the award of general damages for the 1st respondent was based on the whole of his evidence and not only on his emotional loss. In the case of misrepresentation the case of *Esso Petroleum Co. Ltd. Mardon (1976) 2 All ER 5* is very relevant to the present appeal because the loss was incurred by the respondents as a result of misrepresentation. They lost jobs and investment funds. Further, the case of *Chande vs. East African Airways (1964) EA, 78,* does not suggest that the respondents could not get damages for disappointment and/or physical inconvenience.

For the rest of the respondents it was submitted that on the basis of the authority of *Esso Petroleum Co. (supra)* there was no distinction in damages for tort or contract in the instant case.

As the Court of Appeal did, I find that the case of *Esso Petroleum Co. (supra)* is applicable to the instant case with regard to the award of damages and other issues. In that case the plaintiffs (Esso) were a company engaged in the production and distribution

of petroleum. In 1961 Esso acquired a site on a busy main street of a town for development as a petrol filling station. The site showed that the estimated annual consumption of petrol at the station, would be 200,000 gallons per annum from the third year of operation. After the site had been acquired, the Local Authority changed the site on which the petrol pumps would be built from the busy main street to a site accessible only from the side streets. As a result of the change of plan Esso's estimate was falsified but through lack of care Esso failed to revise their original estimate of 200,000 gallons.

Esso negotiated with the defendant to lease to him the petrol station. A representative of Esso with 40 years experience told the defendant in good faith that petrol sales at the station would reach 200,000 gallons in the third year of operation of the station. The defendant was aware of the deficiencies of the station and suggested that a lower figure would be more realistic, but the expertise of the Esso representative quelled his doubt and on the basis of the Esso estimated potential the defendant was induced to enter into a tenancy agreement. That agreement was for three years at a rent assessed by Esso on the basis of the potential of the station at 200,000 gallons per year. The defendant put capital into the station. At the end of 15 months only 78,000 gallons of petrol had been consumed. In July 1964 the defendant tendered notice to quit the station, but Esso wishing to retain him, reduced the rent. The defendant continued to incur losses. By August 1966 the defendant was unable to pay Esso for the rent and the petroleum products he had received, and in December 1996 Esso sued him, claiming possession of the station, money owed for petrol and mesne profits. The defendant continued to trade at the station until March 1967 when he gave up possession. He had lost all the capital he had put in the station and had incurred a substantial overdraft. By his defence and counter claim the defendant claimed damages in respect of the representation made by Essso's representative as to the potential through put of petrol, alleging

(i) that it amounted to a warranty for breach of which the defendant was entitled to damages, and

(ii) that it also amounted to negligent representation in breach of Essos's duty of care to the defendant in advising him as to potential through put. The trial judge rejected the claim for breach of warranty, but held that Esso were liable in damages for breach of their duty of care to the defendant.

On appeal to the Court of Appeal, it was held that:

(a) Esso was liable for breach of warranty because where during a pre contractual negotiations, one party, who has special knowledge and expertise concerning the subject matter of negotiations, made a forecast based on that knowledge and expertise with the intention of inducing the other party to enter into the contract, and in reliance on that forecast the other party did enter into the contract, it was open to the court to construe the forecast as being not merely an expression of opinion but as constituting a warranty that the forecast was reliable i.e. that it had been made with reasonable care since the forecast made by Esso of throughput of Petrol was based on their wide skill of the petrol trade and had induced the defendant to enter into the tenancy agreement the

forecast was to be construed as constituting a warranty that it was sound. Accordingly, since the estimate had been made negligently and was therefore unsound, Esso were liable to the defendant.

(b) Esso was also negligent in relation to statements made in the course of negotiations, which culminated in the making of a contract. Esso was also under a duty to use reasonable care to see that the advice, information or opinion given to the defendant was reliable. The duty of care was not limited to persons who carried on the business or profession of giving advice. In the circumstances of that case, the relationship between Esso and the defendant

was such as to give rise to a duty on the part of Esso to take care since they had special knowledge and skill in estimating the throughput of a filling station. It followed that Esso, since the forecast had been made negligently, therefore they were also liable to the defendant in damages for negligence.

(c) The measure of damages was the loss the defendant had suffered by having been induced to enter into a disastrous contract. The loss included loss suffered after the date of the new tenancy entered into in September, 1964. Since that also was attributable to the original misrepresentation; in taking the new tenancy the defendant had acted reasonably in attempting to mitigate the losses which he had already incurred in running the station.

On damages in that case Lord Denning MR said on page 16:

> "Now for the measure of damages Mr. Mardon is not to be compensated here for 'loss of a bargain." He was given no bargain that the throughput would amount to 200,000 gallons a year. He is to be compensated for having been induced to enter a contract, which turned out to be disastrous to him. Whether it be called breach of warranty or negligent misrepresentation, its effect was not to warrant the throughput, but only induce him to enter into the contract. So the damages in either case are to be measured by the loss he suffered. Just as in the case of *Doyle v Olby (Iron Mongers) Ltd. (1969) 2 All ER,* he can say:
>
> > "I would not have entered into this contract at all but for your representation. Owing to it I have lost all the capital I put into it. I also incurred a large overdraft. I have spent four years of my life in wasted endeavour without reward; and it will take me some years to re-establish myself."
>
> For all such loss he is entitled to recover damages. It is to be measured in a similar way as the loss due to a personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract; and contrast
>
> with his position as it is now as a result of entering into it. The future is necessarily problematical and can only be a rough-and-ready estimate. But it must be done to assess the loss."

The principles on damages as stated in the *Esso Petroleum Co. case (supra)* are, in my opinion, applicable to the instant case. The respondent's claims were based on breach of

warranty and on negligent misrepresentation. They lost use of their deducted housing loans, which they had planned to invest in income generating projects or enterprises. Since the purposes of damages are to put the plaintiff in the position he would have been had the contract been performed, it is my view that the learned trial judges acted properly in awarding damages to the respondents for the reasons they did, and the Court of Appeal was correct to up hold the awards of the trial courts.

For damages to be awarded they must have been reasonably foreseeable as naturally arising from a breach of contract. 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, that is to say, according to the usual course of things from such a breach of contract itself, or as may be reasonably 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 the contract. See *Hadley vs. Baxendale (1854) 156 ER 145; Victoria Landry (Windsor) Ltd. vs. Newman Industries Ltd. (1949) 1,All ER 997;* and *V. R. Chande v East African Airways Corporation (1964) E.A 5.*

Arising from the principle that in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach, another principle appears to be that in general the only damages which can be recovered for breach of a contract are damages in respect of pecuniary loss which is actually sustained by the plaintiff and which was at the time of the making of the contract reasonably foreseeable. To this general rule, however, there are certain exceptions. For instance, it appears that damages may be awarded for disappointment arising out of a breach of contract. *See V. R. Chande and others vs. East African Airways Corporation (supra)* and *Cook vs.* Spanish *Holiday Tours (London) Ltd. (1960),* "Times" 6th February. These last two decided cases, to me, answer the appellant's complaint that the learned trial judge awarded the 1st appellant damages on the basis of the social and psychological suffering he experienced.

In the circumstances, my view is that the learned trial judges applied the correct principles in awarding the damages they did to the respondents.

With regard to the quantum of the damages awarded to the respondents, the Court of Appeal, correctly in my view, took the view that as an appellate court it would not reverse the findings of the trial judges merely because if it had tried the cases in the first instance it would have given a lesser sum.

In *Flint vs. Lovell (1935) 1KB 354,* Greer, CJ said:

> "In order to justify reversing the trial judge on the question of amount of damages it will generally be necessary that this court (appellate court) should be convinced either that the judge acted upon some wrong principle of law, or the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

In my opinion this is still good law, which the Court of Appeal rightly applied to the instant case.

In the case of the last five respondents, the learned trial judge awarded shs.10m/= as damages collectively to the five respondents. The Court of Appeal left that award undisturbed. However, for the sake of clarity as regards the amount of damages which should have been received by each of the respondents, it would have been preferable in, my view, for the learned trial judge to have apportioned the award amongst the respondents. In the absence of such apportionment, it may be assumed that the five respondents should each receive an equal share of the collectively awarded damages. That view not withstanding, I think that this court should also leave the collective award of damages undisturbed.

Ground six of the appeal should, therefore, fail.

Ground seven of the appeal is that the learned Justices of Appeal generally failed to assess and analyse the evidence at the trial and also the appellants' main submissions on several issues, namely:

(a) that if there was a contract it was made when the appellant accepted the respondents' offer to retire;

(b) the alternative submission that the supposed agreement was not achieved and the appellant simply terminated the respondent's services.

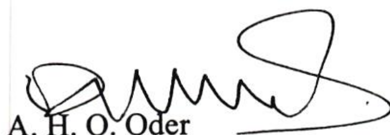
With due respect, I do not see any merit in this ground of appeal. The Court of Appeal, in my view, properly reevaluated the evidence in this case and drew its own conclusions as a first Court of Appeal.

Secondly, in any case, this ground of appeal in my opinion has been adequately dealt with by my consideration of, and conclusions on, the other six grounds of appeal.

For the reasons given, I would dismiss this appeal with costs to the respondents here and in the court below.

As Tsekooko, J.S.C.; Karokora, J.S.C.; Mulenga, J.S.C. and Kanyeihamba, J.S.C. agree it is ordered that this appeal be and is hereby dismissed with costs here and in the court below.

Dated at Mengo this....6th....day of May, 1999.



A. H. O. Oder
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENG

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J, S.C. AND KANYEIHAMBA, J.S.C.)

CIVIL APPEAL NO. 3 OF 1998

BETWEEN

BANK OF UGANDA ... ... APPELLANT

AND

1. FRED WILLIAM MASABA
2. FRANCIS KIYINGA
3. GEOFFREY KASHAIJA KIRABIRA
4. SEMAKULA KAYISO PETER
5. KIWANUKA FREDRICK
6. JAMES MUKUWA ... ... RESPONDENTS

(Appeal from the Judgment of the Court of Appeal at Kampala (Manyindo, D.C.J., Berko, J.A. and Twinomujuni, J.A.) dated 28th April in Civil Appeal No. 23 of 1998 and Civil Appeal No. 45 of 1998)

JUDGMENT OF TSEKOOKO, J.S.C.:

I have read in draft the judgment prepared by the Hon. Mr. Justice Oder, Justice of the Supreme Court, which he has just delivered. I agree with it and the orders he has proposed. I have nothing useful to add.

Delivered at Mengo this .6th...day of ...May.....1999.

J.W.N.Tsekooko.
Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, J.S.C)

CIVIL APPEAL NO. 3/98

BETWEEN

BANK OF UGANDA .... APPELLANT

AND

1. **FRED WILLIAM MASABA** }
2. **FRANCIS KIYAGA** }
3. **GODFREY KAHAIJA KIRABIRA** }
4. **SEMAKULA KAYISO PETER** }
5. **KIWANUKA FREDRICK** }
6. **JAMES MUKUWA** } .... **RESPONDENTS**

(Appeal from the judgment of the Court of Appeal at Kampala before His Lordships Justice S.T. Manyindo, D.C.J., Berko, JA., and A. Twinomujuni, JA., dated 28th April, 1998 in consolidated Civil Appeal 23 of 1998 and Civil Appeal no. 45 of 1998 rising from H.C.C.S. no. 653 of 1995 and 725 of 1995)

JUDGMENT OF KAROKORA, J.S.C.

I have had the advantage of reading in draft the judgment prepared by Oder, J.S.C., and I do agree with him and the orders he has proposed.

I only wish to add that the appellant were in breach of contract when they deducted the housing loan from the voluntary retirement package – one of the terms that had

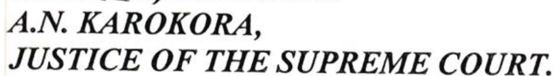
induced the respondents to go on an early retirement. This deduction of housing loan from the voluntary retirement package infringed upon clause 5 of the "Early Retirement and/or Voluntary Termination of Service Scheme" which the Governor of the appellant Bank wrote on 1/11/94 which provided inter alia:-

> ***"The Bank shall have the right to off set all personal loans, other than housing loans granted to employees leaving the Bank under this compensatory package. However, any housing loan, which is currently secured by hypothecation of mailo land certificate or leasehold deposited with the Bank, shall be registered as a legal mortgage loan to be repaid over a period to be agreed between the Bank and each employee concerned before departure."***

The appellant were in breach, because they deducted the loan money from the package paid, and thus defeated the inducement they had offered to the respondent to give up their employment. The appellant ought not to have deducted it from the package. In the circumstances, the respondents are entitled to get their full packages. The appellant shall recover housing loans from the respondent over a period to be agreed upon between the appellant and each of the respondents.

In the result, the appeal should fail.

Dated at Mengo this ..8th.. day of ..May.., 1999.



A.N. KAROKORA,
JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., & KANYEIHAMBA, J.S.C.

CIVIL APPELA NO.3 OF 1998

BETWEEN

BANK OF UGANDA :::::::::::::::::::::::::::::::::: APPELLANT

AND

1. FRED WILLIAM MASABA
2. FRANCIS KIYINGI
3. GEOFREY KASHAIJA KIRABIRA
4. SEMAKULA KAYISO PETER ::::::::::::::::::::: RESPONDENTS
5. KIWANUKA FREDRICK
6. JAMES MUKUWA

(Appeal from the Judgment of the Court of Appeal (Manyindo, D.C.J., Berko, J.A. and Twinomujuni, J.A.) at Kampala dated 28th April in Civil Appeal No.23 of 1998 and Civil Appeal No.45 of 1998)

JUDGMENT OF MULENGA, J.S.C.

I have read and agree with the judgment prepared by ODER, J.S.C.

Delivered at Mengo this ......6th.................. day of ....May.......,1999.

J.N. MULENGA,
JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C.,
MULENGA, J.S.C., KANYEIHAMBA , J.S.C.

CIVIL APPEAL NO. 3 OF 1998

B E T W E E N

BANK OF UGANDA ::APPELLANT

A N D

1-FREDA WILLIAM MASABA
2-FRANCIS KIYINGI
3-GEOFREY KASHAIJA KIRABIRA:::::::::::::::::::::::::RESPONDENTS
4- SEMAKULA KAYISO PETER
5-KIWANUKA FREDRICK
6-JAMES MUKUWA

(Appeal from the Judgment of the Court of Appeal Manyindo,D.C.J., Berko, J.A., and Twinomujuni, J.A.,) at Kampala dated 28th April in Civil Appeal No. 23 of 1998 and Civil Appeal No. 45 of 1998)

JUDGMENT OF KANYEIHAMBA J.S.C.

I have read in draft the judgment by ODER J.S.C., and, I agree with his findings and orders. I have nothing to add..

*DELIVERED AT **MENGO** THIS ......6th........DAY OF.........May.......1999*

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT