IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)

APPAU, JSC

PWAMANG, JSC

DORDZIE (MRS.), JSC

HONYENUGA, JSC

CIVIL APPEAL
NO. J4/02/2020

14TH APRIL, 2021

DALEX FINANCE AND
LEASING COMPANY LTD. ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

1. EBENEZER DENZEL AMANOR ..... 1ST DEFENDANT
2. L.G.G COMPANY LIMITED ..... 2ND DEFENDANT
3. HUAWEI TECHNOLOGIES (GH) SA LIMITED .. 3RD DEF/RESPONDENT/RESPONDENT

JUDGMENT

PWAMANG JSC:-

My Lords, this appeal presents for our consideration the circumstances under which a limited liability company may be held liable on account of the fraudulent acts of its official. From the facts of the case, it is beyond doubt that John Oseku Ankrah, who at

all material times was the Finance Manager of the 3rd defendant/respondent/respondent (the 3rd defendant), in his engagements with the plaintiff/appellant/appellant (the plaintiff), was acting a role in a choreographed performance put up to deceive and defraud unsuspecting third parties. The performance involved a number of conspirators and they succeeded in collecting an amount of about GHS6,539,612.00 from the plaintiff, a non Bank Financial Institution, as loans that have not been repaid. As is usual with this type of cases, the prospects of recovering the money from the fraudsters are dim so the court has been called upon to decide, between the plaintiff and the 3rd defendant, a big multinational telecommunications company, who ought to bear the loss.

THE FACTS

The scheme designed by the gang was this. Sometime about 10th May, 2012 the 1st defendant approached the plaintiff and presented to it some Local Purchase Orders, VAT Invoices and Waybills which showed that his company, the 2nd defendant, supplied telecommunication equipment to the 3rd defendant and was waiting payment. He told them he wanted to discount the invoices, an undertaking the plaintiff is into as part of its business. Supporting the documents was a letter on the letterhead of the 3rd defendant signed by John Oseku Ankrah, Finance Manager, confirming the order and stating that the items had indeed been received. The letter further stated, that as requested by the 2nd defendant, payment for the order would be effected to the joint names of the plaintiff and 2nd defendant. On receipt of the documents the plaintiff decided to verify their authenticity. Some officials went to the offices of the 3rd defendant in Accra and held a meeting with the Finance Manager in his office and he affirmed the transaction between the 2nd and 3rd defendants and the letter he signed. After that affirmation the plaintiff requested the 2nd defendant to formally apply for a loan. The 2nd defendant duly applied attaching all the documents and a loan for an amount of GHS2,317,112.00 was quickly processed and approved to be repaid within 180 days at monthly compound interest of 4.7%. The 1st defendant signed as the guarantor of the loan.

However, before disbursement, the plaintiff wrote another letter addressed to the Finance Manager of the 3rd defendant stating that; "We have received a request from LGG (2nd defendant) to discount their payment on Purchase Orders…….totaling GHS3,310,160.00….All payments in connection with the contract must be transferred directly to our Fidelity Bank Account Number 1070000434348, Ridge Towers Branch. Please confirm acceptance of our proposal by appending your signature in the space provided below." The letter provided spaces for Name, Signature, Position, Date and Stamp. The letter was countersigned as requested by John Oseku Ankrah, Finance Manager and dated 16/05/2012 but no stamp was affixed. When the countersigned letter was received by the plaintiff, it executed the first loan agreement of GHS2,317,112.00 the same day, 16/05/2012 and the 1st and 2nd defendants were paid.

There was a second loan for GHS3,622,500.00 which followed the same modus involving invoices and waybills confirmed by the Finance Manager and a letter accepting to pay money due to 2nd defendant directly to the plaintiff. Then there was a third for GHS600,000.00 but by then the amount expected from the 3rd defendant was sufficient to cover that amount as well so no documents were taken for it. Before requesting for the third loan, the 2nd defendant paid the plaintiff GHS1,000,000.00 to offset an earlier loan it contracted before the series of loans subject matter of this litigation. This apparently gave the plaintiff the confidence that these loans would be repaid.

Sadly, no payment was received from the 3rd defendant by end of the expected period and apart from a meager sum of GHS429,965.00, the 2nd defendant defaulted in payment of the three loans. When the plaintiff enquired from 1st defendant why the 3rd defendant did not effect payment as agreed by John Oseku Ankrah, he claimed they were paid directly by 3rd defendant. The natural immediate reaction was for the plaintiff to smell a rat so it decided to re-verify the representations upon which it advanced the loans. This time, the plaintiff wrote to the Managing Director of the 3rd defendant by letter dated 4th February, 2013 stating; "Kindly confirm if Huawei Tech. (Gh). S. A. Ltd owes an amount of….to LGG Company Limited as at 4th February, 2013." The letter made reference to the Purchase Orders and Waybills that it had been presented with

and attached copies to the letter. The letter also stated the paltry amounts it had received thus far. The 3rd defendant replied the letter and said it had no such transaction with the 2nd defendant and did not owe it any money. On further investigations by the plaintiff it turned out that the whole thing was a fraud and that the said Finance Manager of 3rd defendant and the 1st defendant had previously engaged in a similar fraud involving another discounting company, SDC Finance and Leasing Co. Ltd of Accra.

THE EARLIER PROCEEDINGS

On 13th March, 2014 the plaintiff sued the three defendants herein in the Commercial Division of the High Court, Accra for recovery of the monies loaned out with the agreed interest. Liability was easily established against the 1st and 2nd defendants and the High Court gave judgment dated 18th July, 2016 for the plaintiff against them. However, the court held that the 3rd defendant was not jointly or severally liable to the plaintiff. The main reason the High Court judge assigned for not holding the 3rd defendant liable was his view that the **Borrowers and Lenders Act, 2008 (Act 773)** was applicable in the case on the facts as narrated above. He held that the invoices and letters written by John Oseku Ankrah that the plaintiff based its case on are "receivables", but the plaintiff failed to register them as required by section 25 of Act 773, so they were not enforceable against 3rd defendant. The issue of the applicability of Act 773 on the facts of the case was raised *suo muto* by the trial judge at the application for directions and finally his judgment turned on that statute. Meanwhile, the parties argued their respective cases before him largely on of provisions of the **Companies Act, 1963 (Act 179)** including the provision that states that companies may be held liable for the fraudulent acts of their officers. This Act has since been replaced by the **Companies Act, 2009 (Act 992).** The trial judge was of the opinion that the issue of whether the 3rd defendant was bound by the fraudulent acts of its Finance Officer was irrelevant. He nevertheless expressed an obiter opinion and took the view, that because the Finance Manager acted fraudulently, sections 137(1), 142 and 143 of the Act were inapplicable in this case. He said in any event, if the plaintiff had been diligent in verifying the

authenticity of the documents it would have uncovered the fraud and not advanced any money to the 1st and 2nd defendants.

The plaintiff appealed against the part of the judgment of the High Court that said the 3rd defendant was not jointly or severally liable to pay the monies it claimed. In the written submissions of the plaintiff in the Court of Appeal, Mr Samuel Cudjoe Esq, learned counsel for the plaintiff, argued, with considerable force, that the High Court judge misunderstood the case it made against the 3rd defendant and that as between the plaintiff and the 3rd defendant, there was no credit transaction so by the very provisions of Act 773, which he quoted it was not applicable as far as its claim against the 3rd defendant was concerned. He also argued the point before the Court of Appeal that notwithstanding any fraudulent conduct on the part of the Finance Manager, the 3rd defendant was vicariously liable under the provisions of Act 179 since the acts were by its Finance Manager, a highly placed officer of the company.

The Court of Appeal in its unanimous judgment dated 29th May, 2018, without expressing themselves on the weighty legal submissions made by Counsel for the plaintiff pointing out fundamental misconceptions in the judgment appealed from, delivered themselves as follows;

"On perusing the appeal records the conclusion I came to is that all these grounds of appeal can be disposed of on determination of the issue whether Mr. Oseku is a staff whose acts on consideration of any or the combination of sections 137 to 143 of the Companies Code can make the 3rd defendant liable for his association with this fraud and by that make the 3rd defendant jointly liable with the 1st and 2nd defendant. Which provisions of the Companies' code are immediately relevant to this issue of the 3rd defendant's liability for the acts of Oseku? On a closer reading of these provisions I singled out two sections and which same sections I (sic) am of the view will also dispose of this appeal: sections 143 and 140. Sections 143 provides for situations where officers and agents are involved in fraud and Section 140 deals specifically with acts of officers and agents. 143 provides:

143. "Where, in accordance with Sections 139 to 142 of this Code, a company would be liable for the acts of any officer or agent the company shall be liable notwithstanding that the officer or agent has acted fraudulently or forged document purporting to be sealed by, or signed on behalf of, the company".

We are here dealing with an undisputed fraudulent transaction by Mr. Oseku the Country Financial Director of the 3rd defendant company. This section provides that the company would be liable for his fraudulent acts provided the company would be liable for this acts in accordance to sections 139 to 142. So we revert to these sections for the answer whether Mr. Oseku falls within persons and whose acts the company should be liable for. In the factual circumstances of this case Section 140, to me provides the answer. It states

1. Except as provided in section 139 of this code, the acts of an officer or agent of a company shall not be deemed to be acts of the company unless

a. The company, acting through its members in general meeting, boards of directors, or managing director shall have expressly or impliedly authorized such officer or agent *to* act in the matter or

b. The company, acting under paragraph (a) has represented the officer or agent as having its authority to act in the matter, in which event the company shall be civilly liable to a person who has entered into the transaction in reliance on that representation, unless that person had actual knowledge that the officer or agent did not have authority or unless, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of authority." (emphasis supplied).

On application of this section to the evidence on record there is no evidence Mr. Oseku was expressly or impliedly authorised to act in the matter of the discounting transaction. The evidence in this case is undisputed that all correspondences on the

transaction was handled by Mr. Oseku without the involvement or knowledge of anybody in the 3rd defendant company.

It is my conclusion therefore that the 3rd defendant cannot be held liable jointly with the 1st and 2nd defendants.

I consequently dismiss the appeal as without merit."

Still dissatisfied, the plaintiff has filed this appeal. An examination of the grounds of appeal and a careful reading of the arguments and submissions contained in the plaintiff's statement of case show that the point of disagreement the plaintiff has with the Court of Appeal is that the court did not properly construe and apply all the relevant provisions of Act 179 in coming to their decision. In the view of the plaintiff, if they had done that they would have upheld its claim against the 3rd defendant.

Before a consideration of the main arguments of the plaintiff, we wish to clarify the matter about the nature of the cause of action the plaintiff has against the 3rd defendant upon the facts in this case. In the Court of Appeal the plaintiff addressed this when it argued that the trial judge misunderstood their case against the 3rd defendant and in this final appeal it has made further submissions on it and even indicted the Court of Appeal of not demonstrating a correct appreciation of its case. In our opinion, learned counsel for the plaintiff, who represented it throughout, makes a valid point when he says that the trial judge misapprehended the case the plaintiff made against the 3rd defendant and that it disabled the judge from making competent and correct analysis of the case on the law applicable. As stated above, the Court of Appeal in their judgment did not address this aspect of the case but, with due respect, we think that, being a court of correction, where arguments in an appeal touch and affect the foundation of a case, as was made by Counsel for the plaintiff in this case, they should be addressed in order that any judgment delivered will be grounded on sound reasoning so that the party that would lose would feel she has been accorded a fair hearing. We are not unaware of the principle that the duty of a judge to give reasons for her judgment does not necessarily require that every issue that arises in a case

must be determined and every argument answered and that it is sufficient if what the judge says shows the parties the basis on which she decided the case. But the authorities say that the application of that general principle differs from case to case. See **English v Emery Reimhold & Stick Ltd [2002] 1 WLR 2409.** Where an issue or argument touches on the very foundation of a case, a court that avoids that issue risks coming to a distorted judgment and the reasons for its decision being unsatisfactory. Courts, especially superior courts of record, must always strive not only to come to the correct conclusion on cases but to arrive at those conclusions on the basis of sound legal reasoning. This is crucial for the common law system we practice because of the doctrine of *stare decisis*, by which it is the *ratio decendi* of a judgment that has binding effect and not the conclusion. See **Gorman v Rep [2003-2004] SCGLR 784.** Because the Court of Appeal did not express themselves on these issues relating to the right principles of law applicable in this case, it has led Mr Peter Zwenness Esq, learned counsel appearing for the 3rd defendant, to take the position before us that the Court of Appeal affirmed the trial judge's finding that Act 773 is the applicable law for a correct resolution of the case. Counsel appears to feel constrained to defend that finding and has argued, strenuously, at great length trying to justify that finding. As we shall demonstrate infra, the inadequate appreciation of the nature of the cause of action between the plaintiff and the 3rd defendant affected to some extent the comprehensiveness of the legal analysis even of the Court of Appeal.

The best approach to gain a good appreciation of this case, which admittedly is complicated and gave us anxious moments during the consideration of our judgment, is to first consider the cause of action that, in law, can be sued upon by the plaintiff against John Oseku Ankrah. After that has been done, then an examination of the arguments on whether the 3rd defendant is liable for his actions can be undertaken. This is critical because the legal basis on which the 3rd defendant may be liable for the actions of its Finance Manager will depend on the nature of the cause of action, either in contract or in tort, against John Oseku Ankrah. In his judgment the trial judge stated that, "He (John Oseku Ankrah) fraudulently committed his employers to a contract or

agreement which the employers had no knowledge of". Then at another part of the judgment he stated as follows; "It has been earlier held that the security created with the account receivable is not enforceable against the 3rd defendant. In accordance with section 25(3) of the Borrowers and Lenders Act, 2008 (Act 773) though the said security is not enforceable, the money which was secured shall immediately become payable…" But what must be noted is that John Oseku Ankrah did not guarantee the loans that were extended to 2nd defendant in this case. It was the 1st defendant who guaranteed the loans. Sections 1 and 2 of Act 773 gives the matters the Act applies to as follows;

Section 1. Application

(1) This Act applies to

(a) *a credit agreement* between parties who deal at arm's length except;- (i) a credit agreement covering an amount of less than one hundred Ghana Cedis (GH¢ 100) or an amount determined by the Bank of Ghana; (ii) any other credit agreement exempted by the Bank of Ghana by notice under this Act.

(b) *a credit guarantee* where the guarantee is only in respect of a credit facility or credit transaction covered by this Act.

2. Meaning of credit agreement

For the purpose of this Act a credit agreement is an agreement in the nature of a credit facility, a credit transaction, a credit guarantee or any combination of these.

A credit guarantee as stated under section 5 of Act 773 is; **"an agreement is a credit guarantee if in that agreement *a third party undertakes to satisfy on demand an obligation of a borrower in a credit facility or credit transaction to which this Act applies."* (emphasis supplied).**

John Oseku Ankrah wrote one set of letters and countersigned another set written by the plaintiff and the plaintiff says that it relied on these documents and advanced the loans to the 2nd defendant. The first set of letters confirmed the fake invoices and stated that the 3rd defendant owed some money to the 2nd defendant and was willing to pay it jointly to the plaintiff and 2nd defendant. It made no reference at all to any obligation 2nd defendant owed the plaintiff. In fact, at the time the very first letter was written the 2nd defendant had not applied for the first loan. The second set of letters written by the plaintiff required of the Finance Manager to agree to pay to the plaintiff, in the future, money due to the 2nd defendant. The money was supposed to be 2nd defendant's own money. The letters make no reference to the loan and did not commit John Oseku Ankrah to satisfy on demand any loans to be extended to the 2nd defendant so they were not credit guarantees. The one who guaranteed the loans to the 2nd defendant was the 1st defendant not John Oseku Ankrah. So, as rightly contended by Counsel for the plaintiff, the legal relationship between the plaintiff and 1st and 2nd defendants was different from that between the plaintiff and John Oseku Ankrah. Whereas there were credit agreements between the plaintiff and the 2nd defendant and credit guarantees between it and 1st defendant on grounds of which Act 773 might, depending on the issues in contention, be applicable in the resolution of a dispute between them, the same cannot be said of the legal relationship between the plaintiff and John Oseku Ankrah. There was neither a credit agreement nor a credit guarantee between the plaintiff and John Oseku Ankrah so Act 773 is not applicable in the case that was made on the pleadings against the 3rd defendant. In fact, 1st defendant who could have argued that the credit guarantee he provided to the plaintiff was not enforceable against him because it was not registered as required by Act 773 did not plead that in his defence.

When the case is viewed with clear legal lenses this way, it becomes plain that the trial judge unfortunately erred when he *suo motu* introduced Act 773 into this case. Yes it is true that John Oseku Ankrah by signing the letters Exhibits "D" and "L" promised to pay monies due 2nd defendant to the plaintiff at a future date, but he failed to do so.

However, even from the pleadings it was clear that the 2nd defendant did not supply any goods to the 3rd defendant and no money was owed to it. So those letters described as "undertakings" were plainly fake documents and such documents cannot create any legal rights even if they were registered. The applicable Latin maxim is; *ex nihilio nihil fit*, meaning; out of nothing comes nothing. In the Court of Appeal. Counsel for the plaintiff submitted as follows;

"Appellants claim against the Respondents is based on the fact that it failed, refused and or neglected to comply with its payment instructions as contained in the letters…"

The truth of the matter is that there was no payment to be made in the first place so how was 3rd defendant expected to comply with payment instructions? The trial judge by implying that if the fictitious undertakings had been registered under Act 773 they could be enforced against the 3rd defendant fell in a grave error.

But that does not end the matter of possible cause of action the plaintiff has against John Oseku Ankrah. He made some representations to the plaintiff which he expected it to rely on and it says it relied on those representations and has suffered loss. These representations were clearly fraudulent so the plaintiff has a cause of action at common law in tort for damages for deceit against John Oseku Ankrah. See the cases of **Pasely v Freemen (1789) 3 Term Reps 51** and **Derry v Peek (1889) 14 App Cas 337,** where the House of Lords gave the now famous definition of fraud. The court stated that;

"*in an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.***"**

The facts in Pasely v Freeman were that Pasley consulted Freeman about the financial condition of one John Falch before Pasley agreed to sell to Falch a number of goods on credit. Pasley inquired about Falch's credit history to determine if he was a credit risk. Freeman gave Pasley a favorable view of Falch, and Pasley proceeded with selling

goods to Falch on credit. When Falch defaulted, Pasley sued Freeman for the value of the goods on the ground that Freeman knowingly misrepresented Falch's credit risk.

Upholding the claim of the plaintiff the court held that;

A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

Though the representations made by John Oseku Ankrah in this case were not as to the general credit worthiness of the 2nd defendant, which if he did may have drawn the provisions of section 14(2) of the **Contracts Act 1960, (Act 25)** into the case, what he wrote and said to the effect that 2nd defendant had money to collect from the 3rd defendant influenced the plaintiff to advance the credit and that is actionable at common law. Some jurisdictions now have enacted statutes on misrepresentations under which various causes of action are clearly provided for. The central question in this case is therefore, whether, in the circumstances of this case, the 3rd defendant can be held liable for the tort of deceit for which John Oseku Ankra is prima facie liable to pay damages to the plaintiff? Regrettably this issue eluded both the High Court and the Court of Appeal with the High Court straying off into areas that further confused the issues in contention in the case.

But it appears to us that the plaintiff could also have pleaded its case in a clearer manner. The reliefs endorsed on the writ of summons and the averments in the statement of claim do not distinguish the cause of action against the 1st and 2nd defendants from that against the 3rd defendant, but there is a world of difference between them as shown above. The cause of action against the 1st and 2nd defendant was in contract and it was a simple case of debt owed, whereas the appropriate cause of action against the 3rd defendant is in tort. This is a case where the plaintiff would have been justified in bringing separate suits for the convenience of the trial. We take this opportunity to deprecate the emerging wrong practice where in setting down issues

for trial in a civil case "whether or not the plaintiff is entitled to her claim" is put down as an issue for trial. The whole trial is aimed at determining whether or not the plaintiff is entitled to the reliefs claimed so how can that be a distinct issue? This practice is a product of lazy work and a stop must be put to it. This case also serves as a reminder to all lawyers of the first principles we learn in civil procedure to always ascertain the cause of action that arises on the facts of a case before drafting our claim. The cause of action determines the relevant evidence to lead and the law applicable in the case thereby saving resources and time expended in adducing unnecessary evidence and ending up confusing and embarrassing the trial. This is not the first time this reminder is being given by this court.

THE APPEAL TO THE SUPREME COURT.

Now, to the substantive grounds on which the plaintiff has impeached the judgment of the Court of Appeal. As previously stated, the evidence established that the plaintiff relied on the representations made by the 3rd defendant's Finance Manager to advance the loans to the 1st and 2nd defendants so in order to succeed in this appeal the plaintiff must convince us that the 3rd defendant is liable for the fraudulent acts of its Finance Manager. Section 143 of Act 179 (supra) clearly provides that a company may in appropriate cases be held liable for the fraudulent acts of its officer or agent so the fact that John Oseku Ankrah acted fraudulently alone is not sufficient ground for the 3rd defendant to escape liability.

My Lords, it is a self evident postulate of law that a limited liability company, being an artificial legal person, can only act through the instrumentality of human beings who stand in certain legal relationships with the company. But the law is very careful in setting the conditions under which the acts of those persons who stand in legal relationships with a company qualify as acts of the company itself or are otherwise binding on it. Secondly, the law distinguishes **acts of the company** from acts of its officers and agents that may be binding on the company but are not deemed **acts of the company**. Stated differently, it is not the acts of any person with a relationship to

a company that are considered **acts of the company** and even for those whose relationship warrants their acts to be deemed **acts of the company**, it is not every act of theirs that the law treats as **acts of the company**.

The first category of persons whose acts amount to acts of the company is stated under Section 139(1) of Act 179 in the following terms;

139. Acts of the company

(1) An act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself; and accordingly the company shall be criminally and civilly liable for that act to the same extent as if it were a natural person.

By this provision the acts of the members in general meeting, the board of directors or a managing director shall be treated as acts of the company provided this category of persons act in the course of carrying out the business of the company in the usual way the company's business is carried out. Under those conditions, a fraudulent misrepresentation would be deemed as made by the company and its liability would arise, both criminal and civil. This provision is not applicable in this case since the act in question was not that of members in general meeting or board of directors or a managing director so there is no need to examine it in detail.

The other category of persons whose acts, though normally are not acts of a company under of Section 139(1) above, but may be deemed acts of the company under certain conditions, is that of officers and agents of the company. The conditions under which their actions would be deemed acts of the company are stated under Section 140(1) as follows;

140. Acts of officers or agents

(1) Except as provided in section 139, the acts of an officer or agent of a company are not the acts of the company, unless,

(a) the company, acting through its members in general meeting, board of directors, or managing director, has expressly or impliedly *authorised that officer or agent to act in the matter*; or

(b) the company, acting under paragraph (a) has represented the officer or agent as having its *authority to act in the matter*, in which event the company shall be civilly liable to a person who has *entered into the transaction* in reliance on that representation, unless that person had actual knowledge that the officer or agent did not have authority or unless, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of authority. (*emphasis supplied*)

My Lords, particular attention must to be paid to the words used by the legislator in this provision. The authorization has to be in respect of the particular act that is the subject of the enquiry. The words are **"authorized to act in THE matter"** and **"entered into THE transaction"**. Therefore, for the category of officers and agents, their acts can only be treated as **acts of the company**, if they have been given authority, either expressly or impliedly, to undertake **the particular act in question** by the members in general meeting, board of directors or a managing director. For example, this type of situation may arise where a person writes a letter to a managing director requesting for information concerning business of the company and the managing director minutes on the letter to an officer of the company to deal with the person and provide the particular information requested for. In that situation the acts of the assigned officer in providing the particular information requested for becomes acts of the company on the strength of section 140(1) of Act 179. It is paramount to observe that the law has been careful to limit the acts of officers and agents that could be deemed acts of the company to particular transactions. Officers and agents have no general authority for their acts to be turned into acts of the company even if they are carrying out the

business of the company in the usual manner. Secondly, even if an act of an officer qualifies as an act of the company, the liability of the company arises only in respect of civil claims and does not cover criminal liability.

It was on this provision that the Court of Appeal rested their judgment and held that the Finance Manager did not have any express or implied authorization from the company to verify the invoices in question or to write the letters agreeing to pay monies directly to the plaintiff. We think the Court of Appeal correctly interpreted and applied section 140(1) of Act 179 because the authorization under this provision that makes the act of an officer or agent the act of the company has limited them to the particular act that has generated the dispute and is not acts in a general sense. There is another provision on authority of an officer or agent to act generally and bind a company in respect of its business but that is different.

The provision of our law at the time on the general power or authority of officers and agents was section 142 of Act 179 which states that;

142. Presumption of regularity

(1) A person having dealings with a company or with someone deriving title under the company is entitled to assume,

(b) that a person described in the particulars filed with the Registrar pursuant to sections 27 and 197 as a director, managing director or secretary of the company, or represented by the company, acting through its members in general meeting, board of directors, or managing director, as an officer or agent of the company, has been duly appointed and has authority to exercise the powers and perform the functions customarily exercised or performed by a director, managing director, or secretary of a company carrying on business of the type carried on by the company or customarily exercised or performed by an officer or agent of the type concerned;

(c) that the secretary of the company, and any other officer or agent of the company having authority to issue documents or certified copies of documents on behalf of the company has authority to warrant the genuineness of the documents or the accuracy of the copies so issued;

(d) that a document has been duly sealed by the company if it bears what purports to be the seal of the company attested by what purports to be the signatures of two persons who, in accordance with paragraph (b), can be assumed to be a director and the secretary of the company; and the company and those deriving title under it are estopped from denying the truth of that assumption.

2) For the purposes of subsection (1),

(a) a person is not entitled to make any of those assumptions if that person had actual knowledge to the contrary or if, having regard to the position with, or relationship to, the company, that person ought to have known the contrary;

(b) a person is not entitled to assume that any one or more of the directors of the company has or have been appointed to act as a committee of the board of directors or that an officer or agent of the company has the company's authority by reason only that the company's Regulations provide that authority to act in the matter may be delegated to a committee or to an officer or agent.

In this final appeal the plaintiff has relied heavily on this provision. The line of argument by the plaintiff on this provision is directed at the defence of the 3rd defendant that its Finance Manager had no authority to approve anything to do with finances in the company and that it is only Chinese officials who can give the verification and approval to pay monies directly to the plaintiff as the Finance Manager purported to do. In answer the plaintiff has argued vigorously, that by virtue of Section 142 (1)(b) of Act

179 it was entitled to assume that the Finance Manager had authority to verify the invoices purporting to emanate from the 3rd defendant. By Section 142, our company law legislation at the material time enacted into law the common law doctrine of presumed regularity which was laid down in the English case of **Royal British Bank v Turquand (1856) 6 E and B 327.** The doctrine was first referred to as the company "indoor management rule" by Lord Hatherley in the House of Lords case of **Mahony v East Holiford Mining Co (1874-75) LR 7, HL 879.** In the Supreme Court case of **Godka Group of Companies v P.S. Global [2001-2002] SCGLR 918** Afreh, JSC explained the doctrine as follows at page 932;

"In any case a person contracting with a company is not required to demand the production of a resolution authorizing the board, the general meeting, an officer or agent of the company, as the case may be, to enter into the contract. It has been established since the case of the Royal British Bank v. Turquand (1856) 6 E and B 327; [1843-60] All E.R. Rep. 435 [Exchequer Chamber] that a person dealing with a company is entitled to assume, in the absence of facts putting him on notice or inquiry, that there has been due compliance with all matters of internal management and procedure required by the Regulations of the company. This is the Rule in Turquand's case or the "Indoor Management" Rule. This rule is codified by our Companies Code, Act 179, in sections 139 to 143. Under s.142 (2), if the company has held out some one as its agent it is estopped from denying the appointment; and a de jure or de facto officer of the company can be assumed to have the usual powers and duties of that sort of officer."

It is vital to understand the context and purpose of the indoor management rule which is aimed to protect persons contracting with companies from liability or loss where that company's duties have been executed illegally or even fraudulently. Where an officer or agent has entered into a binding and enforceable business undertaking in the name of a company, the rule prevents the company from repudiating that binding commitment on the ground of an irregularity in the appointment of the officer or agent or want of authority on her part. But in this case, notwithstanding the defence put up by the 3rd

defendant, we have earlier explained that the Finance Manager did not enter into any legally binding and enforceable agreement with the plaintiff so his authority from the 3rd defendant to bind it does not arise. The letters John Oseku Ankrah signed were based on non-existent facts and clearly fictitious. If he had guaranteed the loans extended to the 2nd defendant that would have been enforceable against him and the argument of the 3rd defendant being bound to satisfy that guarantee though it did not authorize him, could be considered but not when he did not guarantee the loans. Consequently, because of the view we have taken of the nature of the cause of action that arises against John Oseku Ankrah, a consideration of the lengthy arguments on presumed or ostensible authority made on behalf of the plaintiff in its statement of case will not, in our opinion, lead to the proper resolution of this case.

Besides, the 3rd defendant countered the plaintiff's submissions on section 142 (1) by relying on section 142(2) and argued that the plaintiff ought to have known that the verification of the invoices should have been done with the Chinese management of the company on account of the plaintiff's knowledge gained from earlier dealings with it. The plaintiff denied such knowledge but is it not revealing that after events showed that John Oseku Ankrah may not have been dealing aboveboard with them, the plaintiff contacted the Chinese Managing Director of the 3rd defendant to re-verify the claims of the Finance Manager? We take judicial notice of the practice of bankers to carefully verify the bona fides of customers who apply for loans as was attempted in this case by the plaintiff. Except in this case the plaintiff's verification, to say the least, was sloppy in that, to verify a letter purporting to emanate from a company not signed by the managing director they went to speak to the very officer who signed it. Basic prudence would seem to suggest that the first verification should have been done with the Managing Director. As has been demonstrated above, under our company law legislation, members in general meeting, board of directors and a managing director, in that order of authority, occupy very important positions in the scheme of affairs of a company so it is always safer to close substantial deals with a company with their direct involvement or at least of the managing director where that is feasible as in this case.

Exhibit "D" that the plaintiff claims it relied on does not bear the stamp of the 3rd defendant and that ought to have alerted it that John Oseku Ankrah was probably acting by himself. Exhibit "L" for the second loan bears not the corporate stamp of the 3rd defendant but that of the Financial Manager, whereas the plaintiff affixed its corporate stamp against the signature of its Chief Executive Officer.

As for the claim of the plaintiff that the 3rd defendant had by the Tonalis transaction established a practice whereby the Finance Manager was the responsible officer for verification of invoices, that is difficult for us to take. For we observe that Exhibit "Q" on the Tonalis transaction is dated 17th July, 2012. This was after the plaintiff had already granted the second loan to the 2nd defendant on 16th July, 2012 per the loan agreement Exhibit "K" series. The payments on that transaction were made by cheque dated 5th March, 2013 (Exhibit "S" series) directly to Tonalis, long after all the loans had been paid out by the plaintiff. Therefore, the Tonalis transaction cannot soar up the plaintiff's collapsed case that the 3rd defendant held out John Oseku Ankrah as the responsible officer in matters of verification of invoices.

However, though none of sections 139(1), 140 (1) and 142 have been found to ground joint or several liability of the 3rd defendant for the wrongdoing of its Finance Manager, its liability may nevertheless arise under Section 140(3) of Act 179 which provides as follows;

(3) This section shall not derogate from the vicarious liability of a company for the acts of its employees while acting within the scope of their employment.

We have earlier in this delivery explained that the plaintiff's cause of action against the 3rd defendant lies in tort so it is appropriate to consider whether on the law and the facts the 3rd is vicariously liable for damages for deceit through the fraudulent misrepresentations by its Finance Manager. The parties argued this ground in their submissions at various stages of the case, though not as extensively as the other provisions of Act 179, which have been shown not to be really germane in this case. For

a company registered under Act 179 to be held vicariously liable for the acts of its employees, the statute says the employees must have been acting within the "scope of their employment". In apparent reference to this provision, the plaintiff in his statement of case has submitted as follows;

"We state that from the above provisions, a company would be held for all actions of its officers including unauthorized acts of its officers if the officer was acting in the cause of his employment. My Lords, abundant and undisputed evidence was led some of which have been stated in ground 1 above to the effect that John Oseku Ankrah was the Country Finance Manager of Respondent."

In his written submissions in the Court of Appeal, Counsel for the plaintiff argued as follows; *"we state that contrary to what the learned judge said, the actions of John Oseku Ankrah make 3rd defendant (his employer) vicariously liable for the wrongful acts of his. It is erroneous for the learned judge to hold that in so far as the acts of John Oseku Ankrah were not officially known to 3rd defendant, it was not liable. This is so in that 3rd defendant such as the appellant have no control over the recruitment of staff of companies they deal with. If therefore John Oseku Ankrah does not act in the normal cause of duty of 3rd defendant, its employer should be held liable for the acts."*

On the issue of the vicarious liability of the 3rd defendant, its Counsel in the statement of case quoted and relied on some English decisions, obviously for their persuasive value. Particular reference was made to the cases of **Reuben vrs Great Fingal Consolidated [1906] 1 AC 439 (HL)** and **Armagas Ltd vrs Mundogas SA [1986] 2 ALL ER 385 (HL).** He quoted the following statement in the speech of Lord Kieth of Kinkel who delivered the lead judgment of the House of Lords in the latter case.

"In the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's

business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorized to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorized to do, and when the employer has done nothing to represent that he is authorized to do it."

Counsel for the 3rd defendant concluded his submissions as follows;

"On the principles of fairness and good conscience a Master should not be held liable for the acts of his servant or employee where the servant was on a "fraudulent frolic" of his own."

The above submissions of the parties portray the difficult conflicting policy choices that have confronted the law for centuries particularly with the ever increasing involvement of limited liability companies in almost every aspects of life. In the current state of human affairs most services are rendered by limited liability companies some not resident in one jurisdiction but they act through numerous officers and agents all over and it is impossible for a company to exercise effective control over all of them. In such circumstances, there is the need to protect companies against acts of their errant and dodgy officers and agents, otherwise companies will be burdened with huge liabilities through their unauthorized and fraudulent acts and cause them to go bankrupt, a situation not good for commerce. The other side of the coin is the valid argument of the plaintiff, that third parties who deal with companies only through their human agents deserve to be protected against unauthorized acts of the company's representative since the third parties have no control over who the company choses to represent it and deal with public and it is not possible for third parties to always verify whether an officer or agent has authority to do what she does. The law has over the years tried to maintain a balance between these two competing policy objectives through the provisions in company law statutes such as Act 179 and principles evolved by judges construing statutory provisions and developing and expounding the common law.

The term "scope of employment" has been considered in a number of cases in our jurisdiction and the courts have done this in line with the construction of the term by other common law judges. See **Agogro v Ago [1973] 1GLR 43; Osei v State Farms Corp & Anor [1964] 1 GLR 649; and Guardian Royal Exchange Assurance v Appiah [1984-86] 1 GLR 52, CA.** In the Court of Appeal case of **Attorney-General & Anor v Dadey [1971] 1 GLR 228** at page 233, Azu Crabbe JA (as he then was) approved of the following approach to answering the question whether an employee was acting within the scope of her employment per Diplock J (as he then was) in **Hilton v. Thomas Burton (Rhodes) Ltd. [1961] 1 All E.R. 74** at pages 77 and 78,

"The question remains, and it is probably the most important practical question in this case: Are the first defendants liable, vicariously, for the second defendant's negligence? I think that the true test can be expressed in these words: Was the second defendant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent as in Century Insurance Co., Ltd. V. Northern Ireland Road Transport Board ([1942] 1 All E.R. 491; [1942] A.C. 509), or even fraudulently, as in Lloyd v. Grace, Smith & Co. ([1912] A.C. 716), or contrary to express orders, as in Canadian Pacific Ry. Co. v. Lockhart ([1942] 2 All E.R. 464; [1942] A.C. 591), the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission. To say, as is sometimes said, that vicarious liability attaches to the master where the act is an act or falls within a class of act, which the servant is authorised to do, may be misleading. In one sense a master may be said to authorise a servant to do an act when he grants the servant permission to do something for the servant's own benefit, which, without such permission, would be a breach of his contract of employment or even a tort, as when he permits him to take time off for refreshment in working hours, as in Crook v. Derbyshire Stone, Ltd. ([1956] 2 All E.R. 447), or permits him to use the master's property, as in Higbid v. R. C. Hamnett, Ltd. ((1932) 49 T.L.R. 104). In such cases, the

master is not liable, for although he may be said, in a loose sense, to authorise the act, ***it is nevertheless not an act which the servant is employed to do . . . It may be he was using his master's vehicle with his master's permission, but as Higbid v. R.C. Hamnett, Ltd. Shows, that is not enough. The true test is: Was he doing something that he was employed to do?" (emphasis supplied).***

In that case, a driver of the Ghana National Fire Service at Sekondi went to work and decided to give a lift to the driver he had relieved by dropping him off at his house with the official vehicle. This was prohibited by the office operations manual. Further to that, when he took the relieved driver to his house he waited for him to change his dressing and then he drove him to a wake-keeping of one of their deceased colleagues at Ketan, a distance away. On his way back to the station the vehicle got involved in an accident damaging the vehicle of the plaintiff so he sued the driver and his employer, claiming the employer was vicariously liable. At page 234 Azu Crabbe JA reasoned as follows;

"It is clear that on the date when the accident occurred there had been no major fire which required reinforcement, and Mr. Jabin, as the officer in charge of his platoon, must have taken the decision by himself to give another employee of the Ghana National Fire Service a lift to Ketan. But to hold the defendant vicariously liable for the negligence of Jabin, it is, in my view, not sufficient that his wrongful act was done in the course of doing something of a kind which he usually had authority to do. It must further be shown that Jabin was, at the time of the accident, performing an official duty, and was not merely on a frolic of his own. The fundamental question in this case is: Was Jabin engaged on a duty he was employed to do at the time of the accident? I think he was not."

The Court of Appeal unanimously set aside the judgment of the High Court which had held that the employer was vicariously liable. Therefore, contrary to the argument of the plaintiff, the fact that an employee committed the tort while in the employment of the employer and was acting in a matter related to the work for which he is employed alone is not sufficient to found vicarious liability against an employer. Yes, Jabin was

employed to drive the Fire Service vehicle and he was driving that vehicle during his working hours at the time the accident occurred, but at the particular moment of the accident he was clearly not engaged in the work of his employer but on a frolic of his own.

In the more recent case of **WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12** the Supreme Court of the United Kingdom discussed the nature of actions by an employee that would be classified as falling within the scope of her employment. The facts of that case are that Mr Skelton worked in the internal audit section of Morrison Supermarkets chain of the United Kingdom. He was taken through disciplinary proceedings over an infraction of office rules and he became angry with the company. Subsequently, in the course of his work he was given access to the employees payroll data of the company which he was to forward to external auditors, KPMG for official work. When he gained the access he made a copy of the employees data on his personal pen drive before sending the data to the auditors. After transmitting the data to the auditors, he created a fake internet account and released the personal data of 98,998 employees onto a website on the internet and sent copies to some newspapers. The workers sued the employer for damages for the tort of breach of confidence claiming the employer was vicariously liable for the wrongful act of Mr Skelton. The High Court and the Court of Appeal held that Mr Skelton's act of releasing the plaintiff's personal data to the public was closely connected to the work he was employed to do so the company was vicariously liable. The employer appealed to the Supreme Court.

Lord Reed, with whom the rest of the panel agreed, said as follows at paragraph 35 of his judgment;

"35. Clearly, the mere fact that Skelton's employment gave him the opportunity to commit the wrongful act would not be sufficient to warrant the imposition of vicarious liability: see, for example, Morris v C W Martin & Sons Ltd [1966] 1 QB 716, 737, and Lister [2002] 1 AC 215, paras 25, 45, 50, 59, 65, 75, and 81-82. The courts below,

however, treated it as important that Skelton's disclosure of the data on the Internet was, as the judge said "closely related to what he was tasked to do" ([2019] QB 772, para 186): a remark which the Court of Appeal described as "plainly correct" ([2019] QB 772, para 63). The fallacy in that approach was explained by Lord Wilberforce in Kooragang Investments Pty Ltd v Richardson & Wrench Ltd [1982] AC 462, which concerned an employee who was authorised to carry out valuations, and negligently carried out a valuation without authority from his employers and not on their behalf. Lord Wilberforce rejected the argument that so long as the employee is doing acts of the same kind as those which it is within his authority to do, the employer is liable, and is not entitled to show that the employee had no authority to do them. He said at p 473:

"the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts." (emphasis supplied).

The Law Lord then concluded his judgment relieving the employer of vicarious liability reasoning as follows;

"47. All these examples illustrate the distinction drawn by Lord Nicholls at para 32 of Dubai Aluminium [2003] 2 AC 366 between "cases … where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own', in the language of the time-honoured catch phrase." In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by LordNicholls in Dubai Aluminium in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do

that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment."

The principles of law relied on in the **WM Morrissons case** are the same as those Azu Crabbe, JA applied in the case of **Attorney-General v Dadey** so we shall analyse the evidence in this case in line with those principles. Now, the first set of letters John Oseku Ankrah wrote confirming the fake invoices were stated on their face to be at the request of the 2nd defendant. The 3rd defendant had no obligation as part of its business to assist the 2nd defendant in its dealings with the plaintiff. Secondly, it has not been contended that credit referencing bureau services was part of the usual business of the 3rd defendant. It is therefore plain that in engaging with the plaintiff to further the business of the 2nd defendant, John Oseku Ankrah was on a frolic of his own and not doing work in pursuit of work he was employed to do. Similarly, the letters he signed agreeing to pay the non-existent monies to the plaintiff were at the request of the plaintiff and to advance the business of the plaintiff and had nothing to do with the business of 3rd defendant who employed him. In fact, the requests were made by the plaintiff direct to the Finance Manager and in agreeing he did not affix the stamp of the 3rd defendant on the first letter Exhibit "D" and for the second letter, Exhibit "L", he affixed his stamp, not the corporate stamp of the 3rd defendant. Under these circumstances, we are of the opinion that in his engagements with the plaintiff, John Oseku Ankrah acted on a frolic of his own for purposes of the businesses of the 2nd defendant and the plaintiff. He was not engaged in work that he was employed to do for the 3rd defendant so he was not acting within the scope of his employment and the 3rd defendant cannot be held vicariously liable.

It is for the reasons explained above that the appeal fails and same is accordingly dismissed.

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(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

Y. APPAU

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