IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ADINYIRA, JSC (PRESIDING)

YEBOAH, JSC

GBADEGBE, JSC

AKOTO-BAMFO, JSC

BENIN, JSC

CIVIL APPEAL

NO. J4/49/2016

6TH DECEMBER, 2017

ECOBANK NIGERIA PLC ..... PLAINTIFFS/RESPONDENTS/ APPELLANTS

VRS

1. HISS HANDS HOUSING AGENCY

2. ACCESS BANK (GHANA) LIMITED ..... DEFENDANTS/APPELLANTS/ RESPONDENTS

J U D G M E N T

GBADEGBE JSC:-

The plaintiff bank took out the writ of summons herein claiming against the defendants certain reliefs touching and concerning its entitlement to a specified sum of money transferred from its bank account held with BCC, a bank in the Republic of Chad into the

account of the 1st defendant with the 2nd defendant's branch in Takoradi. The plaintiff's claim did not find favor with the trial High Court and an appeal therefrom to the Court of Appeal was dismissed. As a result of the said dismissal, we have before us in these proceedings an onslaught directed at the judgment of the Court of Appeal. For reasons of convenience, the parties to the proceedings herein shall bear the designation which they bore in the trial court. Accordingly, the parties shall be described as the plaintiff, the 1st defendant and the 2nd defendant.

The relevant facts on which the action herein is based may be stated shortly as follows. The plaintiff, a bank incorporated in Nigeria desirous of expanding its business operations in Chad opened an account with BCC, a bank in the Republic of Chad in the sum of USD 6,000,000.00. According to the unchallenged evidence, this was the equivalent of 36 million CFA, which is the minimum capital requirement under the Laws of the Republic of Chad in regard to banks. The evidence provides further that sometime after the lodgment of the money in the said account, its attention was drawn to certain developments relating to the account wherefore it called for transactions on the account for its study. An examination of the transactions on the account disclosed to its surprise that an amount of USD 2,368,725.00 had been transferred therefrom into the account of the 1st defendant held with the 2nd defendant's Takoradi branch. As the transaction was unauthorized and indeed, unknown to them, they took out the instant action. By the amended writ of summons, the following reliefs were sought from the High Court.

> (1) A declaration that the plaintiffs have not authorised the transfer of the sum of USD 2, 368,725.00 or at all into the accounts of the 1st Defendant with the 2nd Defendant Intercontinental Bank, Ghana Limited or at all
>
> (2) A declaration that the transfer of USD 2,368,725.00 into the 1st Defendant's accounts with Intercontinental Bank, Ghana Limited was obtained by fraud.
>
> (3) An order restraining the 2nd Defendant from honoring any cheques, bills or other instructions for the purpose of withdrawing or otherwise dealing with any

and all sums currently held in the accounts of the 1st Defendant with the 2nd Defendant.

(4) An order restraining the 1st Defendant from making any withdrawals or otherwise dealing with its accounts with the 2nd Defendant Intercontinental Bank, Ghana Limited.
(5) An order directed at the 2nd Defendant to pay any and all sums currently held in the accounts of the 1st Defendant with it to the Plaintiff forthwith.
(6) An order directed at the 1st defendant to pay the plaintiff the total of USD 2, 368, 725.00 transferred into the account of the plaintiff forthwith.

The statement of claim by which the plaintiff placed before the court the relevant material facts averred to the fact of it having deposited the sum of USD6,000, 000.00 into an account held by it with BCC, in the Republic of Chad and its subsequent unauthorized movement into the accounts of the 1st defendant, which the latter was holding with the 2nd defendant's Takoradi branch. The statement of defence filed by the 1st defendant in response to the statement of claim was substantially to the effect that the transfer, which form the basis of the claim herein was transferred to it by a business partner who had earlier on been introduced to him by a friend. At the close of pleadings, several issues were set down for trial of the action; these issues appear at pages 146 -147 of the record of appeal. In our view, the core issues for determination are those numbered as (a-d) and (f) as follows:

(a) Whether or not amount of USD 2, 368,725.00 transferred into the account of the 1st defendant with the 2nd defendant bank originated from the plaintiff's account with Chari Commercial Bank in N'Djamena Chad?
(b) Whether or not the amount of USD2, 368, 725.00 was transferred with the consent and authorization of the plaintiff from its account with Clari Commercial Bank in N' Djamena Chad?
(c) Whether or not the transfer of the sum of USD 2, 368, 725.00 into the account of the 1st defendant was procured by fraud?

(d) Whether or not the 1st defendant had any reasonable expectation to receive the said sum from the plaintiff's account into its account?

(f) Whether or not the defendant received the sum of USD 2, 368,725.00 from its business partners in Chad or from the accounts of the Plaintiff in Chad.

We are of the view having regard to the effect of the pleadings that a determination of the issues set out in the preceding paragraph would substantially dispose of the dispute with which we are concerned in these proceedings. As these are issues on which agreement was reached by the parties, it is important to state that the parties had impliedly reached an agreement on the existence of crucial facts on which they were based namely:

(A) That the plaintiff had an account with the Clari Commercial Bank in Chad;
(B) That the funds lodged into the accounts of the 1st defendant held with the 2nd defendant's Takoradi branch was transferred from an account that belonged to a person other than the 1st defendant.

Having regard to the above, the main issue for determination at the trial related to the question from whose account was the lodgment into the accounts of the 1st plaintiff made? Closely linked thereto, is the subsidiary question that may be posed thus: Was the money moved from the account of the plaintiff fraudulently into that of the 1st defendant or from the plaintiff's business partner called Youssif Djibirine? As the parties described the Chadian Bank commonly as BCC, it is proposed hereafter in this delivery to adopt the said description for reasons of convenience. Now, what is the effect of the admitted evidence which was placed before the learned trial judge as contained in the record of appeal on which this re-hearing is based.

Pausing here, we turn our attention to the grounds of appeal filed in the matter herein as follows:

(a) That the judgment of the Court of Appeal is against the weight of the evidence

(b) That the costs awarded to the defendant/ Respondents are excessive

(c) The Court of Appeal erred and occasioned a substantial miscarriage of justice when it held that it is unable to order restitution because the case was not fought on grounds of mistake and or that the case of the plaintiff was not based on the principle of restitution.

(d) The Court of Appeal failed to consider all the reliefs claimed and issues set down for determination by the Court thereby occasioning a substantial miscarriage of justice.

(e) The Court erred when it upheld the holding of the trial court that the "General Traverse Clause" in the Amended Statement of Defence of the 1st Defendant was an adequate denial of the allegation that the 1st Defendant was set up to defraud the Plaintiff and further that the admission of fraud was inadvertently made when the allegation was expressly admitted by the 1st Defendant

(f) The Court erred when it held that the Fraud and or forgery had not been pleaded and or particularized when the Statement of Claim clearly particularized same.

In our opinion, the issues which arise for determination turning on the said grounds are:

(a) Whether the leaned justices of the Court of Appeal were right in rejecting the plaintiff's case rooted in fraud for failure to comply with the Rules of Court?

(b) Whether or not the evidence supported the conclusion reached by the court of Appeal?

(c) Whether or not a case was made out by the plaintiff for an order of refund to be made in its favor against the 1st defendant for the amount of USD 2, 368, 725.00?

We start from the position taken by the Court of Appeal in regard to the allegation of fraud asserted by the plaintiff concerning the movement and or transfer of its fund into the account of the 1st defendant held with a branch of the 2nd defendant in Takoradi. In the judgment of the court, Gyaesayor JA at page 655 of the record of appeal observed thus:

"Fraud is a serious matter and when pleaded in a civil matter converts into a criminal matter which must strictly be proved. Indeed, CI 47, the High Court (Civil Procedure) Rules of 2004, Order 11 rule 8 demands that fraud must be specifically pleaded. Rule 8 deals with matters to be specifically pleaded."

We observe unhesitatingly that as the objection relates to requirements of good pleadings, and not a pleading filed subsequent to a statement of claim, the applicable rule is contained in Order 11 rule 12(1)(a) as follows:

"Subject to sub-rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, but without prejudice to the generality of the foregoing words;

"Particulars of any misrepresentation, fraud, breach of trust willful default or undue influence on which the party pleading relies"

Although the rule is expressed in mandatory language, our courts have held that where a party fails to comply with the requirements of Order 12 rule 1 (a) but his adversary (ies) fails to object to the evidence led in support of the allegation of fraud, a court of law cannot shut its eyes to the evidence so led but must take it into account in deciding the dispute before it. Reference is made in this regard to the decision of the Supreme Court in **Amuzu** v **Oklika [**1998-99} SCGLR 141. In the course of his judgment in the Oklika case (supra), Atuguba JSC at page 183 said:

"**In this case, fraud has not been pleaded as the practice requires. But in view, especially of the provisions of sections 5, 6 and 11 of the Evidence Decree, 1975, NRCD 323, regarding the reception of evidence not objected to, it can be said that where there is clear but unpleaded evidence of fraud, like any other evidence not objected to, the court cannot ignore the same, the myth**

surrounding the pleading of fraud notwithstanding: see generally Asamoah v Setordzie [1987-88] 1 GLR 67, SC and Atta v Adu [1987-88] 1 GLR 233, SC. In the context of equity, it can even be said that fraud relates to any colorable transaction and not necessarily fraud in the strict legal sense."

The above pronouncement of the Supreme Court in the Oklika case (supra) was unfortunately not considered by the court of Appeal in its judgment although as a matter of law by virtue of the doctrine of judicial precedent the court was bound to follow it. We are of the view that if the attention of the learned justices of the Court of Appeal had been drawn to the said decision, they would in all probability have come to the view expoused in the Oklika case (supra), the effect of which is that notwithstanding the failure to particularize the fraud, they were bound to have taken into account the evidence tendered before them by the plaintiff in support of its case that the transfer of the amount into the account of the 1st defendant was done fraudulently. Accordingly, we are of the opinion that the learned justices of the Court of Appeal erred when they rejected the case pressed on them by the plaintiff turning on the allegation of fraud.

Before proceeding further, we wish to say that from the circumstances of the action herein, it appears that fraud at common law aside, the plaintiff's case was to the effect that the transfer of the disputed amount into the accounts of the 1st defendant was done improperly, dishonorably and in a manner that was contrary to conscience and in this regard was derived from equity to show that it was done for the purpose of depriving the real owner of the benefit thereto. Had the learned justices of the Court of Appeal considered the case of the plaintiff in this light, we have no doubt that they would have given due attention to it before reaching a conclusion on the facts but as it is, they pursued a course which unfortunately prevented them from giving any consideration at all to the evidence which tended to raise serious questions on the case of the 1st defendant. Fraud in this context is broader than fraud at common law and need not involve any moral turpitude as was found by the English Court of Appeal in **Beaman v**

A. R. T. S. Ltd [1949]1 All ER 465. In another English case of **Kitchen** v **Royal Air Force Association and Others** 1958] 2 All ER 241, the Court of Appeal took the position that fraud was proved if the evidence sufficiently proved that what was done was unconscionable.

Looking at the conduct of the 1st defendant subsequent to being informed by the 2nd defendant of the disputed transfer, his conduct in not finding out from Youssif Djibril, his alleged business partner and yet proceeding to start expending the amount is in reality dishonorable and unconscionable. According to the 1st defendant, he was asked if he was expecting any amount from Chad by the bank officials at the time of the receipt of the funds into his account to which he answered "yes" but can this be true from the circumstances of the case particularly when he did not in all honesty tell the officials that the money came from a source other than that which he was expecting. The failure of the 1st defendant to inform the 2nd defendant that the funds did not come from the source he was expecting, though of a minimal character has the effect of concealment of information from the bank and breached the fiduciary relationship between him and the 2nd defendant such that the failure to speak may amount to concealed fraud. See: **King** v **Victor Parsons and Co (a firm)** [1973] 1 All ER 206. Again, in the English case of **Archer** v **Moss** [1971] 1 All ER 747 where the Court of Appeal had to consider the meaning of 'fraud' as used in the Limitation Act involving a builder who had covered up inadequate work so it was not discovered for some years, Denning MR approving the earlier decisions referred to of Beaman v ARTS Limited (supra) and Kitchen v Royal Air Force Association (supra) observed at page 750 as follows:

> **"It has long been settled that "fraud" in this context does not necessarily involve any moral turpitude... It is sufficient if what was done was unconscionable."**

Having, overruled the learned justices of the Court of Appeal on the case of fraud, we are bound to take the evidence led by the plaintiff in support of its case into account

before deciding the question whether the judgment of the Court of Appeal is against the weight of the evidence. The question which then emerges for our determination is having regard to all the evidence including that which was routinely rejected by the learned justices of the Court of Appeal, the decision of the court below is one supported by the evidence? Alternatively, that question can be framed in the negative whether the said decision can be said to be unreasonable and or perverse?

Turning to the evidence led by the parties, we are of the view that as the 1st defendant was unable to prove that the lodgment into its accounts came from his alleged business partner, Youssif Djibril, the totality of the evidence led by the plaintiff in support that the transfer was from its account with BCC in Chad looks more probably to be true than its non-existence in terms of section 11(4) of the Evidence Act, NRCD 323 of 1975 which provides that:

> **"In all other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence the fact was more probable than its non-existence."**

The evidence of the documents bearing out the swift transfer into the accounts of the 1st defendant shows overwhelmingly that it was paid out of its account held with BCC. The signatures that allegedly instructed the transfer from the headquarters of the plaintiff bank to BCC were said by the plaintiff not to belong to those who signed exhibit "F", the document by which the instruction to effect the transfer in the name of the plaintiff bank was made. The evidence further established that the said instruction was not authorised by the plaintiff. Then there is the evidence of the 2nd defendant's representative that the transfer was made from the plaintiff's account. This important piece of evidence was neither contradicted by the 1st defendant nor any challenge made to the evidence coming as it were under cross-examination. The following pieces of evidence elicited from the said witness under evidence in chief at page 252 -253 and the cross-examination or the

lack of a challenge to the testimony regarding the ownership of the funds from which the transfer was made is particularly revealing. When led in evidence in chief, this is what the representative of the 2nd defendant testified to:

> **"Q. your records show that a sum of $ 2.3m was received into your customer, Hiss Hands Agency Account is that correct?**
>
> **A. Yes, My Lord.**
>
> **Q. And your records also show that the money was received from Chad, is that correct?**
>
> **A. Yes, My Lord.**
>
> **Q. And your records also show that that money from Chad comes from the account of the plaintiff?**
>
> **A. Yes, My Lord.**
>
> **Under cross-examination by counsel for the 1st defendant, this is what the representative said at pages 252-253 of the record of appeal.**
>
> **Q. Now, you were asked whether or not you know the plaintiff. Is that correct?**
>
> **A. Yes, My Lord.**
>
> **Q. And your answer was that the plaintiff had some dealings with the Bank. Is that correct?**
>
> **A. yes, My Lord.**
>
> **Q. Can you kindly tell the court what type of dealings the plaintiff had with the Bank?**
>
> **A. My lord, the subject matter was Foreign Exchange Transactions.**

Q. Mr. Kwaadade, I am putting it to you that the plaintiff which is Oceanic Bank never had any dealing with the Bank?

A. That is not correct.

Q. Now that the funds were transferred from Chad to the account of the 1st defendant with Intercontinental Bank, now Access Bank, Ghana Limited, did you have any reason to suggest that the money was fraudulently transferred?

A. No, My Lord."

My Lords, the above exchange in the course of the trial demonstrates how poorly the 1st defendant performed in its attempt to put across its case. From the evidence referred to, the important statement from the representative of the 2nd defendant regarding who owned the funds from which the transfer was made into the account of the 1st defendant was left unchallenged as, after the last quoted piece of evidence at page 253, counsel for the 1st defendant made the following statement:

"My Lord that is all we have for the witness."

In reaching this view of the facts, we are not disregarding the last answer of the representative under cross-examination by counsel for the 2nd defendant as its import is that the funds coming from Chad by itself is no evidence of fraud. The fraud relates to its lodgment into the accounts of the 1st defendant. But as said earlier, the cross-examination not having touched the critical evidence of the ownership of the funds from which the transfer was made coming from the mouth of a representative of the bank whose officers called the 1st defendant to advise him of the transfer into his account renders any attempt to diminish the evidential effect of the plaintiff's case on the ground that it did not call any official from BCC is without substance. In fact, an official from the plaintiff's bank testified at page 203 of the record of appeal that the signatures on the cheques by which the transfer was said to have been authorised by the plaintiff were

forged but strangely the 1st defendant whose counsel conducted a very lengthy cross-examination of the said witness did nothing to challenge the said testimony; the effect of which is that plaintiff's evidence regarding the forgery has been admitted by the 1st defendant. We think that as the mandate on the plaintiff's account with BCC belongs to the plaintiff bank, its evidence regarding the genuineness or otherwise of the signatures which initiated the transfer from the plaintiff's account is decisive of the matter. Proceeding further, the observation is made that as the 1st defendant's case is not to the effect that the transfers were authorised in its favor for some consideration, it is difficult to appreciate the import of the comment by the leaned justices of the Court of Appeal regarding plaintiff's failure to call any official from the Chadian bank, BCC. What evidence, if we may ask, was to be testified to by the said officials? All the evidence relating to the instruction which they received from the plaintiff back and their action thereon by way of effecting the transfer into the account of the 1st defendant was placed before the court through documents which speak for themselves in terms of the originator of the transfer, and the named beneficiary. In our opinion, based on the admitted evidence in the record of appeal, the comments made by the learned justices of the Court of Appeal in regard to matters which persuaded them to reject the plaintiff's evidence of the fraudulent transfer lose sight of the fact that following the mass of evidence introduced by the plaintiff regarding the opening of its account with BCC, the deposit of the sum of USD 6, 000, 000.00 into it and the unauthorized instruction which resulted in the 1st defendant receiving the huge sum of USD2, 368, 725.00, the 1st defendant was obliged by the rules of evidence to introduce evidence disproving the effect of such evidence but this it failed to do. The failure of the 1st defendant to introduce evidence referred to as the burden of persuasion had only one effect- that the trier of fact must accept the plaintiff's version as more likely to be true. See: sections 10-12 of the Evidence Act, NRCD 323 of 1975.

Judicial notice is taken of the fact that swift transfers effected today by banks are notified to the drawer by a copy of the document bearing out the transaction which is a print-out from a machine and as soon as this takes place, a corresponding entry of the amount transferred is communicated to the beneficiary. The document bearing out the swift

transfer contains all the information that any reasonable person would require regarding the transferor, the transferee and the bank which initiated the transfer. Parties are not required to mount the witness box to testify in respect of matters which are not in contention and it is baffling that facts which are not in dispute having been made available to the court by means of documents which in the circumstances of this case constitute the best evidence should quite frankly be the subject of adverse comment by the leaned justices of the Court of Appeal. In our view, the totality of the evidence contained in the documents tendered by the plaintiff in support of its case and the oral evidence placed before the court are sufficient to enable this court and indeed, the learned justices of the Court of Appeal to draw their own inference that the disputed transfer was fraudulent. The adverse comment by the learned justices of the Court of Appeal should therefore not be a matter of much concern to us in the light of all the evidence tendered in the action herein. See: Sasu Bamfo v Sintim [2012] 1 SCGR 136, holding 4 at 138.

Quite to the contrary, we are firmly of the opinion that the failure of the 1st defendant in the face of cogent evidence from the plaintiff regarding the ownership of the transfer to call his alleged benefactor, Youssif Djibril may be explained on the ground that no such transfer was made to him and that the allegation touching same is untrue. The probability that turns on the question arising from the failure to call the said person is that even when he turned up, the evidence would not be favorable to the case of the 1st defendant. We are compelled to conclude in the circumstances that the allegation that the funds were from the said Youssif Djibril's account is not only contrary to the effect of the documentary evidence tendered at the trial but one that was concocted by the 1st defendant when he was faced with the reality of the fraudulent transfer made into its account by the plaintiff. We think that this is the legitimate inference from the admitted evidence contained in the record of appeal and that the decision of the learned justices of the Court of Appeal to the contrary is unreasonable. In the circumstances, the ground of appeal numbered as (a) succeeds.

As we have from the available evidence reached the conclusion that the transfer of the disputed amount was made from the account of the plaintiff held with BCC in Chad, is it lawful for the 1st defendant to continue to keep the said amount which the plaintiff by reliefs 5 and 6 endorsed on the writ of summons herein demands to be refunded to it? Before then. However, we wish to discuss some issues of procedural importance that arise from the record of appeal before us.

In our view, although the parties in their written briefs submitted to us in the matter herein spent much time in discussing ground "f" relating to the alleged admission by the 1st defendant of paragraph 2 of the statement of claim by which it was averred that the 1st defendant entity was set up to defraud the plaintiff, we would like to say that fraud is a legal concept whether existing at law or equity and in either case is made up of distinct acts which when considered together in the light of the circumstances of a case might lead a trier of fact to such a conclusion. Fraud therefore is dependent upon facts which must first be established in an action before such a conclusion is reached. Indeed, writing on the subject of "pleadings facts not law or argument', the learned authors in Atkin's Court Forms, 2nd Edition 1985 issue at page 16 state thus:

> **"The court's duty at the trial is to determine the legal effects of the facts it finds proved, so all that the parties are concerned with in the pleadings is to state the facts on which they rely to establish their claim or defence. They are not required to state the legal effects of the facts. The question for the court is whether the allegations of facts in the statement of claim, as proved, show that the plaintiff had established his case in law."**

Thus the requirements of the rules on pleadings that particulars of certain matters including 'fraud' be given is to enable the party who relies on such an allegation to provide the adversary with the fact or combination of facts which form the constituent element of the technical legal term for example in this case fraud. The mere fact that a party uses a particular term of art is determined from the evidence and in one particular case,

although by the claim negligence was used, the evidence established trespass. See: **Konskier v B Goodman** Ltd [1928] 1 KB 421. Accordingly, since it is a conclusion to be reached on established facts, one cannot rightly be held to have admitted a pleading of fraud. We are of the opinion that fraud like negligence has to be proved clearly from the evidence and we are unable to accede to the contention that a party can make admissions of questions of law whose determination though turning of facts is a matter for the court. We think that considerable though the submissions on the said ground are, it is sufficient to dispose of them in these few words. The said ground of appeal accordingly fails. Additionally, since the relief predicated on the allegation of fraud as expressed in relief (2) seeks a declaration, it is a matter which from the settled practice has to be decided upon the evidence led at the trial. See**: Bank of Ghana No** 3 v **Sefa (No 3**) **and Others** [2015-2016] 1 SCGLR 741.

There is also a matter which touches and concerns the request from the plaintiff to the 1st defendant by notice to admit facts under order 23 sub- rules 2 and 3 of the High Court (Civil Procedure) Rules, 2004, CI 47. Although the 1st defendant did not respond to the request within the mandatory 14 days provided by the court and must therefore be deemed by sub-rule 3 (2) to have made an admission of the truth of the fact contained in exhibit "A" (the notice to admit), the application for judgment filed by the plaintiff does not appear from the record of appeal to have been dealt with. We are of the view that as the application was justified by the relevant rules of the high Court, the learned trial judge should have at least adverted his mind to it before the matter proceeded to trial in order that the requirements of the rules would not be rendered nugatory. Judgments on admissions under Order 23 are part of case management techniques and it is no wonder that the provision relating to it come before the application for directions. The sequential order in which the rules on admissions appear in the High Court Rules, CI 47 is not fortuitous but intended to eliminate cases which need not go to trial if either admissions have been made of facts which render unnecessary a trial or by the failure of a party to respond to a notice to admit, he is faced with the sanction of such a default being deemed to constitute an admission of the particular fact or facts which he was requested to admit.

This leaves us with the plaintiff's claim contained in reliefs 5 and 6 by which the plaintiff demanded of the 1st defendant to pay into its account the disputed amount in the sum of USD 2, 368, 725.00. The Court of Appeal in its judgment which was beclouded by its rejection of the clear case of fraud set up by the plaintiff following its strict adherence to merely technical rules which from the circumstances of this case was a blot on the administration of justice refused to accede to these reliefs. Since the learned justices of the Court of Appeal waved away the plaintiff's claim on the ground of not particularizing the fraud on which it relied, it is difficult to understand the basis of their consideration of the plaintiff's right to the said reliefs. In his judgment at page 667 of the record of appeal, Gyaesayor JA made the following speech:

> **"Since this case was not fought on the grounds that the payment was a result of a mistake we are unable to make an order for restitution."**

We are in great difficulty to comprehend the basis for the statement to which reference has just been made. It seems to us that having dismissed the plaintiff's claim, there was no reason for the court to have made reference to the plaintiff's claim for restitution at all. But be that as it may, having held that the funds which belong to the plaintiff was fraudulently transferred into the account of the 1st defendant, we think that there is imposed upon the said defendant by operation of law an obligation to turn over the amount in dispute to the lawful owner. The obligation which arises from the conclusion reached by us on the ownership of the funds is clear from principle and in accord with justice and common sense for the purpose of preventing a person such as the 1st defendant from unjustly enriching himself at the expense of an owner. The claim made by the plaintiff in relies 5 and 6 for a refund of the money to it and we find no justifiable reason for which such a relief can be denied. The claim by the plaintiff to the money was dependent upon the fact that its funds were unlawfully and fraudulently transferred into the account of the 1st defendant held with the 2nd defendant. Although by the formulation of the said reliefs, the plaintiff did not use the technical legal term' 'restitution', we think

that a careful scrutiny of the said reliefs which is reproduced hereunder reveal that they related to a claim for money had and received without consideration and as such they raise for our determination the question whether in the circumstances, an order of restitution can be made by the court? The said two reliefs were formulated in the following words:

> **"5. An order directed at the 2nd defendant to pay any and all sums currently held in the accounts of the 1st defendant with Intercontinental Bank, Ghana Limited to the plaintiff forthwith.**
>
> **6. An order directed at the 1st defendant to pay the plaintiff the total of USD 2,368,725.00 transferred into the account of the plaintiff forthwith."**

In our view as the said reliefs are in their nature claims for restitution of the money had and received in regard to the disputed transfer from the account of the plaintiff into the account of the 1st defendant. In the case of **Lipkin Gorman v Karpnale Limited**, [1991] 2 AC 548, [1992] 4 All ER331., the House Lords had to consider a similar situation when a solicitor in a firm of solicitors and a signatory to the firm's bank account withdrew some money from the account which he utilized in gambling in a casino owned by the 1st defendant. When the firm discovered the withdrawal they took action against the owners of the casino for the return and or recovery of the stolen money. The action failed in both the High Court and the Court of Appeal which denied the plaintiff's claim to a return of the money but the plaintiff succeeded in the House of Lords. In its judgment, the House of Lords in a landmark judgment said to allow the owners of the casino to keep the money would have the effect of unjustly enriching the defendant and therefore made an order for the return of the money retained by the casino as part of their winnings from the solicitor. In his judgment, Temple LJ man said the money could be recovered by the solicitors:

> **"The solicitors can recover the sum of….. if they can show that in the circumstances the club was unjustly enriched at the expense**

of the solicitors…The club received stolen money by way of gift from the thief; the club, being a volunteer, has been unjustly enriched at the expense of the solicitors from whom the money had been stolen and the club must reimburse the solicitors."

English courts are not alone in allowing claims for restitution in circumstances such as have been proven before us. Canadian courts also recognize the right to restitution in situations where to deny a claimant of relief would result in unjustly enriching the defendant, See: **Gordon Garland v Eubridge Gas Distribution Inc**. [2004] 1 SCR 629, [2004] SCC 25.

In the case before us, although we have not made a finding of theft of the money that belongs to the plaintiff but in the 1st defendant's account by virtue of a fraud, it is right and proper that we accede to the order of restitution contained in reliefs 5 and 6 of the writ of summons herein for the following reasons. The 1st defendant has received an enrichment which came from the plaintiff and there is from the evidence no reason in law for the 1st defendant to keep that enrichment. The effect is that the 1st defendant has been unjustly enriched from funds that came from the plaintiff. The conduct of the 1st defendant in keeping the money in the face of the evidence that it came to him fraudulently from the plaintiff's account is to say the least unconscionable. Fraud and theft, in our view stand on the same footing being in their nature dishonorable acts that are perpetrated against the property of others and so we see no reason in principle that can justify a refusal of the restitutionary orders sought from the court. To withhold from the true owner the orders of restitution which are sought in the action herein, would in the circumstances of this case amount to fraud, a conduct which we desire not to condone else we would be undermining public confidence in the administration of justice. The 1st defendant from the undisputed evidence before us in these proceedings became indebted to the plaintiff to the extent of the amount transferred into his accounts held with the 2nd defendant bank. Quality justice, we note is effective justice, which from the circumstances that have unfolded before us dictates a refund to the plaintiff of the disputed amounts in

terms of reliefs 5 and 6 of its claim. Accordingly, we accede to the said reliefs. Having regard to the relief 5 which we have granted, the order of refund under relief 6 should be less the amount of money paid by the 2nd defendant to the plaintiff by virtue of relief 5.

The result is that the appeal is allowed and the judgment of the Court of Appeal dated 10th December 2015 is hereby set aside and in place thereof is substituted a judgment in favor of the plaintiff on all reliefs endorsed on the writ of summons herein.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

COUNSEL
KWABENA ADU-KUSI FOR THE PLAINTIFF/APPELLANT/APPELLANT
CHARLES POUZUING FOR THE IST DEFENDANT/RESPONDENT/RESPONDEN