IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA - GHANA A.D. 2016

CORAM: **AKUFFO (MS.), JSC. (PRESIDING)**

BAFFOE - BONNIE, JSC.

AKOTO – BAMFO (MRS), JSC.

APPAU, JSC.

PWAMANG, JSC.

CIVIL APPEAL

NO.J4/40/2015

9TH MARCH 2016

CLIPPER LEASING CORPORATION - PLAINTIFF/ APPELLANT/APPELLANT

VRS

1. THE ATTORNEY-GENERAL - 1ST DEFENDANTS/ RESPONDENTS/RESPONDENTS

2. GHANA AIRWAYS IN LIQUIDATION

J U D G M E N T

PWAMANG, JSC.

This is an appeal against the unanimous decision of the Court of Appeal dated 10th May, 2012 dismissing a Cross Appeal against the judgment of the High Court, Accra delivered on 5th February, 2009.

The Plaintiff/Appellant/Appellant, hereinafter referred to as 'the Appellant', brought an action in the Commercial Division of the High Court, Accra against the Defendants/Respondents/Respondents, hereinafter referred to as 'the Respondents', in respect of claims it had against Ghana Airways Ltd, hereinafter referred to as 'the 2nd defendant'. The Appellant is an aircraft leasing company registered in Antigua and by an agreement dated 7th March 1997 it leased a DC-10-30 aircraft to the 2nd defendant for a period of 36 months on a dry lease basis.

At the end of the lease period Appellant had some outstanding claims against 2nd defendant in respect of rent, maintenance reserves and engine repairs it carried out on behalf of 2nd defendant. In the meantime, by the terms of the aircraft lease, the monthly rent stated in the agreement to be paid by 2nd defendant continued to accrue since 2nd defendant failed to pay Appellant's claims and did not return the aircraft. Appellant therefore filed a suit in the High Court, England, against the 2nd defendant on 28th May, 2004 claiming among other reliefs, payments of outstanding rent, maintenance reserves and damages for breach of contract.

At that time, in addition to Appellant, 2nd defendant was indebted to many other businesses for non-payment of various bills all totaling over US$160 million and was struggling to operate. The Government of Ghana, as the sole shareholder decided to intervene to try and salvage the 2nd defendant, it being the national airline. Consequently, the Minister for Transport wrote a letter, dated 24th September 2004 to creditors of the 2nd defendant, including Appellant, informing them of the intention of the Government of Ghana to assume the liabilities of 2nd defendant incurred as at 31st August 2004. The letter indicated that Appellant would be contacted by a debt committee the government had established and charged with the negotiation of claims against 2nd defendant.

Appellant was subsequently contacted and sent a representative to Ghana who met with the debt committee and held some discussions with them. According to Appellant, it suspended the suit in the United Kingdom on account of the letter from the Minister of Transport but nothing conclusive was ever agreed upon with the debt committee.

On 22nd June, 2005 the Government of Ghana, acting by the Minister of Finance and Economic Planning, resolved to place the 2nd defendant into official liquidation under **Section2 (2)** of the **Bodies Corporate (Official Liquidation) Act, 1963 (Act. 180).** The official liquidator, who is the Registrar-General of Ghana, published a notice to all creditors of 2nd defendant requesting them to submit to the liquidator proof of their debts. Appellant responded to the notice by filing its proof of debt on 25th August 2005 claiming an amount of **US$ 35,021,488.00 as outstanding rent and maintenance reserves for the lease of its aircraft for the period ending 20th August 2003, including claims on engine pooling account.**

Thereafter Appellant, through its lawyer in Ghana, attended some meetings with the liquidator at which he requested for the return of the

aircraft but did not get a satisfactory answer. According to Appellant it learnt, much later, that the aircraft was scrapped in Rome by the Italian authorities for reasons relating to the inability of 2nd defendant to pay taxes levied on the aircraft. Appellant did not see any prospects of a satisfactory settlement of its claims by the liquidator so it sought and obtained leave of the High Court of Ghana, pursuant to **Section 17 of Act 180,** and filed a writ of summons on 13th July 2006 claiming the following reliefs:

a. Recovery of the sum of thirty-five million and twenty-one thousand, four hundred and eighty-eight dollars (US$35,021,488) being outstanding rent for the lease of the McDonnell Douglas DC-10-30 series Aircraft and replacement engines.

b. Interest on the sum of thirty-five million and twenty-one thousand, four hundred and eighty thousand dollars ($35,021,488) from 20th June 2001 to the date of final payment.

c. Return of the aircraft, McDonnell Douglas DC-10-30 Series Aircraft with Manufacturer's Serial Number 46554 and Registration Number GH-PHN and the replacement engines fixed on them by the plaintiff in accordance with the conditions of return under section 9 of the lease agreement or <u>in the alternative, the cost of the aircraft and engines.</u>

d. Damages for breach of contract by the 4th Defendant.

e. Costs.

Appellant sought relief against the 1st defendant on the grounds that the Government of Ghana promised to assume the liabilities of 2nd defendant which it relied on so the government is liable to pay Appellant its claims.

The 1st defendant filed a defence and denied being liable to pay Appellant's claims. 2nd defendant also filed a defence denying Appellant's claims and counterclaimed for various sums of money it contended it was entitled to from the Appellant. 2nd defendant pleaded that plaintiff had sold out the aircraft while it was parked in Rome so it had no *locus standi* to bring the action.

JUDGEMENT OF THE HIGH COURT

The High Court in its judgment held that Appellant had capacity to institute the action and also upheld the claim of Appellant for the value of the aircraft which was set at US$27,000,000.00 as provided in the lease Agreement. She however dismissed Appellant's claim for rent as unproven by the evidence adduced before the court. She further dismissed Appellant's claim that the Government of Ghana be held liable to pay its claims on the ground that the principle of estoppels Appellant raised against the government was not applicable on the facts of the case. She dismissed the 2nd defendant's counterclaim and held that Appellant was not liable under the lease Agreement for the obligations 2nd defendant sought to hold against it.

APPEAL TO THE COURT OF APPEAL

The 2nd defendant filed a Notice of Appeal in the Court of Appeal against the judgment of the High Court and stated four grounds of appeal but did not pursue its appeal. Appellant also filed an appeal to the Court of Appeal and they pursued it and that is the appeal that was determined by the Court of Appeal resulting in this appeal to the Supreme Court. The Appellant stated only two grounds of appeal in its Notice of Appeal in the Court of Appeal. These were as follows;

"a). The Learned Trial Judge misdirected herself and occasioned a grave miscarriage of justice when she came to the conclusion that the plaintiff had failed to lead evidence in support of his claim for outstanding rent.

b). The Learned trial Judge misdirected herself on the principles applicable to promissory estoppel when she held that the promise to the plaintiff was conditional and that the steps to be taken had not been completed at the time of the liquidation of the 2nd defendant company and as such the promise could not be fulfilled."

The Court of Appeal in its judgment affirmed the finding of the High Court that Appellant had failed to prove its claim for rent of US$ 35,921,488.00. It further upheld the decision of the High Court on the principle of promissory estoppels and dismissed Appellant's appeal in its entirety.

APPEAL TO THE SUPREME COURT

Being aggrieved by the judgment of the Court of Appeal, Appellant has further appealed to this court. Appellant set out six grounds of appeal in the original Notice of Appeal and then filed and argued one Additional Ground of Appeal with the leave of this court. The original grounds of appeal are as follows;

a) That the Learned Court of Appeal Justices misdirected themselves when they failed to award the Appellant his claim for rent even though the Defendant/Respondent/Respondent's witness acknowledged that rent was due to the Plaintiff/Appellant.

b) The Learned Court of Appeal Justices misdirected themselves on the principles applicable to promissory estoppel when they held that the letters written by the Minister for Finance was not a firm irreversible commitment to negotiate and pay the moneys due the plaintiff.

c) That the learned Justices failed to apply the equitable doctrine of fairness when the evidence clearly states that the very Government

which made the promise to the Appellant to settle Ghana Airways debts turned round to liquidate the Airline before paying the debt thus leaving the Appellant in a lurch in the enforcement of the Judgment Debt.

d) The learned Court of Appeal judges misdirected themselves and occasioned a grave miscarriage of justice when they held that the Plaintiff had not suffered any detriment upon its reliance on the Government of Ghana's promise to settle Ghana Airways debts with its debtors.

e) The learned Court of Appeal Judges erred and misdirected themselves when they applied the rules relating to proof of special damages to the claim for outstanding rental charges endorsed on the Plaintiff's Writ.

f) That the Learned Court of Appeal Judges erred and misdirected themselves upon the failure of the 2nd Defendant/Appellant to pursue their appeal to grant the Plaintiff/Cross Appellant the opportunity to lift the corporate veil as the 2nd Defendant/Appellant has been liquidated.

g) Further grounds of appeal would be filed upon receipt of the Records of Proceedings.

Despite the fact that Appellant set out six original Grounds of Appeal they cover the two main grounds that were filed in the Court of Appeal. We intend to start with Ground A and after that deal with Ground E. We shall then tackle Grounds B, C, and D together. Ground F was not argued by plaintiff. The Additional Ground shall be considered separately.

PRINCIPLES APPLICABLE TO APPEALS AGAINST CONCURRENT FINDINGS

It is well-settled that where a second appellate court is called upon to reverse concurrent findings and conclusions on evidence by two lower courts, the second appellate court has to be slow in coming to a decision to reverse those findings and conclusions. However, the rule does not bar the second appellate court from reversing concurrent findings and conclusions where there are sufficient grounds to do so. The grounds upon which a second appellate court may reverse concurrent findings and conclusions have been stated in a number of cases decided by this court including the following**; ACHORO AND ANOR V. AKANFELA [1996-97] SCGLR 209; KOGLEX LTD (NO.2) V. FIELD [2000] SCGLR 175; ADU V. AHAMAH [2007-2008]SCGLR 143; GREGORY V. TANDOH & HANSON [2010] SCGLR 971, ASIBEY V GBOMITTAH & COMMANDER OSEI [2012] 2 SCGLR 800 and ACQUIE V. TIJANI [2012] SCGLR 1252.** These cases lay down the following as grounds upon which a second appellate court may interfere and set aside concurrent findings by two lower courts;

(i) Where the said findings are not supported by the evidence on record or where the reasons in support of the findings are unsatisfactory.

(ii) Where the findings are based on a wrong proposition of law or a principle of evidence such that if that wrong proposition is corrected the findings will cease to exist.

(iii) Where the findings are inconsistent with a crucial document or other undisputed evidence on the record.

(iv) Where the findings are otherwise substantially or seriously perverse and unjustified so as to occasion a grave miscarriage of justice.

An appeal is by way of rehearing and where particularly an appellant is challenging findings and conclusions which are based on evidence led at the trial, the appellate court is required to review the whole record and come to its own conclusions on the evidence and the law. See **Ackah v Pergah Transport Ltd [2010] SCGLR 728.**

In the case of **ACQUIE V. TIJANI [2012] SCGLR 1252, Anin Yeboah JSC.** delivering the unanimous judgment of this court stated as follows at page 1257 of the report;

> "This court is the second appellate court before which this ground has been canvassed to invite it to reverse the findings of facts made by the trial court and affirmed by the first appellate court, i.e. the court of Appeal. It has been said several times that, in civil appeals the Supreme Court, as a second appellate court, should be slow in reversing findings of fact made by the trial court which had been concurred in by the court of Appeal. ***The onus thus lies on the defendant in the instant case to demonstrate clearly that the findings were perverse and unjustified."*** *(emphasis mine).*

GROUND A

In a bid to discharge the onus on them in this case where there have been concurrent findings by the High Court and the Court of Appeal, the Appellant has argued in its statement of case under Ground A of the Grounds of Appeal that the 3rd witness of the 2nd defendant (hereinafter referred to as DW3) acknowledged that 2nd defendant owed plaintiff the sum of US$3,941,821.00. Appellant stated that the evidence of DW3 amounted to an admission that Appellant was entitled to that amount from 2nd defendant so the courts below ought not to have required any further proof of that part of its claim. Appellant has based this submission on the witness's testimony on oath and exhibits "28", "29" and "35" tendered by the witness. Appellant concluded on

Ground A that it is entitled to recover the sum of US$3,941,821.00 as admitted.

The Respondent in their statement of case quoted from the judgments of the High Court and the Court of Appeal to the effect that Appellant did not adduce sufficient evidence in proof of its claim and prayed this court not to disturb those findings.

By the line of argument under Ground A of the appeal, Appellant appears to contend that the two lower courts failed to apply the rule of evidence that where a claim or part of it is admitted by the opponent, then the claimant needs no further proof in order to obtain judgment in his favour. We therefore need to examine what amounts to admission of an opponent's claim in law in order to determine whether defendant's witness indeed admitted that part of Appellant's claim.

The well-settled position of the law is that for a statement to amount to admission of an opponent's case, it has to be clear, unequivocal and unambiguous, leaving no doubt that the intention of the maker of the statement was to accept the case of his opponent against his own proprietary or pecuniary interest in the matter concerned. See the case of **AKUFFO-ADDO V. CATHELINE [1992] 1 GLR 377**,**SC**.

In this case the claim Appellant filed in the High Court court was for *"(a) Recovery of the sum of thirty-five million and twenty-one thousand four hundred and eighty-eight dollars (USD35,021,488.00)* ***being outstanding rent for the lease of the aircraft, McDonnel Douglas DC 10-30 series Aircraft and replacement engines."*** (emphasis mine).

The question that arises therefore is, did DW3 unequivocally and unambiguously admit that Appellant was entitled to USD 3,941, 821 as outstanding rent for the lease of its aircraft?

Appellant has referred the court to the following testimony of DW3 in his evidence-in-chief;

> *"Q. When plaintiff sent you exhibit 28 did Ghana Airways agree the plaintiff was due all that amount?"*
>
> *"A. Yes, we checked this one into our accounts to see the invoices there were okay, the payment and all those things that were there. We only have objection to some of them, for example the interest charges, we raised objection."*

This answer that the witness provided here is open ended and cannot be said to be unequivocal and unambiguous. As the Court of Appeal rightly noted in its judgment;

> "What could be gleaned from this cross-examination (sic) (in fact it was evidence-in-chief) was that when witness was asked whether the 2nd defendant agreed to the amounts on Exhibit 28 he said yes and that they did some cross-references and had objection to some of them. He gave as example the interest charges as one item they objected to. Which are the other's one would ask?"

When counsel for Appellant cross examined DW3, if he intended to rely on admissions he should have asked questions to ascertain clearly what specific amount the witness would admit was due to Appellant as rent for the aircraft. Unfortunately he did not pin the witness down to any specific figure.
In the statement of case in this court, Appellant has also referred to the following cross-examination of this same DW3;

> *"Q. Ghana Airways knew that they owed plaintiff and that is why it made the offer of making payment on arrears in 2001 of $250,000 per month?*

"A. Yes Ghana Airways made an offer pending a reconciliation because at the point, they agreed that there should be a reconciliation of the accounts to see exactly how much Ghana Airways owed and if ***so exactly how much*** *Ghana Airways owed and if you look at the statement of account that I tendered here it shows that at least immediately Ghana Airways owes so much* ***according to that statement (emphasis mine)****."*

However, on further cross examination of the witness the following transpired;

"Q. Have a look at exhibit 'C' what you are saying is that there is just a ***blank statement*** *by Ghana Airways that they would pay the outstanding* ***rent*** *at a rate of 250 thousand dollars per month?" (emphasis mine)*

A. Yes this letter dated the 21st of May 2001 and at that time Ghana Airways had the intention of doing the 'C' check which the aircraft was ferried and the ***position of the plaintiff statement that was brought*** *showed that he owes some money. So at this meeting that they held, then that agreement was written. But there was another meeting where Ghana Airways was saying that they should, I read one of it, but there was a later one that the said plaintiff should not talk about any rental. What they want to do is that the security deposit should just go off and they finished with it and that too was not agreed." (emphasis mine)*

When DW3 stated in his answer that "if you look at the statement of account that I tendered here it shows that at least immediately Ghana Airways owes so much **according to that statement"** (emphasis mine), the witness was not made to specify the statement of account he was referring to since he tendered two statements of account. Nonetheless,

Appellant in its statement of case in this court has opined that the witness was referring to Exhibit 35." We shall accept that for the purpose of analysis of the evidence of the witness.

Exhibit "35" was tendered by DW3 as a tabulation of the respective amounts that were being claimed by the parties as at 30th June 2001. It is not an official accounting record of the 2nd defendant and it is not signed by anyone. It is titled;

> **"CLIPPER LEASING /SKYJET VRS GHANA AIRWAYS STATEMENT OF ACCOUNT OF DRY LEASE OF DC 10 AIRCRAFT AT 30TH JUNE, 2001; CURRENCY; USD"**

The relevant entries in the said statement are as follows:

> **"A. Lease/maintenance Reserve position at April 20th 2001 . . . . . .**
>
> **Balance as per Clipper Leasing/Skyjet statement (up to 28/3/01) – 3,941,821.00"**

Clipper Leasing/Sky Jet Statement of Accounts was tendered as Exhibit "28". So Exhibit "35" is not different from what DW3 stated in his evidence namely that the amount of US$3,941,821.00 was the claim "according to Clipper Leasing/Skyjet". Is that an unequivocal and unambiguous admission by the witness that what Clipper Leasing is saying in their Statement of Account is the true position? We do not see any intention on the part of DW3 to admit the amount of US$3,941.821.00 as owed by 2nd defendant to Appellant. We are fortified in this view by reason also of the further answer the witness gave under cross examination to the effect that Ghana Airways at a meeting told Appellant not to talk of any rental payment but to contend itself with the Security Deposit of US$1,280,000.00 that 2nd defendant had paid.

We agree with the finding of the Court of Appeal that the amount of US$3, 941,821.00 as stated in Exhibits "28" and "35" is in respect of rent and maintenance reserve payment combined whereas the claim before the court is for rent; so what portion of the amount of US$ 3,941, 821.00 is for rent and what portion is for maintenance reserves?

As has been pointed out already, in law an admission of the case of an opponent has to be clear, unequivocal and unambiguous and is not to be conditional or the result of an interpretive exercise by the court. The analysis above shows that the evidence of DW3 which Appellant has relied upon in its statement of case does not pass the test of admission of an opponent's case. We therefore hold that there was no admission in law of a part of Appellant's claim in the sum of US$3,941,821 so Appellant had the burden to prove that at the end of the lease, 2nd defendant owed it outstanding rent in the sum of US$3,941,821.00.

A review of the evidence of Appellant on the record does not show any explanation by plaintiff's witness as to how the figure of US$3,941,821.00 in the accounts it submitted to 2nd defendant as covering rent and maintenance reserves can still remain the same when only rent is claimed. The court has no way of determining the value that was assigned to the maintenance reserves, and in those circumstances the court cannot award such a figure as rent to Appellant. We therefore further hold that, on an evaluation of all the evidence on the record, the amount of US$3,941,821 as rent has not been sufficiently proved on a balance of probabilities. Accordingly we dismiss Ground A of the appeal.

GROUND E

Under Ground E of the appeal the Appellant has argued as follows;

> "Even if the exact amount owed plaintiff by the 28th of March, 2001 was not known, it is humbly submitted that there is sufficient evidence for the Honourable Court to make finding of

fact as to how much rent is due the plaintiff as at the date it filed its writ from the date of the last invoice."

The evidence Appellant relies on is Exhibit "A", the Aircraft Lease and particularly its provisions for monthly rent of US$260,000 payable until the aircraft is returned. By Appellant's calculation it arrived at the figure of US$20,321,821.00 as the amount it claims the evidence is able to support and therefore prays that judgment be entered in its favour for that amount instead of the amount of US$35,021,488.00 endorsed on the writ of summons.

By this Ground of appeal the Appellant appears to be introducing a claim in the alternative to its claim for outstanding rent of US$35,021,488 owed it by 2nd defendant as at 12th August, 2005. Unfortunately the Attorney-General did not specifically react to this ground of appeal. In the statement of case of the Respondent the Attorney-General quoted and relied on the finding in the judgment of the Court of Appeal that Appellant was unable to prove the specific claim for US$35,021,488.00 so was entitled to nothing.

Our view is that Ground E of the appeal directly raises an important legal issue for the determination of the court; namely whether if a party claims a specific sum in an action and is able to prove only part of the claim, he is entitled to judgment on the part proved or is entitled to nothing, as the Court of Appeal seem to have implied. It is only if this issue is resolved in favour of Appellant that we shall consider whether, on the evidence in this case, the Appellant has proved that he was owed US$20,321,821.00 as rent for the lease of its aircraft.

In respect of the issue of whether a party who is unable to strictly prove a specific sum claimed in a suit is entitled to recover judgment for any portion of the claim proved, the Court of Appeal quoted and relied on the following passage in the judgment of Dr Twum JSC in the case of;

Delmas Agency Ghana Ltd vrs Food Distributors International Ltd [2007-2008] SCGLR 748 at page 760 as follows;

> "Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate."

Appellant disagrees with this position and states as follows in its statement;

> "…it is asserted that although a plaintiff must prove strictly any loss suffered as special damages the court will grant a claimant the quantum of damages that he has led sufficient evidence on. This is despite the fact that it may be less than what is endorsed on its statement of claim."

We are inclined to agree with Appellant on this point. With all due respect to the justices of the Court of Appeal, they quoted the statement of Dr Twum JSC in **Delma Agency V Food Distributors (supra)** out of its context and wrongly applied the principle of pleading and proving special damages. What Dr Twum JSC said did not imply that, where a party endorses a sum certain on his writ of summons as special damages, he must prove the full amount endorsed or he would not be entitled to anything. Dr Twum JSC in the **Delmas case** was not referring to the total amount that may be endorsed on the writ of summons but about the quantifiable loss or losses that the plaintiff has to plead and strictly prove.

The law as we know it is that where a party has suffered a quantifiable loss as a result of a breach of a right he is required to specifically plead it, with particulars. The claim should not only be stated in the endorsement on the writ of summons but the pleadings must contain

the particulars as to how such loss came about and the value in money terms of the loss. The purpose is to give sufficient notice to the opponent so that there are no surprises at the trial and for the opponent to prepare to defend the claim. A party may suffer more than one quantifiable loss and in that case he is required to give particulars of each loss and will be required to prove each particulars strictly. All the particulars will give the total sum being claimed as special damages which may be endorsed on the writ of summons. What Dr Twum JSC must be understood to mean is that a party who has given particulars of how his total loss is made up must strictly prove each of the particulars or else is not entitled to anything in respect of the particulars that he is unable to prove.

In any event the Appellant's claim in this case is more in the nature of debt owed as rent outstanding than special damages for breach of contract and though the requirements of proof may be similar they are not exactly the same. There are two important questions here; (i) was the claim for rent for the lease of the aircraft from the end of the lease till its return pleaded with sufficient particulars so that defendants had the opportunity to answer? (ii) is the evidence on the record sufficient to prove that claim of Appellant?

From the pleadings in this case the claim for rent owed by defendant might be divided into two parts; the amount owed as at 20th June 2001 when the lease came to an end and the rent payable under the lease up to the time all contractual obligations under the lease became non operational. In its statement of claim Appellant pleaded as follows at paragraphs 7 and 8;

> "7. Plaintiff further states that the Lease expired on 20th June 2001. By the terms of the lease, the lease continued to run until the Lessee (sic) returned the aircraft and engines in

accordance with Section 9 of the lease agreement governing the return of the aircraft.

8. Plaintiff avers that at the expiration of the lease, in spite of repeated demands from the plaintiff to defendant to return the aircraft in accordance with the lease agreement, the defendant refused to do so. Accordingly defendant remained obliged to perform all its obligations set out in the lease, including in particular, the obligation to pay rent, the maintenance of the aircraft and the return of the aircraft in suitable return condition following the expiry of the term granted under the lease agreement."

To our understanding it is this part of Appellant's claim that forms the basis for the claim he is now pursuing under Ground E of the appeal. What was 2nd defendant's answer to the said pleading? In its statement of defence 2nd defendant denied the averments and demanded strict proof of same. 2nd defendant further pleaded that Appellant sold the aircraft to Pan Aviation Corporation so it no longer had title to the aircraft consequently Appellant had no cause of action based on the aircraft. Clearly therefore the purpose of justice was served when Appellant stated its claim and defendant answered it. The second issue is the question of proof.

In law proof simply means convincing the court or jury that a fact that is alleged is true. This is the purpose of the provisions on burden of proof contained in **SS.10 and 11(1) & (4)** of the **Evidence Act 1975 (NRCD 323)** which are as follows;

S.10 (1)

"for the purposes of this Decree, the burden of persuasion means the obligation of a party to establish **a requisite degree of belief**

concerning a fact in the mind of the tribunal of fact or the court.

S.11 (1)

for the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) in other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence **a reasonable mind could conclude that the existence of the fact was move probable than its non-existence."**

In determining whether a fact has been proved, precedent is certainly helpful but courts must realize that in each case the precedent does not override its function of deciding what to believe provided it has grounds and reasons for what it believes. The decided cases are clear that evidence is not counted but is weighed and the court can be convinced of the existence or non existence of a fact basing on the evidence of only one witness. See the cases of **Takoradi Floor Mills V Samir Faris [2005-2006] SCGLR 882; Zambrama V Segbedzi [1991]2GLR 231.**

Therefore, the simple question that needs to be answered here is whether there is sufficient evidence on the record to convince a reasonable mind that 2nd defendant owed appellant rent under the lease in the sum of US$20,321,821.00? It is important to distinguish the debt being claimed in this case from that of simple debt where a defendant borrowed a lump sum from a plaintiff and refuses to pay and when he is sued he flatly denies borrowing any money and plaintiff is called upon to prove that defendant in deed borrowed money from him.

In this case the debt arose by virtue of a contractual relationship. The defendant has not denied the existence or validity of the contract neither have they denied that the monthly rent under the lease was US$260,000 per month. So we turn to the record to assess the evidence led on this aspect of Appellant's claim. The Managing Director of Appellant testified and tendered the aircraft lease as Exhibit 'A' and section 9 of Exhibit 'A' states exactly what plaintiff pleaded in its statement of claim. In his evidence he explained that Appellant made several demands on 2nd defendant to return the aircraft but they failed to do so. In her judgment the trial judge dismissed the defences put up by 2nd defendant. Appellant led evidence to prove that the sale of the aircraft was aborted because it was unable to collect it from 2nd defendant and deliver the same to the purchasers. Though the 2nd defendant filed an appeal and complained against the findings of the High Court dismissing their counterclaim, they did not pursue their appeal, consequently, that findings of the High Court are of binding effect.

It is therefore our finding that on the evidence, Appellant has proved on a balance of probabilities that it is entitled to monthly rent of USD260, 000.00 from 20th June, 2001 till the termination of the agreement.

This finding we have made on the proof of this part of plaintiff's claim was not made by the High Court and the Court of appeal. This is because Appellant did not make a case for only a part of its claim as an alternative relief in the courts below in the manner it has argued before us. In the reply to the written address of 2nd defendant filed in the High Court, Appellant's counsel argued that the evidence led sufficiently proved that they were entitled to US$32,741,821.00 as at 15th August, 2005. Appellant pressed the same case in its submissions at the Court of Appeal and prayed the court to exercise its authority under Article 129(4) of the 1992 Constitution and amend its claim and award it

US$32,741,821.00. However the evidence did not support that contention.

It has always been the law that a party is entitled to make his claims in court in the alternative. **See Rule 10(2) of Order 11 of the High Court (Civil Procedure) Rules, 2004 (CI 47).**

The silence of the respondent on this issue notwithstanding, there is the need for the court to decide on the period for which Appellant is entitled to be paid the rent stated in the Lease as this is a point of law which the court can *suo moto* raise. On the evidence, and as is conceded by Appellant, the commencement date for this claim is 20th June 2001 however it is the end date that is debatable. In its pleadings in the High Court Appellant claimed rent up to 12th August 2005. When it filed its proof of debt with the liquidator the period for rent and maintenance reserves was stated as at 23/8/2003. Before us it now claims in its statement of case that it should be paid the rent up to the date of filing of the writ of summons which is 13th July 2006. What is the basis for these varying dates and what is the right date that shall be applied?

The well-known rule in law of contract is that where a party defaults in the performance of his obligations under a contract, the non defaulting party has an option to continue performing his obligations under the contract and hold the defaulting party to the performance of its obligations too. The other option is for the non defaulting party to terminate the contract and claim against the defaulting party for outstanding payments due under the contract and damages for breach of contract. **See Ghana Ports and Harbours Authority v Issoufou [1993-94] 1 GLR 24. SC.**

When the non defaulting party terminates the contract this way the contract ceases to exist and no obligations arise from it. The facts in

this case show that after 20th June, 2001 when 2nd defendant failed to deliver the aircraft to Appellant he initially waived the breach while pursuing 2nd defendant to honour its obligations and return the aircraft. However after a period of time during which the Appellant sought, unsuccessfully to recover the aircraft, Appellant sued the 2nd defendant on 28th May, 2004 in the High Court, Queens Bench Division in London claiming monies due under the contract with interest and damages for breaches of the contract. By this act of suing the 2nd defendant, Appellant is deemed to have exercised its option to terminate the contract. The legal effect is that, thereafter, no obligations arise from it. The true legal position of the Appellant, therefore, is that section 9 of the Lease ceased to be operative on 28th May, 2004 thus it is only entitled to be paid rent under that section for the period 21st June, 2001 to 28th May, 2004. That is approximately 35 months giving us a figure of US$9,100,000.00. In our judgment this is the amount Appellant is entitled to, based on the evidence and the applicable law in this case.

At all times material, the 2nd defendant who executed the lease was aware of the provisions of section. 9 of the Lease yet they did not take steps to resolve the issue of the deregistration of the aircraft which, from the record, could have ended this whole dispute long ago. We are not unaware of the defendant's case in their counterclaim that Appellant was responsible for the non delivery of the aircraft. That position of 2nd defendant was rejected by the trial court and same has not been set aside so the axe has to fall on 2nd defendant.

Article 129(4) of the 1992 Constitution which Appellant referred to provides as follows;

> "For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to

the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law."

Then **Rule 7(1) of CI 47** provides as follows;

"For the purpose of determining the real question in controversy between the parties or of correcting any defect or error in the proceedings either of its own motion or on the application of any party, order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner as it may direct."

Having regard to our finding that Appellant proved that it was entitled to US$9,100,000.00 it will be in the interest of justice for the court to amend the endorsement on Appellant's writ of summons to include an alternative relief for US$9,100,000.00 being rent owed under the aircraft leased from Appellant from 21st June, 2001 to 28th May, 2004. We hereby do so and proceed to grant that amount to Appellant.

Appellant would be entitled to interest on the amount. The lease agreement in this case did not state any rate of interest to be applied in the event of default in payment. In the suit in the London court Appellant claimed interest at the rate of 1.5% or such rate as the court may award. However, in accordance with the **Courts (Award of Interest and Post Judgment Interest) Rules, 2005 (C.I.52)** and the decision of this court in the case of **Royal Dutch Airlines (KLM) v Farmex Ltd (No.2) [1989-90] 2 GLR 682,** we award interest at the prevailing bank rate of interest of the United States Dollar in New York. The interest shall be calculated from 28th May, 2004 to date of this judgment.

In effect we uphold Ground E of the appeal in a modified form.

GROUNDS B, C and D

Grounds B, C and D are based on estoppels and will therefore be dealt with together. Though Appellant mentioned ground F, the arguments in the statement of case covered only the doctrine of estoppels. Under these grounds plaintiff is praying this court to hold the Government of Ghana liable to settle any amount that they are found to be entitled to as rent so that instead of pursuing the liquidator for payment, they might enforce their judgment against the Government of Ghana.

Appellant on these grounds of appeal has built its case mainly on the contents of three letters, two by the Ministry of Roads and Transport and one by Mr Amoah, (then of the legal department of 2nd defendant), all written in 2004 and tendered in evidence by plaintiff as Exhibits "F", "G" and "H". These letters expressed an intention of the Government of Ghana to assume the liabilities of Ghana Airways "including all known and unknown debts as at 31st August 2004". The letters informed creditors of Ghana Airways including Appellant that the government had established a debt committee to validate and negotiate the debts of 2nd defendant with a view to raising money to settle them.

According to Appellant, it relied on the content of these letters and suspended the prosecution of its suit in the High Court in England only for the government to suspend the work of the debt committee and put 2nd defendant into official liquidation. The official liquidator told them that, having regard to the value of the assets and liabilities of 2nd defendant, Appellant will be paid only about 7% of what 2nd defendant owed it. This, Appellant contends, is a detriment it has suffered by relying on the representations in the letters referred to. Appellant argued that the letters and conduct of the government implied an undertaking to pay off the debts of 2nd defendant so by virtue of the provisions of **Section 26 of the Evidence Act 1975 (NRCD 323)** and the doctrine of promissory estoppels, the government ought to be held liable for Appellant's claim. Appellant has argued that it will be

unconscionable for the government to be allowed to avoid liability in the circumstances.

Respondents in their statement of case herein contend themselves with the holding of the Court of Appeal on this aspect of the case and urged this court not to disturb those holdings.

The Court of Appeal on the issue of estoppels held that the letters relied on by the Appellant did not state in clear and unambiguous terms a commitment to negotiate to conclusion and payment of the debts of 2nd defendant or that it will not rely on its statutory right to put 2nd defendant into official liquidation. The Court of Appeal held that the representations in the letters relied on by Appellant to found promissory estoppels were conditional and could not in law be the ground for promissory estoppels. The Court of Appeal further held that there was no proof that Appellant had suffered a detriment by relying on the letters from the government so it cannot in law rely on promissory estoppels.

Though Appellant all along built its case on the doctrine of promissory estoppels, which it pleaded in its reply to the statement of defence of the 1st defendant, in its statement of case in this court plaintiff alluded to the principle of estoppels by convention which is different from the doctrine of promissory estoppels. Estoppel by convention arises where two parties have entered into a contract but, in its operation they both adopted a mistaken interpretation or legal effect of a term of the contract and conducted their affairs on the basis of that mistaken interpretation. If a dispute should arise out of that term of the contract, the court, in ascertaining the intention of the parties, will hold them bound by the mistaken interpretation they themselves had mutually given to the term through their practice. See **Norwegian American Cruise A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd (the Visafjord) [1988] 2 Lloyds Rep 343 C.A**.

Estoppel by convention is an aid to interpretation of deeds to help find the intention of parties to a contract where the parties are shown to have based their subsequent dealings on a common assumption or belief. See the case of; **Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38.**

In this case there is no contract between the Appellant and the Government of Ghana. In fact it is the absence of such a contract of guarantee that has left plaintiff to be relying on equitable doctrines to found its case against the government. Consequently in our view, the principle of estoppels by convention is not applicable in this case.

Before we proceed with the consideration of Appellant's case in respect of promissory estoppels, it is important to distinguish between the application of the doctrine of promissory estoppels as a rule of evidence and as a rule of substantive law. As a rule of evidence, promissory estoppel bars a party, or his successor to proceedings, from denying the truth of a representation intentionally made for his opponent to rely upon and the opponent acted on it. That is what has been captured in **Section 26 of our Evidence Act** as a conclusive presumption in the following wording;

> *"Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief,* ***the truth of that thing shall be conclusively presumed*** *against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."*
>
> (See also the earlier case of **Law v Bouverie (1891) 3 Ch 82)**

In equity however, promissory estoppels is a rule of substantive law. It was originated by the English courts to rectify the situation where, at common law, an unwritten contract is not binding unless there is valuable consideration from the promisee to the promisor. This position of the common law left parties who had acted upon representations and changed their positions without relief because they did not offer valuable consideration for those representations in the first place. So in the case of **Central London Property Trust Ltd V High Trees House Ltd [1947] KB 130, Denning J**, (as he then was) after failing to find on the facts that the defendant had given valuable consideration to their landlord for his promise to reduce the rent that had been stated in the contract, said as follows at page 134;

> *"In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of Hughes v. Metropolitan Ry. Co. (7) (1877) (2 App. Cas. 439), Birmingham & District Land Co. v. London & North Western Ry. Co. (8) (1888) (40 Ch.D. 268), and Salisbury v. Gilmore (9) ([1942] 1 All E.R. 457), show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognised. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense."*

As is the case with all the doctrines of equity, promissory estoppels has further evolved such that, whereas at its birth it was applied as a shield and not a sword, it is now regularly resorted to found a claim. See **Combe V Combe[1951] 2KB 215, Walton Stores (Intestate) ltd v Maher (1988) 164 CLR 387** and the Ghanaian case of **Quist V George [1974] 1 GLR 1.** The requirement that the party relying on promissory estoppels must demonstrate a detriment he suffered by relying on the promise of his opponent does not appear to be supported by any legal authority binding on Ghanaian courts contrary to what the Court of Appeal stated in its judgment. After all the **High Trees case supra** was one where the party that relied on the promise actually gained by the reliance. See also **Alan v El Nasr [1972] 2 WLR 800.**

In its current form, promissory estoppels is a doctrine of equity that allows a party to recover the benefit of a promise made even if a legal contract does not exist. The promise must be clear, unequivocal, unambiguous and unconditional and the promisor must have intended the promisee to act upon it and the promisee must show that he acted on it and altered his position. Because it is an equitable relief, all the circumstances of the case will be taken into account in granting relief and the usual maxims of equity will apply. See **Woodhouse A.C. Israel Cocoa Ltd v Nigerian Product Marketing Co Ltd [1972] A.C. 741; D & C Builders v Rees [1966] 2WLR 28 and Guimeli v Guimeli (1999) 196 CLR 387.**

In this matter, Appellant has grounded its case, for the application of the doctrine of promissory estoppels against the government on its reliance on the letter of the Minster for Transportation dated 24th September, 2004. It is therefore important to quote the relevant parts of this letter in order to appreciate the promise or representation (if any) that the government made to Appellant;

> "The *Government of Ghana ("GOG"), the sole shareholder in Ghana Airways Limited (GH), has expressed its intention to assume the liabilities of the airline including all known and unknown debts as at 31st August, 2004.*
>
> *In this regard, the government has constituted a Debt Committee, which is tasked with entering into* ***discussions and negotiations*** *(emphasis mine) with GH's creditors to reach agreements that will allow GOG to assume and discharge the company's liabilities to those creditors…*
>
> *The purpose of this letter is to advise you, as a known creditor of GH, that the committee has commenced its work and will be in touch with you to commence discussions that GOG hopes will lead towards the eventual settlement of the companies outstanding liabilities to you.*"

This was followed by another letter from the Ministry which set out the following four steps that were to be gone through leading to any payments to creditors;

1. Validation of debts
2. Request for parliamentary approval and funding
3. Negotiation of debts and signing of agreements
4. Payments of agreed amounts.

The relief that Appellant is claiming against the Respondent is that the Government of Ghana be held liable to pay the amount found to be owed them by 2nd defendant. In its statement of case in this court the Appellant repeated a number of times that the government undertook "to pay off the debts" of the 2nd defendant. It also stated in the statement of case that the government made plaintiff to believe that government will pay off the debts of 2nd defendant. But the fundamental

question is; did government represent to Appellant that it will pay to plaintiff whatever amount was found to be owed them by 2nd defendant?

The answer to this question can be found in ascertaining what promise or representation the government made through the letters referred to. As is evident from the tenor of the letters government issued, it promised to undertake validation of the claims, seeking for parliamentary approval, negotiation of the validated amounts with the creditors, signing binding contracts on the negotiated debts before payment. Appellant has submitted that it will be unconscionable to allow the government to avoid liability in this case but the question we ask ourselves is; is it conscionable for us to hold the government to a promise it did not make?

From the letters relied upon by the Appellant we do not see any undertaking in any form by the government to pay any amount validated. Mr Felix Addo from Price Waterhouse Coopers who was the responsible person on the government's debt committee testified in the trial on behalf of the 1st defendant. In his evidence-in-chief he stated as follows;

> *"It has been very clear from the inception of the debt committee's work that government was not guaranteeing payment of 100% of all..."*

This significant evidence was not challenged under cross examination and is deemed admitted. This shows that Appellant was alerted not to expect full payment. In any case the plain understanding of negotiating a validated claim is in order to seek a compromised figure that would be paid as full discharge of all claims. Appellant cannot be speaking the truth when it claims that it was made to believe that the government would pay all debts of 2nd defendant. The letters speak for themselves and if Appellant seeks to rely on them, then it will be bound by their

whole contents. See **Osei v Ghanaian Australian Goldfields Ltd [2003-2004] SCGLR 69.**

A close reading of the letter written by Mr. Amoah, shows on its face that it was written without prejudice. This ought to have sounded a warning to Appellant that the defendants were not giving up their legal rights as far as the claims of plaintiff were concerned. The lawyer forwarded the Minister's letter to Appellant saying he hoped that Appellant will be convinced to stay his legal suit and explore the opportunity offered by the government. This letter could not have conveyed any promise bigger than the Minister's letter which was being forwarded and stated to be "self explanatory". Besides, since the lawyer did not write the letter on behalf of the government of Ghana, we fail to see how the government can be held bound by any representation contained in that lawyer's letter.

It is a well-known fact that business involves risks and this includes the possibility of insolvency of a business partner which could lead to a situation of bad debts. To forestall this eventuality, some businesses enter into properly drafted third party guarantee agreements. The absence of such an agreement has been the bane of Appellant in this case. On the analysis of the facts and the law we are unable to uphold plaintiff's grounds B, C and D and same are hereby dismissed. Ground F was not argued so it is struck out.

It now remains plaintiff's Ground G which is that;

> **"the learned High Court Judge erred and misdirected herself when she failed to avert her mind to the fact that it was the Government of Ghana that ordered the destruction of the aircraft and as such should be held liable."**

Appellant contends in respect of this Ground of Appeal that the rules of appeal permit her to argue this ground of appeal which is expressed to

be against the decision of the High Court and ought normally to have been made to the Court of Appeal under the law.

The Respondents in their further arguments filed pursuant to leave of the court dated 1st March, 2016, has argued that Appellant did not plead this ground at the High Court and therefore is not entitled to raise it before this court. They further deny that the destruction of the aircraft was on the orders of the government of Ghana.

The general rule is that a party cannot, on appeal, rely on a ground in support of his claim or defence which ground was not raised at the trial court. The exception to this general rule is in respect of a substantial point of law that arises on the record of appeal.

The law on this subject was authoritatively stated by **Georgina Wood JSC (as she then was)** in the case of **ATTORNEY-GENERAL V FAROE ATLANTIC CO LTD [2005-2006] SCGLR 271 at 309** as follows:

> "The salutary and well-known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being of one of them. A jurisdiction issue can therefore be taken or raised at any time, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute.... Again, the well-established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence it should be allowed."

So clearly the exception to the general rule on appeals is in respect of substantial points of law. The well known policy of the law is that parties to a case in court are to know exactly what it is that they are required to answer and this is a requirement of fair hearing that the

courts insist on. The requirement of fair hearing is a fundamental rule of natural justice so a party cannot change its case on appeal when the opponent has no opportunity to adequately defend himself and lead requisite evidence in his defence.

Appellant argued in its statement of case that unchallenged evidence at the trial showed that it was the Government of Ghana that ordered the destruction of the Appellant's aircraft without any lawful authority and so the government should be held liable and not the liquidator. This is clearly a claim being made in tort against the Government of Ghana for allegedly unlawfully ordering the destruction of Appellant's aircraft. This cause of action was not pleaded at the trail court. The case that was made against 1st defendant was that of promissory estoppels and it fought the case on that footing.

In the High Court, Appellant claimed for return of the aircraft in accordance with the conditions of return under the provisions of the lease or in the alternative, the cost of the aircraft and engines. In the written address of Appellant's counsel in the trial High Court, he submitted as follows;

> "Now that evidence has been led to show that the aircraft has been scrapped by the 2nd defendant although legal ownership of the aircraft and engines belonged to the plaintiff company. The 2nd defendant is liable to pay to the plaintiff the value of the aircraft and engines which as stated in exhibit A (the Lease Agreement) is the sum of twenty seven million United State dollars ($27,000,000.00)"

So the cause of action was in contract against 2nd defendant. The trial judge granted this claim of Appellant based on the terms of the lease exhibit "A". This new ground of appeal which castigates the trial judge for adopting the submissions of Appellant is a complete about-face by

Appellant. This new case is inconsistent with that which it put forward at the trial court.

It was held by the Supreme Court in the case of **TAWIAH-YEBEREH V. CFAO [1966] GLR 357 by Bruce-Lyle JSC at page 366 as follows**;

> *"Can the plaintiff at this stage be heard to challenge the validity of the mortgage deed of 29 December 1953, and the memorandum of agreement dated 18 January 1954, when throughout he had fought his case on the basis that these documents were genuine and valid? My answer to this is in the negative and I am supported in my view by the principle laid down in Esso Petroleum Co., Ltd. V. Southport Corporation, (Footnote 2) ably discussed and followed by Adumua-Bossman J.S.C. (as he then was) in Dam v. J. K Addo and Brothers, (Footnote 3) to the effect that an appeal court should not accept in favour of a party a case different from and inconsistent with that which he himself has put forward in and by his pleadings and that for an appeal court to act otherwise would be a flagrant disregard of the functions of pleadings which in the words of Lord Normand in the Esso Petroleum case are "to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them" (Footnote 4) In view of the foregoing, I find myself unable to accept the submissions of learned counsel that the mortgage deed of 29 December 1953 is null and void and also that the memorandum of agreement made under that deed is not binding on the late Forkuo."*

More importantly, the case sought to be made under this Ground of Appeal is not a point of law but is a new cause of action in tort which Appellant is seeking to pursue against 1st defendant at this late hour. We observe that counsel for Appellant has thrown into her submissions **Section 254 of the Companies Code, 1963 (Act 179)** to the effect that Government of Ghana had no authority to assume powers of the

Directors of Ghana Airways in liquidation so that any authorization the government gave for the destruction of the leased aircraft was *ultra vires* and unlawful. That reference will not make the point being raised a legal one. The net effect of plaintiff's new complaint is that Government of Ghana unlawfully caused the destruction of its aircraft and should be held liable for its value. This certainly is a new cause of action which, if it had been pleaded from the beginning of the case, 1st defendant would have answered.

Appellant should note that the award of US$27,000,000 as the value of the aircraft was liquidated damages as agreed between plaintiff and 2nd defendant under the terms of the aircraft lease. There was no evidence as to the actual value of the aircraft at the time of the trial. If Appellant now abandons the claim based on the terms of the contract and pursues a claim in tort against the government, which was not party to that contract, upon what evidence will the court assess the actual value of the aircraft, assuming it succeeds?

Besides Appellant's contention that the evidence conclusively shows that it was the Government of Ghana that authorized the scrapping of the aircraft is opposed by defendant as not borne out by the record. The evidence-in-chief of Appellant's Managing Director covers the processes leading to the destruction of the aircraft and it shows that it was Ghana Airways, through the liquidator who was handling that issue with Appellant. For example the following ensued between plaintiff and his counsel;

> *Q. Sometime before the destruction of the aircraft did you receive any correspondence from Ghana Airways about wanting to destroy the aircraft?*

A. Yes, I did receive a letter from Ghana Airways asking my authorization to scrap the aircraft and document to be signed by myself which I did not sign.

Q. who was by then representing Ghana Airways at the time you received the letter?

A. I believe it was the liquidator of Ghana Airways.

Furthermore the full text of the email sent by Alitalia to Appellant tendered as Exhibit "M" is as follows:

"Dear Pierre

I confirm that all the aircrafts of Ghana Airways have been destroyed after the request of Italian custom for the relevant V. A. T. not paid at the moment of import and about the aircrafts remained on the Italian Ground and that couldn't fly. All the operations terminated on august 2006 and were authorized by the Government task force in Ghana. Alitalia paid a relevant amount in euro, and today has Ghana Airways credit of 25 million US dollars all the parts of the aircraft (include the engines that you are asking me) were destroyed in the fire without the recovery of any component."

As at August 2006 Ghana Airways had gone into liquidation as shown by the evidence on the record. So which body is the email referring to as the Government task force in Ghana? Is it the liquidator that according to Appellant's evidence he was dealing with or some other body? In any case the email does not say who authorised the destruction of the aircraft. It only states that the operations seized on the authorization of the Government task force in Ghana. Exhibit "M" is inconclusive.

Without further evidence in respect of this issue we cannot conclude that the destruction of the aircraft was authorized by the Government of Ghana. For the reasons explained above we dismiss Ground G of the Appeal.

CONCLUSION

In conclusion, save for the entry of judgment for Appellant against 2nd defendant in the sum of US$9,100,000.00 plus interest at the prevailing bank rate of interest of the United States Dollar in New York from 28th May, 2004 to date of this judgment, the appeal is dismissed. For the avoidance of doubt, the judgment by the High Court in favour of Appellant to recover in liquidated damages US$27,000.000.00 against the liquidator of Ghana Airways still stands and is not affected by this judgment.

(SGD) G. PWAMANG
JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

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

(SGD) V . AKOTO – BAMFO (MRS)
JUSTICE OF THE SUPREM COURT

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CECIL ADADEVOR (PSA) FOR THE 1ST DEFENDANT/RESPONDENT /RESPONDENT.