IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)
YEBOAH, JSC
BAFFOE-BONNIE, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/11/2016

25TH JULY, 2018

DANIEL OFORI ……. PLAINTIFF/APPELLANT/APPELLANT

VRS

1. ECOBANK GHANA LTD …… 1ST DEFENDANT/REPONDENT/RESPONDENT RESPONDENT
2. SECURITIES & AND EXCHANGE COMMISSION ….. 3RD DEFENDANT/RESPONDENT/ RESPONDENT
3. GHANA STOCK EXCHANGE ……. 4TH DEFENDANT/RESPONDENT/RESPONDENT

J U D G M E N T

PWAMANG, JSC:-

This case comes before us upon the invocation of our appellate jurisdiction by the plaintiff/appellant/appellant who was dissatisfied with the judgment of the Court of Appeal dated 6th June, 2013 which judgment went in favour of the defendants/respondents/respondents. The case arose out of trading of company shares on the Ghana Stock Exchange. Unless otherwise stated, we shall in this judgment refer to the parties by the descriptions they had in the trial court.

FACTS

The essential facts of this case are quite straightforward. Because the processes of the securities market with which we are concerned in this case are time bound, we shall set out the facts in chronological order. In May 2008, the 2nd defendant engaged Databank Brokerage Ltd (Databank), a licensed dealer at the Ghana Stock Exchange (the Exchange), to act as his agent and buy for him 14, 130,000 shares in Cal Bank Ltd which are listed on the Exchange. Around the same time, plaintiff offered his shares in Cal Bank Ltd to Databank to sell for him. From the record, it appears that the movement of the shares at the time was in anticipation of an impending General Meeting of shareholders of the bank. The rules of the Exchange permit a single broker to represent the seller as well as the buyer of the same securities traded at the Exchange so in this case Databank represented both plaintiff as well as 2nd defendant. Consequently, on 27th May, 2008 Databank executed on the floor of the Exchange a trade in 14, 310, 000 shares of Cal Bank Ltd from plaintiff and two other shareholders to 2nd defendant. Generally speaking, by the rules of the stock exchange, from the day a trade is executed the brokers involved are required to undertake certain stipulated activities daily up to the third day 11 am when the seller's broker and the buyer's broker are expected to undertake the exchange of the securities and the payment for the securities. This is done under the supervision of an officer of the stock exchange but where a single broker represents both seller and buyer, then the broker effects the exchange and reports to the Exchange that the trade has settled. Once a trade is settled it becomes irrevocable by the parties to the trade.

In this case, the clearing and settlement of the trade progressed from 27th May, 2008 and, apart from a request for further particulars about the transaction which the broker supplied, there was no problem. The broker got NTHC, who were the Registrars of Cal Bank Ltd, to transfer the shares of the sellers to the name of the buyer in the register of members they kept for Cal Bank. The 2nd defendant instructed his bank, the 1st defendant, to effect payment for the shares that Databank had bought for him. On the third day, Friday 30th May, 2008 at about 2.30pm, an official of Databank went to 1st defendant with the plaintiff to hand over the payment for his shares to him. At the bank, the money was made available to the plaintiff and the bank inquired from him the manner he wanted them to disburse it. Upon the instructions of plaintiff, two banker's drafts were made to Zenith Bank and SG-SSB Bank for the benefit of plaintiff. One banker's draft was made to SG-SSB Bank for the benefit of Databank. After the banker's drafts, the money that remained was GHS 6,162,420.00 and plaintiff instructed 1st defendant to invest it in a fixed deposit for him. 1st defendant gave him forms to fill for the purpose of the fixed deposit. Plaintiff walked away with his banker's drafts and handed the one to Zenith Bank to that bank and it proceeded to credit his account with the face value of the draft that same day.

However, unknown to Databank, the plaintiff and the 1st and 2nd defendants, that Friday, 30th May 2008 at about 1.00pm the Exchange received a letter from the Bank of Ghana(BOG) requesting that particular trade in 14,130,000 shares of Cal Bank shares to be put on hold while BOG carried out some investigations concerning the transaction. The Exchange in turn wrote a letter to Databank suspending the trade but the letter was received by Databank at about 5.00pm on the Friday 30th May, 2008. This was after payment had been made to the plaintiff. Databank upon receipt of the letter suspending the trade wrote back to the Exchange that same day protesting against their action and stating that they ought to have challenged BOG for it had no lawful grounds to interfere with the trade.

After close of work on that Friday, 30th May 2008, the intervention by BOG in the transaction was reported in the media in the evening so first thing in the morning of Monday, 2nd June, 2008, the 1st defendant stopped the banker's drafts it had issued the previous Friday. Thereafter, there were hot exchanges of communication among the banks, Databank, the Exchange and BOG. The effect of the suspension of the trade was a fall in the value of the shares of Cal Bank from GHS1.05, at which they were traded on 27/5/2008, to GHS0.65 per share. The next significant event for our purposes was a letter written by the 2nd defendant dated 11th June, 2008 to 1st defendant in which he stated that he was no longer interested in acquiring the shares and that any payments made by the bank in that respect should be recovered. In that letter, 2nd defendant also requested a cancellation of a facility he had obtained from the 1st defendant for the purpose of acquiring the shares in issue. Then on 13th June, 2008 BOG wrote to the 4th defendant stating that it had concluded its investigations and was satisfied that the transaction was in order so the trade was to proceed in accordance with the rules of the Commission and the Exchange.

After this clearance of the transaction, plaintiff demanded for his money from 1st and 2nd defendants but they would not pay. Databank also requested 2nd defendant to ensure that 1st defendant paid for the shares because the shares had been transferred to him but he rejected their advise. The Exchange on its part demanded from Databank levies on the commission the broker earned on the trade and when Databank failed to pay the levies, the Exchange banned it from trading at the Exchange. The ban and the levies were later replaced with penalty which the Exchange said it was imposing because Databank had misled them that the trade settled. At the centre of the confusion that engulfed the parties was the question whether the trade in the 14,130,000 between plaintiff and the other sellers on one hand and 2nd defendant on the other had settled as at the time of the suspension or it had failed. In a bid to resolve matters, the various parties complained to the 4th defendant as the statutory regulator of the securities market in Ghana.

The Director-General of the 4th defendant went into the matter and carried out investigations and at the end of it issued directives for the compliance of all interested parties. On the central issue of whether the trade settled or failed, the Director-General of 4th defendant held that the trade had not been consummated in accordance with the rules of the Exchange which, in the parlance of the Exchange, meant the trade had failed. As a consequence of that holding he directed that the shares in question be reverted to plaintiff and the other sellers in the register of members of Cal Bank Ltd. The effect was that plaintiff and the other sellers were not entitled to be paid any money and they carried the risk on the shares.

By the provisions of the **Securities and Exchange Commission Act, 1993 (PNDCL 333),** the Director-General may deal with complaints in two ways. He may investigate the complaint and settle it and if the parties are satisfied with the settlement, that ends the matter. He may also, depending on the nature of the complaint, after investigating refer it to an Administrative Hearing Committee which would conduct a formal hearing and make a determination binding on the parties. Any party aggrieved by such binding determination may appeal to the High Court. In this case, the Director-General opted for the settlement process so there was no hearing and no binding determination. 4th defendants in their statement of case said that because they did not receive any objection to their directives they concluded that the parties were satisfied. What is obvious is that the plaintiff, against whom the directives went, was not satisfied and he choose to exercise his constitutional right to have the matter determined by the court.

HIGH COURT DECISION

In simple terms, the case of the plaintiff in the High Court, which he maintained at the Court of Appeal and has urged before us in this final appeal, is that, as at the time the trade was suspended it had settled and concluded in that by then the shares had been transferred into the name of the 2nd defendant and he had received payment. According to the plaintiff, the transaction satisfied the rules of the stock exchange and was a valid trade. He concedes that the Exchange under the rules had authority to cancel a trade even if it had settled but that was not done in respect of this trade. He said the funds covering the transaction which were lodged with 1st defendant had been given to him and he became the customer of the 1st defendant bank in respect of those funds hence he initially sued only the 1st defendant for his money. Plaintiff challenged the lawfulness of the request by BOG for the trade to be suspended but that issue will not be considered in this appeal since BOG was not made a party in the case. Databank was made 3rd defendant but it successfully applied and was struck out as a party.

The defendants filed a number of defences to the claim. The substantive defence of the 1st defendant can be found at paragraph 26 of its amended defence filed on 20/5/09. It is as follows;

"26. 1st defendant further avers that pursuant to the directive of Bank of Ghana and the Ghana Stock Exchange the intended sale of the shares held by plaintiff in Cal Bank Limited by plaintiff to 2nd defendant was aborted and title to the shares which were the subject matter of the intended sale between plaintiff and 2nd defendant remained in plaintiff who continues to be legal owner of the said shares."

The main defence of 2nd defendant is at paragraph 10 of its defence filed on 11/6/09 which is as follows;

"10. Paragraph 25 is vehemently denied and 2nd defendant says further that any purported transfer of the said shares would not have been legitimate at the material time."

The 4th defendant pleaded in its defence at paragraphs 12 and 14 that the entry of the name of the 2nd defendant in the register of Cal Bank could only have been validly done after the settlement of the trade and that in any case it had directed the Registrar, NTHC, not to transfer ownership of the shares because of the investigations by BOG. It further contended that plaintiff did not own all the shares of Cal Bank that were traded so the transaction was void. According to the 4th defendant, its investigations showed that the trade was not consummated in accordance with the rules of the Exchange.

5th defendant, the Exchange, in its statement of defence stated that contrary to the contention of the plaintiff, the transaction did not satisfy the time provision of T+3 in the rules of the Exchange because the suspension of the trade upon the intervention of the BOG prevented plaintiff from delivering his shares to 2nd defendant on the third day.

After the trial, the High Court Judge in her judgment dated 16th September, 2011 concluded that the trade did not conform to the rules of the Exchange in that there was no Delivery versus Payment as the payment and delivery of the share certificates were not effected as at 11am on the third day. She further held that the bankers drafts used in payment were dishonoured and, under the rules of the Exchange, that was a ground for failure of a trade. Her Ladyship stated that, since the share certificates were not delivered before the suspension of the trade there was total failure of consideration so plaintiff was not entitled to be paid. The trial judge upheld the contention that plaintiff did not have ownership of some of the shares at the time of the sale to the 2nd defendant so the transaction was void on ground of the legal principle of *nemo dat quod non habet*. Defendants, at the addresses stage, argued that the contract between plaintiff and the 2nd defendant for the sale of the shares was frustrated as a result of the suspension of the trade so 2nd defendant was relieved from paying for the shares. This argument was upheld by the trial judge. Her Ladyship therefore dismissed the claims of the plaintiff. Nonetheless, she accepted the case of the plaintiff that, after the 1st defendant made the funds for the payment of the shares available to plaintiff and took instructions from him

as to the disbursement of the funds he became the customer of the bank with regard to those funds. She also held that a banker's draft, also known as a banker's cheque, is equivalent to cash.

COURT OF APPEAL DECISION

Plaintiff appealed against the judgment of the High Court but the Court of Appeal dismissed the appeal in its entirety and agreed with the High Court on all the grounds on which it based its decision. In particular, the Court of Appeal agreed with the construction the trial judge placed on **Rule 46(1)** of the **Trading and Settlement Rules** of the Exchange that required a trade to be settled by 11am on the third day and said that time was inflexible so the payment received by plaintiff after 11am on 30th May, 2008 offended the rules of the Exchange hence the trade failed.

APPEAL TO THE SUPREME COURT

Being aggrieved by the decision of the Court of Appeal, the plaintiff has appealed to us on eight grounds as follows;

I. **The Court of Appeal erred when it affirmed the judgment of the High Court holding that the share sale transaction the subject matter of fact Plaintiff's suit failed because Plaintiff did not own some of the shares sold by the Plaintiff to the buyer.**

II. **The Court of Appeal erred when it affirmed the judgment of the High Court to the effect that the share sale transaction the subject matter of plaintiff's suit failed by reason of the intervention of Bank of Ghana.**

III. **The Court of Appeal erred when it affirmed the judgment of the High Court that the share sale transaction the subject matter of Plaintiff's suit was frustrated by reason of the intervention of the Bank of Ghana.**

IV. **The Court of Appeal erred when it held that the share sale transaction violated the trading rules of Ghana Stock Exchange by reason of payment having been made after 11:00 on the third day of the trade.**

V. **The Court of Appeal erred when it held that the Plaintiff did not deliver the shares to the buyer simultaneously with payment for the shares for which reason the share sale transaction violated the trading rules of the Ghana Stock Exchange.**

VI. **The Court of Appeal erred when it failed to consider the true and proper effect of the trading rules of the Ghana Stock Exchange.**

VII. **The Court of Appeal erred when it held that Plaintiff did not lead evidence to prove that the Bank of Ghana did not properly exercise its discretion when it intervened in the share sale transaction the subject matter of Plaintiff's suit.**

VIII. **The Court of Appeal did not properly evaluate the evidence on record.**

The plaintiff filed a statement of case in which he argued all the grounds of appeal. The 1st defendant also filed a statement of case while the 4th and 5th defendants filed a joint statement of case. The 2nd defendant has not been made a respondent to this appeal and that means plaintiff is not seeking any relief against him. We have studied the statements of case filed by the parties to this appeal and noted their submissions and intend to refer to them in the course of analysing the issues arising in the appeal.

An appeal is a rehearing and a second appellate court, as we are, is nonetheless required to review the evidence and documents on the record as well as the law applicable in the case and decide for itself whether the court that delivered the judgment appealed against was right or wrong in its findings and conclusions. See **Gregory V Tandoh [2010] SCGLR 971.**

It is evident from the record that the 4th defendant's Director-General purported to interpret the rules of the Exchange, which were tendered at the trial as Exhibit "25", and applied his understanding of those rules in coming to the conclusion he did. The 5th defendant concurred in the opinion of the 4th defendant that the trade did not conform to the rules of the Exchange. The plaintiff on the other hand has argued that they were in error in their understanding of the rules of the Exchange so their directives ought to be set aside. However, whereas in the High Court the 4th and 5th defendants submitted to the court's jurisdiction, and rightfully so, and sought to justify their interpretations of the rules of the Exchange which, it appears are not statutory, they now contend in their statement of case that matters of the securities market are highly sensitive and the court should defer to the judgment of they who are responsible and knowledgeable in them. In that respect, they referred to the case of **R v International Stock Exchange of the UK [1993] 1 AllER 420**. In that case, shareholders of a company applied for leave for judicial review against a decision by a committee of the stock exchange suspending trading of shares of the company which they felt aggrieved about. However, under the applicable statutory provisions, it was only the company itself that could bring such application. The Court of Appeal therefore dismissed the application for leave on the

ground of want of *locus standing* by the shareholders. At p. 432 Sir Thomas Bingham, MR said as follows;

"In a highly sensitive and potentially fluid financial market, the factors listed in s 31(6) of the 1981 Act have a special significance. And the courts will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market. ***But if, exceptionally, a shareholder were able to overcome these formidable problems, I question whether his claim to relief should fail for lack of sufficient interest."***

We note with great disappointment that Sterling Partners, Legal Practitioners of Adabraka, Accra, lawyer for 4th defendant who settled their statement of case, in quoting Sir Bingham, MR left out the reference to s 31(6) of the 1981 Act and the last sentence of the statement above, apparently intending to mislead the court. The page of the report was not stated neither was the page quoted from. Such practice contravenes the ethics rules of the legal profession. Sir Bingham, MR referred to the provisions in the English statute that denied standing to shareholders and that the provisions were inserted by knowledgeable regulators. He was clear that if the applicants could overcome the hurdle of *locus standing*, they would have been entitled to relief. The locus standing of plaintiff in this case is not an issue and it seems to us that the passage was misquoted to deceive the court but it is the height of impertinence for counsel to have thought that he can overreach the highest court of the land and we condemn his conduct.

The settled position of the law is that, it is the courts that have the final say on all matters of law such that when any statutory authority determines a matter which involves interpretation of statutory rules, such determination is subject to review by a court of competent jurisdiction. This principle also applies to the interpretation of rules of voluntary associations and clubs. Even if a voluntary association has a domestic tribunal charged with interpreting its rules, its interpretation is subject to review by the courts. In the cases of **Lee v Showmen's Guild of Great Britain [1952] 1 AllER, 1175 at pp. 1181-1182** Lord Denning said as follows;

> *"Although the jurisdiction of a domestic tribunal is found on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must for instance observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard..... Another limitation arises out of the well known principle that parties cannot by contract oust the ordinary courts from their jurisdiction....They can of course, agree to leave questions of law, as well as of facts, to the domestic tribunal. They can indeed make the domestic tribunal the final arbiter on questions*

of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the court and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void.....But the question still remains; to what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal has observed the law".

We understand the exercise undertaken by the courts in this case from its beginning to be an examination of the position taken by the 4th and 5th defendants, with which the 1st and 2nd defendants agree, to see if they were right in their application of the rules fashioned by the experts. In fact, there was division among the experts with Mr Patrick Kingsley-Nyinah of Databank and Lawyer Joe Aboagye Debrah, who wrote letters on behalf of plaintiff, maintaining that the trade had settled, whilst the 4th and 5th defendants said the opposite. The two lower courts agreed with defendants so let us review their reasoning and either agree or disagree with them.

As was stated by 5th defendant's witness, a fair and just determination of this case required an examination of not just the rules of the Exchange alone but principles of the general law of the country. This is evident from the defences that were put up by the defendants relating to ownership and title to the shares traded which call for us to determine when ownership and title to company shares can be said to have passed from a seller to a buyer under Ghana law. The trial judge addressed those matters in her judgment and we shall consider them in this opinion. However, the foremost issue in this appeal is the one raised by Ground IV of the appeal which is whether the Court of Appeal was right when they concluded that, by the rules of the Exchange, payment for shares received after 11am on the third day meant that the trade was not conducted in accordance with the rules of the Exchange. On this matter Mr Kofi Sadick Yamoah, who testified on behalf of the exchange, was of two minds. When he answered questions asked in cross examination by Mr Thaddeous Sory, learned Counsel for plaintiff, he said that after the 11am deadline on the day T+3, if the brokers were desirous of proceeding with the transaction to completion they could. Then when the same witness responded to questions posed by learned counsel for 2nd defendant, Nana Bediatuo Asante, he agreed with him that after 11am on day T+3 the trade was dead and for the parties to achieve completion then they have to commence the trading processes all over again. Thankfully, the rules were in evidence and the court simply needed to read and construe them as a whole and not feel bound by the testimony of any of the witnesses. The provisions that have been relied upon by the parties and considered by the lower court are Rules 50(1) and 46(1) of the Trading and Settlement Rules of the Exchange, 2006 tendered as Exhibit "25" which are as follows;

"50 Default and Failed Trades

(1) A trade is said to have failed or been in default if a member,

a. *fails to deliver securities or make payment within the time specified by the rules, or*

b. *issues to another a cheque which is dishonoured.*

"46 Clearing and Settlement Time and Procedure

(1) The clearing and settlement for a trading session (T) shall take place three (3) business days after the related trading session which is (T+3) at 11a.m. or within a given time frame that the Exchange shall specify by notice of amendment of this rule.

The defendants in their statements of case have contended that after 11am on day T+3, if securities are not delivered or payment not received then a trade failed and was dead. However, rule 50(2) provides as follows;

(2) Subject to the provisions of this rule, rules 52-56 of the Exchange's Trading and Settlement Rules shall apply, mutatis mutandis, in respect of failed trades."

So rule 50(2) shows that the Exchange has made specific rules in respect of failed trades meaning, once the trade goes beyond 11 a.m. on day T+3 the matter does not end there but the provisions of rules 52-56 kick in. Rule 52 which is relevant on the facts of this case provides as follows;

"52. Closing out Contracts

1) *If a Licensed Dealing Member fails to settle a trade by T+3, the member who is not in default is entitled after a three further days, to close out the relevant trade made.*

2) *The member who decides to close out shall give prior notice of the closing out (i.e. buying in or selling out) to the Exchange."*

The modern trend in the interpretation of statutes and deeds is the purposive approach. In the case of **Abu Ramadan & Nimako v EC & A-G [2013-2014] 2 SCGLR 1654,** Wood C.J, in support of this approach stated as follows at page 1674;

"To arrive at a proper construction of regulation 1(3)(d) and (e) of the Public Elections (Registration of Voters) Regulations, 2012 (CI 72), firmly established principles of statutory interpretation require that CI 72 be read as a whole, not piecemeal, and purposely construed and the impugned legislation interpreted in the context of the other parts of CI 72."

A guide for the interpretation of rules of voluntary associations was given in the case of **British Actors' Equity Association v Goring & Ors [1977] ICR 393** where the English Court of Appeal at p. 396 said as follows;

> *"They should be construed, not literally according to the very letter but according to the spirit, the purpose, the intendment, which lies behind them, so as to ensure-especially in a matter affecting the constitution- that they should be interpreted fairly, having regard to the many interests which its constitutional code is designed to serve".*

The purpose of the Payment and Settlement Rules is to protect buyers and sellers of securities by ensuring that sellers receive timely payments for their securities and buyers receive securities they paid for timely and without default. Normally, parties to a contract can waive breaches of terms of the contract meant for their benefit but which are not fundamental to the contract. So if the rules of the Exchange allow further three days within which the broker of a seller who was not paid by 11am on the third day has the option to close out the trade or accept payment, or the broker of a buyer of securities who did not receive the securities he paid for can exercise an option of closing out the trade or accept late delivery of the securities, then that is just operating within the known principles of the law of contract. In our understanding, a failed trade is not dead but may be saved within three days at the option of the party not in default.

We noticed that the parties and the lower court did not read rule 50 as a whole but limited themselves to only rule 50(1), but the law is that documents must be construed as a whole with the purpose of the document in mind. Even the 1st defendant who in its statement of case referred to the case of **A-G v Prince Augustus of Hanover [1957] AC 436** and submitted that the rules of the Exchange ought to construed as a whole limited itself to Rule 50(1) and failed to consider Rule 50(2) and its reference to rule 52. Looked at from this broader perspective, failed trades under the rules of the Exchange are not dead and the opinion expressed by the representative of the Exchange in his testimony under cross-examination by 2nd defendant's lawyer was ill-informed and would be rejected. Rule 52 is specifically for failed trades so the general provision at rule 46(1) does not override it for the principle of interpretation is *generalia specialibus non derogant.* A trade settled within the time provided for in rule 52 is binding and irrevocable. In our view, it is only when a trade has been closed out by the party not in default that the trade would not be capable of being settled.

In the circumstances of this case, the seller who was to receive payment latest by 11 a.m on 30th May, 2008, waived the time provision and accepted payment within the three additional days provided for under rule 52. In our opinion, the payment in this case was in accordance with the rules of the Exchange.

The question that follows the issue of the timeline immediately is the one that arises from Ground V of the appeal which is, whether the transfer of the shares to the 2nd defendant was validly effected in consonance with the rules of the Exchange, particularly the requirement of Delivery Versus Payment (DVD) which, according to defendants, ought to have been done simultaneously. A review of the literature on the subject revealed that, globally, there are different models of DVD settlement systems in the securities industry and each system has to be understood within the context of the specific provisions of the rules of the Exchange in question and the general law of the country in which it operates. There are advanced securities markets where trades are settled by computer transfers of funds and shares but in those markets the rules and statute laws have been crafted in a manner that gives legal effect to such transfers. In the case of **Margaret Elizabeth Mills & Ors v Sportsdirect.Com Retail Ltd [2010] EWHC 1072,** Mr Justice Lewison observed as follows at paragraph 5 of his judgment;

> *"5. At this point I digress to say a little about CREST. Traditionally legal title to shares was evidenced by a share certificate; and share ownership was transferred by the execution of a stock transfer form. However, in more modern times shares can be uncertificated (or "dematerialised"). Where shares are uncertificated there is no share certificate. Instead title to shares is recorded in a computer based system called a central securities depository (CSD). In the UK the operation of CSDs is governed by the Uncertificated Securities Regulations 2001 in which a CSD is called a "relevant system". Regulation 2 (1) defines this as:*
>
> *"a computer-based system and procedures which enable title to units of security to be evidenced and transferred without a written instrument…"*

Ghana is not yet there but we expect to get there some day. Though our Securities and Exchange Commission Act, 1993 (PNDCL. 333) makes provision for the establishment of a Central Securities Depository (CSD), we are not aware that one is in operation and, in any case, the trade in Cal Bank shares that concerns us in this case was not settled through a CSD. So to understand the nature of the DVP we operate in Ghana we have to examine the rules of our Exchange and our Company Law rules on transfer of legal title in shares.

Rule 46 of the rules of the Exchange makes reference to Schedule D which sets out, in general terms, the processes to be undertaken by the brokers in clearing and settling securities traded on the floor of the Exchange. Because of the importance of the schedule to an understanding of our DVP model, we shall reproduce it at length;

SCHEDULE D

(RULE 46)

SECURITIES CLEARING & SETTLEMENT PROCESS

The process for clearing and settlement including registration of certificates for delivery shall be as follows:-

1) Brokers shall see to the verification of all certificates, transfer, receipts, deposit receipts, among others, for transactions by obtaining verification from the Registrar of company before the trade is executed on the floor of the Exchange.

2) On T, a selling broker shall confirm with the buying broker, all trades executed on the floor by comparing bargain slips and completing a transfer form signed by the buying broker.

3) On T, all necessary documents (certificates, transfer receipts, deposit receipts, etc.) to be lodged with the registrar shall be prepared or sorted out and documented.

4) By 3:00pm on T, the selling LDM shall deposit certificates, transfer receipts or deposit receipts as the case may be, at the Registrar's offices and in respect of transactions involving non-resident foreigners, Schedule E shall apply.

5) By close day on T + 1, the Registrar shall have completed the processing of deposit receipt and/or balance receipt as the case may be.
6) Before the close of T + 2, the selling LDM shall collect the deposit receipts, etc. from the offices of the Registrar.

7) On T + 3, the selling LDM shall present the transfer receipt certificates, etc. to the buying LDM under the supervision of the presiding officer.

8) Also on T + 3, buying LDMs shall present their cheques to selling LDM on one-to-one basis under the supervision of the Presiding Officer.

9) Thus on T + 3, <u>payment shall be made against delivery i.e(Delivery versus Payment DVP).</u>

By this schedule, where the securities traded are company shares, the Registrar of the company which shares are being sold ought to receive the document required for him to effect the transfer of the shares sold into the name of the purchaser by 3.00pm on the first day, T and is expected to have completed that process of transfer by close of day T+1 and issued receipts of the transfer. That means that by then the Registrar should have entered the name of the buyer of the shares in the register of members of the

company. On day T+2 the selling broker would collect the transfer receipts from the Registrar and on day T+3 he shall present the transfer receipts to the buyer's broker and collect from him the payment. The exchange of the payment against delivery of the receipts of the transfer of the shares is what is referred to in the rules of the Exchange as DVD. This schedule provides the general outline but there are other rules of the Exchange that provide for alternative methods of achieving DVP without a physical exchange and we shall refer to them in due course. The transfer receipts serve as evidence of the transfer of the shares to the buyer and it is important to differentiate delivery of shares and transfer receipts from share certificates under Ghana law. In her judgment, the trial judge held as follows;

> **"According to the plaintiff, the fact that plaintiff's shares were duly transferred into 2nd defendant's name is evidenced by Exhibit "H". I would disagree with the plaintiff's position. The mere fact of the name of the 2nd defendant appearing in the list of Cal Bank shareholders (Exhibit "H") is not sufficient proof of transfer. In my opinion, the *"written transfer in common form"* stated in section 95(1) of Act 179 assumes that the rules of the Ghana Stock Exchange have been complied with. The unchallenged evidence of Emmanuel Mensah Appiah, Head of Market Surveillance Department of the 4th defendant at the time in question, was that their investigations revealed that the transfer in the register of shares was done when the trade had not settled."**

With due respect to the trial judge, we are unable to agree with her that entry in the register is not sufficient proof of transfer of shares of a company. Section 95(1) of the **Companies Act, 1963(Act 179)** that she referred to is not the relevant provision. It is rather sections 30, 36 and 98 that govern the issue. They are as follows;

Section 30-Membership of Companies—Constitution of Membership.

(1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code.

(2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company.

(3) Every member shall have such rights, duties and liabilities as are by this Code and the Regulations of the company conferred and imposed upon members.

(4) In the case of a company with shares each member shall be a shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company.

(5) Membership of a company with shares shall continue until a valid transfer of all the shares held by the member is registered by the company, or until all such shares are transmitted by operation of law to another person or forfeited for non-payment of calls under a provision in the Regulations, or until the member dies.

(6) Membership of a company limited by guarantee shall continue until the member dies, or validly retires or is excluded from membership in accordance with a provision to that effect in the Regulations.

36. Register to be evidence

The register of members is prima facie evidence of any of the matters which are, by this Act, directed or authorised to be inserted in the register."

98. Registration of transfers

(1) Subject to sections 99 and 100, a notice of a trust, express, implied or constructive or of any equitable, contingent, future, or partial interest in a share or debenture or a fractional part of a share or debenture shall not be entered in the register of members or debenture holders or receivable by the company.

(2) For the purposes of subsection (1), the company shall not be bound by, or be compelled in any way to recognise, any other rights in respect of a share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and **accordingly until the name of the transferee is entered in the register in respect of the share or debenture the transferor, so far as concerns company, remains the holder of the share or debenture.**

In the case of **Luguterah v Northern Engineering Co. Ltd [1979] GLR 477 at page 502** Taylor J (as he then was) said as follows;

> *"The position of persons like the eight respondents who have agreed to become members is regulated by the provisions of section 30(2) of the Code. Commenting on the corresponding section of the English enactment, i.e. section 23 of the Companies Act, 1862, Fry L.J. in Nicol's Case(1885) 29 Ch. D 421 at p. 447, C.A. said that the section" makes the placing of the name of a shareholder on the register a condition precedent to membership." I agree with this interpretation and I adopt it here."*

Therefore, as has been expressly provided for by section 98 (2) of Act 179, it is the entry of the name of a transferee of shares in the register of members that confirms that he is the new owner of the shares stated against his name from the date of that entry.

Sophia Akuffo, JSC (as she then was) in the case of **Adehyeman Gardens Ltd v Assibey [2003-2004] SCGLR1016 at p. 1026,** approved of the above holding of Taylor J and added as follows;

"the mere fact that a person claiming to be a shareholder of a company has not been issued with any share certificates, is not material to that person's legal status as a member and shareholder."

The combined effect of sections 30 (2) & (5), 36, 98(2) of Act 179 and the decisions referred to above is that ownership of shares is determined by the entries in the register of members so when shares have been transferred the title of the buyer to the shares is vested from the time the purchaser's name is entered in the register of members.

Schedule D requires delivery of securities to be made by the seller's broker but Delivery is defined by rule 69 of the rules of the Exchange as; *"means in respect of a trade in securities the conveying of the securities by the movement of transfer documents or by any other mode as may be determined by the Exchange or by law."*

"By law" as stated above in the rule refers to the general law of Ghana which, in the case of company shares, is Act 179 and the jurisprudence on it. The law as has been explained above states that if a transfer of shares is registered in the register in the name of the buyer, then the shares have been delivered to him. Therefore, in the case of sale of company shares, entry of the buyer's name in the register is one of the modes of delivery of the security approved by rule 69 of the rules of the Exchange. Consequently, upon a proper construction of the rules of the Exchange, though documentary evidence of the entry of the name of the buyer in the company's register such as a receipt of transfer may take place physically on day T+3 in accordance with paragraph 9 of Schedule D of the rules of the Exchange, that is not mandatory since the rule is satisfied by the very fact of entry of the name in the register. Therefore, the pedantic insistence by the defendants for delivery of share certificates as delivery of the securities paid for by 2nd defendant was misguided.

But the 1st defendant in its statement of case referred to Exhibit "W", written by the Exchange, to the effect that as at mid-day of the third day a lodgement letter to the registrars was yet to be sent and implied that the transfer of the shares into the name of 2nd defendant did not occur as at 30/5/08. However, the same Exhibit "W" states that *"A copy of the letter sent to NTHC Registrars on 30th May, 2008 did not meet what we asked for".* So that letter is not clear whether the lodgement letter was sent or not. 1st defendant next referred to the evidence of Mr Patrick Kingsley-Nyinah of Databank who testified as PW1 in support of its contention that the transfer in the register did not happen before the payment. The cross examination of Mr Patrick Kingsley-Nyinah referred to is as follows;

Q. You recall writing to the Stock Exchange on the 30th of May in which you indicated to the Stock Exchange that the suspension of the transaction had occasioned as you put it "an inequitable situation" because the seller had received payment but the buyer had not received the security.

A. I do recall writing that letter but that letter was based on the fact that the registrar which was in charge of the books of the company in question at the time had moved the

shares into the buyer's name but had been prevented from doing so in terms of issuing a certificate because of the intervention of Bank of Ghana."

Mr Emmanuel Mensah Appiah who testified on behalf of 4th defendant addressed this matter in his evidence and was emphatic that the investigations they carried out proved that the entry of 2nd defendant's name in the register of Cal Bank was made on 27/5/08, except that he stated that it breached the rules of the Exchange. From the privileged position of the 4th defendant who investigated the matter, the testimony of its witness is more probable than the letter of the Exchange from which we are unable to know the state of the records with the registrar who, unfortunately, was not summoned to testify. Furthermore the answer Mr Kingsley-Nyinah gave under cross examination that the shares had been moved into the name of 2nd defendant before the payment was not challenged. Therefore, notwithstanding a contrary impression put out by the line of cross examination by plaintiff's lawyer, we conclude that from the evidence on record, the entry of the shares in the name of 2nd defendant occurred before the payment was effected on 30/5/08.

Mr Emmanuel Mensah Appiah's view that entry of the name of 2nd defendant in the register of Cal Bank breached the rules of the Exchange was not backed by reference to any particular rule of the Exchange. By paragraph 4 of Schedule D, the documents from the seller's broker requesting for the transfer of the shares is expected to be received by the registrar by 3.00pm of the first day T which is 27/5/08 in this case. So if the registrar works on the documents that same first day, the transfer can be effected in the register the same day and that would not violate any rule of the Exchange. In this case, if the entry of 2nd defendant's name was made in the register of Cal Bank by the Registrar on 27/5/08, no rule of the Exchange would have been breached. The position that was taken by 4th defendant was misconceived and we would disregard it.

The comprehensive explanation of the rules of our Exchange above shows clearly that the notion bandied about by the defendants of simultaneous Delivery Versus Payment in reality does not pertain in the Ghana Stock Exchange. We still go by the manual system where the settlement of a trade is a three-day process in the course of which securities are delivered latest by close of day T+1 and payment delivered on day T+3. Our system of DVP is therefore sequential though one is dependent on the other. Simultaneous DVP in the real sense requires the use of computers, a CSD and a different legal regime that accords validity to electronic transfer of shares. The literature shows that our model of DVP is what operates in most developing securities markets. So yes, the receipt evidencing the registration of the shares in the name of the buyer may be handed over on day T+3 but ownership of the shares would have passed to the purchaser under the general Company Law provisions the moment the buyer's name is entered in the register and by rule 69 of the rules of the Exchange, the shares would have been deemed delivered.

Thus, on the issue of whether there was Delivery versus Payment in this case, we answer in the affirmative. The shares were delivered to the 2nd defendant in accordance with the rules of the Exchange and payment received within those rules so the trade was consummated and settled in accordance with the rules of the Exchange before the

purported suspension by the Exchange. The 4th defendant's Director-General purported to be applying the rules of the Ghana Stock Exchange but it appears he had in mind the rules of some other exchange which has rules that give validity to dematerialised shares and electronic transfers of shares. His conclusions were at variance with the rules of the exchange he superintends and the relevant laws of Ghana so his directives would be set aside.

We shall next consider Ground I of the appeal dealing with the issue whether plaintiff had ownership of all the shares that were sold to 2nd defendant. From the record and the submissions of the parties, it appears that particular attention was not paid to the fact that the parties to the transaction acted through an agent and that in agency law, an agent has presumed authority of the principal. 2nd defendant acquired the shares through a broker and it was the responsibility of the broker to gather sufficient number of shares of Cal Bank to meet the demand. As the representative of the Exchange testified, where the broker got the shares from to meet the requirement of the buyer was of no concern to the buyer. The broker satisfied the order and 14,130,000 shares in Cal Bank were transferred and registered in the name of 2nd defendant and by Section 36 of Act 179, prima facie ownership of all those shares are in the 2nd defendant. 4th defendant at paragraph 7 of its defence referred to three persons who instructed the broker as their agent to sell their shares totalling 14,130,000 in Cal Bank for them. So assuming plaintiff's purported acquisition of 47, 199 shares from Esther Frimpong did not vest in him as at 27/5/08, that meant ownership was in Esther Frimpong and the broker is presumed to have acted on her behalf to sell those shares. The shares have been sold and transferred without her making a case against the broker that she did not authorise it.

"Short selling" that 1st defendant referred to in its statement of case has been defined at rule 69 of the Rules of the Exchange as *"selling of borrowed securities in anticipation of repurchasing them at a lower price"*. This has no relation to the situation in this case. *Nemo dat* principle would have properly arisen if the share were not delivered to 2nd defendant. See the case of; Re **Lehman Brothers International (Europe) (No 2) [2009] EWHC 3228** (Ch). In this case, the total shares sold have been delivered to the buyer so this is really not an issue. There is the small matter of the typographic slip that occurred in the entry of the full name of 2nd defendant in the register, but that does not affect the substance of the record that it was 2nd defendant who was being referred to. Such slips cannot affect substance and can be rectified without changing anything.

We shall next consider Grounds II and III of the appeal together. The lower court upheld the submission that the intervention by the BOG frustrated the transaction and that argument has been made forcefully before us by the defendants in their statements of case. From our analysis above, it becomes clear that at the time the Exchange sought to suspend the trade, the trade had already been irrevocably settled. 2nd defendant's letter dated 11th June, 2008 purporting to resile from the transaction was too late and of no

effect. Ownership of the shares had been transferred to him and payment had been made to the plaintiff. By section 53 of Act 179, it is the duty of the company to issue share certificates to the transferee of the shares and there is no question that, but for this litigation, that would have been done. The doctrine of frustration, where it is held to apply, relieves a party to a contract from performing future obligations not those that have already been performed.

See **Barclays Bank v Sakari [1996-97] SCGLR 639.**

In law, 2nd defendant had no future obligations to discharge towards plaintiff at the time of the suspension. There is talk about the intervention of BOG in the trade but the truth is that it was the Exchange which suspended the trade in exercise of its powers under the rules of the Exchange though it was at the requested of BOG. Otherwise, the Exchange had no problem with the trade hence it demanded for its share of the broker's commission. The defences to the case put up by the Exchange were afterthoughts. If at the end of its investigations the BOG had detected breaches of any statute, the matter would have been dealt with according to the provisions of that statute, be it the Anti Money Laundering Act, 2007(Act 749) or the Banking Act, 2004(Act 673). As no statutory breaches were detected by the BOG, the liabilities and obligations of the parties to the trade executed and settled under the rules of the Exchange and by the general laws of Ghana subsisted and they were bound by them.

One other matter that unnecessarily engaged a substantial part of the time of the trial court and the parties was whether banker's drafts are to be honoured immediately upon presentation or they are to be cleared after three days. That whole trajectory was irrelevant to a resolution of the real issues arising on the facts in this case. By rule 28 of the rules of the Exchange, trades are to be settled by cash and Rule 69 defines "cash" to include *"currency, cheque, banker's draft and direct remittance".* This is another instance where payment can be made in satisfaction of the rules of the Exchange without a physical handover of cash, cheque, banker's draft or currency occurring on day T+3. Payment under the rules of the Exchange can be by direct remittance and the payment in this case was in the nature of direct remittance. Plaintiff was not paid by a cheque or banker's draft from the broker or even from the buyer of the shares. The bankers drafts in this case were drawn on the orders of the plaintiff. The money was given direct to him and after taking ownership of the money **he** directed the disbursements and the 1st defendant complied. At that point, 1st defendant bank kept that money for plaintiff as its customer and this is what the trial judge rightly found in her judgment. At page 14 of the judgment Her Ladyship stated as follows;

"As I have already stated, I am in no doubt that there was a banker/customer relationship established between the plaintiff and the 1st defendant when 1st defendant complied with the instructions by 2nd defendant to make payment to plaintiff and I will so find."

Defendants have not appealed against that finding so it is binding on them. What that means is that plaintiff's counsel is right in submitting that 1st defendant, by refusing to honour the disbursements directed by plaintiff, was in effect acting in breach of the legal

relationship of customer/banker between the plaintiff and 1st defendant. At that point, the 2nd defendant had no ownership of the funds in law. It was therefore a misconception of the legal position for 1st defendant to claim that it was acting to protect the interest of 2nd defendant who had ceased to have ownership of that money. Of course, its defence that ownership in the shares never passed to 2nd defendant, if that were correct, would have justified its actions because there would have been a failure of the consideration. Unfortunately, they were wrong on the true position of the law as we have demonstrated above.

In this final appeal, 1st defendant in its statement of case joined the other defendants in contending that the trade was not in conformity with the rules of the Exchange but, here too, we have shown that defendants either failed to read the rules of the Exchange as a whole or misread them. In our considered opinion, the defences of the defendants melt away in the face of a true and proper construction and application of the rules of the Exchange as a whole and the relevant law to the facts of the case.

In sum, upon a close examination of the Trading and Settlement Rules of the Exchange as a whole, we are of the considered opinion that the trade in the 14,130,000 shares of Cal Bank Ltd was settled in accordance with those rules before the suspension of the trade. Delivery versus Payment had been achieved. Rule 69 provides that Delivery of securities traded at the Exchange may be effected in accordance with the general law. The combined effect of sections 30(2), 36, 98(2) of Act 179 and the decisions in **Luguterah v Northern Engineering Co. Ltd [1979] GLR 477** and **Adehyeman Gardens Ltd v Assibey [2003-2004] SCGLR 1016** is that, company shares are deemed delivered to a transferee by the entry of his name in the company register of members. In this case, the evidence showed that the shares in question were moved into the name of the 2nd defendant before the suspension of the trade. Then by rules 28 and 69, payment for securities may be effected by direct remittance and the payment in this case was in the nature of direct remittance to plaintiff. The bankers drafts were issued upon the orders of plaintiff who became the customer of the 1st defendant after taking ownership of the funds from the bank. Rule 50(2) makes reference to rule 52 and under that rule a trade that is not settled by 11am of day T+3 may still be settled within three additional days so the payment effected after 11am on 30/5/2008 in this case did not offend the rules of the Exchange. As all the shares were delivered to 2nd defendant, the principle of *nemo dat quod non habet* is not applicable in this case. The trade became irrevocable and as 2nd defendant had no outstanding obligation to discharge, the reliance on the doctrine of frustration was misconceived. Consequently, plaintiff is entitled to his money from 1st defendant who kept it as his banker.

By the conclusion we have come to in this appeal, the loss in the value of the shares that were traded fell on the 2nd defendant, but that is the decision the law has led us to. **Section 27 of the Sale of Goods Act, 1962 (Act 127)** states that;

> *"Unless a contrary intention is apparent, the goods are at the seller's risk until the property in them passes to the buyer, after which the goods are at the risk of the buyer".*

Property in company shares passes to the buyer the moment the shares are registered in the buyer's name in the company's register so the shares in this case were at the risk of the 2nd defendant from the day they were moved in the register of Cal Bank into his name. If an event had occurred that caused the value of the shares to have soared after the registration, the law would have prevented the plaintiff from coming back to claim them. Such is business, it goes with risks and traders in securities know this more than any other person.

PLAINTITT'S RELIEFS

In his amended writ of summons, the plaintiff claimed the following reliefs;

a) **A declaration that the shares are the property of the 2nd Defendant.**

b) **An order that the name of the 2nd Defendant be entered unto the Register of Shareholders of CAL Bank Ltd, as the holder of the shares which is the subject matter of the suit.**

c) **An order that the 1st Defendant gives full value for the bankers drafts issued for the full payment of the shares bought by the 2nd Defendant or in the alternative.**

d) **An order for specific performance of the sale contract note against the 2nd Defendant.**

e) **An order of injunction against the 1st Defendant from interfering with Plaintiff's funds representing the full value of Bankers drafts issued by the 1st Defendant in payment for the shares upon the instructions of the 2nd Defendant.**

f) **An order that the 1st Defendant gives value for the payment order dates May 30, 2008 and deposited into the Plaintiff's account with SG-SSB Ltd.**

g) **A declaration that the 4th Defendant's ruling that the trade was not "consummated" and the shares remain the property of the Plaintiff is null and void as not supported by law or fact.**

h) **And order that the 4th Defendant directs the 5th Defendant to enforce its rules against the 3rd Defendant to assure payment by the 2nd Defendant through the 1st Defendant.**

i) **Damages**

j) Costs
k) Any other relief(s) as may seem fit to the Honorable Court.

On the basis of the reasons explained in the body of the judgment, we grant plaintiff's reliefs (a) and (b). From the record, the total amount that was due to the plaintiff and the other sellers of the shares sold to 2nd defendant was GHS15, 059,047.50 out of which plaintiff was paid a total of GHS13,762,240.00 made up of; GHS7,200,000.00 bankers draft to Zenith Bank, GHS400,000.00 banker's draft to SG-SSB Bank and GHS6,162,240.00 invested in fixed deposit. However, it will be noticed that the above stated reliefs did not specifically address the amount of GHS6,162,240.00 belonging to plaintiff that was to be invested by 1st defendant on his behalf. In his written submissions in the Court of Appeal, plaintiff prayed for an order for 1st defendant to pay that money with interest at 30%, stating that was the rate of interest agreed between him and 1st defendant at the time of making the investment on 30/5/08. and that rate subsisted up to 7th January, 2011 when 1st defendant responded to the request to admit facts. The record shows that 1st defendant admitted that rate of interest in answer to a request to admit facts and even admitted that the rate prevailed up to 7th January, 2018 when it filed the response. Though it was not specified in the reliefs, that money and the interest it would have earned belonged to the plaintiff but was unjustifiably kept from him by 1st defendant and he is entitled to an order for it to be paid to him. See the case of **Hanna Assi (No.2) v Gihoc Refrigeration & Household Products Ltd (No.2) [2007-2008] SCGLR 16.**

Accordingly, we grant plaintiff's reliefs (c), and (f) and make an order for 1st defendant to pay to plaintiff a total amount of GHS13, 762,240.00.

In respect of claims for interests on the amounts found by a court to be due and owing, Aikins JSC stated as follows at pp. 644-645 in the case of **Royal Dutch Airline (KLM) v Farmex Ltd [1989-90] 2GLR 623, SC**;

"Interest is normally awarded to the plaintiff where the defendant's breach of contract has deprived him of the opportunity to work with the money to earn profit or income. The power of the courts to award interest is derived from section 98 of the Courts Act, 1971 (Act 372) and the Courts (Award of Interest) Instrument, 1984 (LI 1295) and the rate to be awarded is the bank rate prevailing at the time the order was made by the court."

The power of the courts to award interest and the rate at which it is to be awarded are now to be found at section 80(2)(e) of the **Courts Act, 1993(Act 459)** and **Courts (Award of Interest and Post Judgment Interest)Rules, 2005(CI. 52).**

Therefore, though plaintiff did not claim for interest even on the money covered by the banker's drafts, he was entitled to interest on the amounts due to him and the court has power to grant interest even when it has not been specifically claimed in an action. See the case of **Senedza v Djokotoe [1991] 2 GLR 81** which was approved by the

Supreme Court in **Standard Chartered Bank v Nelson [1998-99] SCGLR 810 at p. 829.**

By the provisions of **Rule 1 of C.I. 52**, where parties by agreement have specified a rate of interest in respect of a sum found due by a court, that rate of interest shall be awarded but where no specified rate is stated in an instrument, writing or agreement, then the prevailing bank rate shall be awarded. In respect of post judgment interest, **Rule 2** states that unless a specified rate of interest is stated in an instrument, writing or admitted by the parties to be applicable up to the date of final payment, judgment debts are to attract interest at the prevailing rate at the time of the judgment. In this case, the admission by 1st defendant did not cover an agreement on the rate of interest payable till final payment, which would have been applicable even after the judgment.

Consequently, plaintiff is awarded interest on the sum of GHS6,160,240.00 to be calculated at the agreed rate of 30% per annum from 2nd June, 2008 up to the date of the judgment of the High Court and at the bank rate prevailing at that date till final payment. Plaintiff is also awarded interest on the sum of GHS7,600,000.00 at the prevailing bank rate of interest as at the date of the judgment of the High Court to be calculated from 2nd June, 2008 to the date of final payment. The interests are to be calculated at the rate of interest as at date of the judgment of the High Court because we are making the orders the High Court ought to have made in exercise of our authority under **Article 129(4) of the Constitution, 1992**.

Relief (e) for an order of injunction would not serve any purpose for plaintiff and would be refused. Relief (g) is granted but relief (h) is struck out as redundant since Databank who were 3rd defendant were struck off as a party. Relief (i) is a claim for damages but plaintiff did not adduce any evidence in that regard. In his written submissions in the Court of Appeal he sought to rely on matters contained in an affidavit the was filed in reaction to a motion for leave to amend and prayed to be paid special damages of GHS4,500,000.00. Special damages by the practice of the courts are required to be specifically pleaded and strictly proved. That affidavit was not tendered as evidence and subjected to cross examination so plaintiff is not entitled to special damages. Nevertheless, he is entitled to nominal damages against the 1st defendant for breach of the contract of banker/customer as explained in the main body of the judgment. Nominal damages are such as the law would presume was suffered by the plaintiff and are said to be at large, meaning the quantum to be awarded is at the discretion of the court. See **Tema Oil Refinery v African Automobile [2011] 2 SCGLR 907.** On the facts of this case, we award damages in the sum of GHS100, 000.00 in favour of plaintiff against 1st defendant.

In conclusion, the appeal succeeds and is allowed.

BY COURT.

The appeal succeeds and is accordingly allowed. The judgments of the High Court dated 16th September, 2011 and the Court of Appeal dated 6th June, 2013 are hereby set aside. In their place, we grant plaintiff's reliefs (a) and (b). We make accession to plaintiff's reliefs (c), and (f) and order 1st defendant to pay to plaintiff a total amount of GHS13, 762,240.00. Plaintiff is awarded interest on the sum of GHS6,160,240.00 to be calculated at the agreed rate of 30% per annum from 2nd June, 2008 up to the date of the judgment of the High Court and at the bank rate prevailing at that date till final payment. Plaintiff is also awarded interest on the sum of GHS7,600,000.00 at the prevailing bank rate of interest as at the date of the judgment of the High Court to be calculated from 2nd June, 2008 to the date of final payment. Nominal Damages of GHS100,000.00 is awarded to plaintiff against 1st defendant. Relief (e) is refused but (g) is also granted. Relief (h) is struck out.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

J. V. M. DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

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

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

THADDEUS SORY FOR THE PLAINTIFF/APPELLANT/APPELLANT.

ISAAC OFOSU-BOATENG FOR THE 1ST RESPONDENT/RESPONDENT/RESPONDENT.

NII OMAM BADU WITH HIM ALIDU MOHHAMMED AND PAUL MBA FOR THE 3RD RESPONDENT/RESPONDENT/RESPONDENT.

YAW ESHUN FOR THE 4TH RESPONDENT/RESPONDENT/RESPONDENT.