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. J4/42/2017

13TH DECEMBER, 2017

HARRISON EDWARD NARTEY MARTIN …… PLAINTIFF/RESPONDENT/RESPONDENT

VRS

BARCLAYS BANK (GH) LIMITED …… DEFENDANT/APPELLANT/APPELLANT

J U D G M E N T

BENIN, JSC:-

The plaintiff/respondent/respondent, herein the plaintiff, opened an account with the defendant/appellant/appellant, herein the defendant and therefore became its customer. The main sources of feeding the account were occasional inward transfers in foreign currencies that the plaintiff made into the account from Germany, where he was resident. The problem that brought the parties to court arose from irreconcilable differences between them in respect of bank reconciliation in respect of the account. The defendant had closed down the account on the ground that virtually the whole amount therein had been withdrawn by the plaintiff, leaving very little to keep the

account running. The plaintiff seriously challenged this saying that apart from one withdrawal of 1000 Deutsche marks he made, he did not make any other withdrawal. The parties adopted an entrenched position on this, thereby compelling the plaintiff to resort to a court action at the High Court, where he claimed these reliefs:

(a) The sum of thirteen thousand Deutsche marks.

(b) The sum of nine hundred United States dollars.

(c) Accruing interest on the amounts from 1994 until date of judgment.

(d) Damages for emotional distress.

The plaintiff succeeded at both the trial High Court and the Court of Appeal. This is a second appeal by the defendant. The case was essentially based on matters of fact, whether or not the plaintiff did make the transfers into the account, and whether or not the plaintiff did withdraw the monies lodged in the account as claimed by the defendant. As was rightly observed by the trial High Court judge in her judgment of 21st March 2012, this was a matter which the bank's records should ordinarily have resolved, given the track records of banks in keeping financial records. But this is one case where the two courts below were unanimous in finding that the customer, the plaintiff herein, had rather kept proper records of his transactions with the bank, defendant herein. The trial court upheld the plaintiff's claim after a hearing. It concluded thus: "The defendant is ordered to reverse all the unsupported entries on plaintiff's accounts, credit the plaintiff's account with the sums of 10,000 DM on 28th March 1990, the Deutsche Mark equivalent of 900$ on 19th March 1991, 2000DM on 2nd September 1992, 1000DM on 11th February 1994, and 1000DM on 11th April 1994 along with accruing interest. Defendant is to debit this reconstructed account with 1000DM at the end of 1994." The court allowed the defendant to deduct ledger fees as the submission thereon was unchallenged.

On the claim for damages for emotional distress, the trial judge granted it in these words: "Plaintiff has proved entitlement to damages for emotional distress. According to his testimony, in order to resolve this matter, he came to Ghana, engaged lawyers, and communicated with Barclays International. He has also lost the use of his savings since he rudely found out the loss of his accounts in 2006- six years ago. As damages, different from whatever balance would accrue to his account following the ordered reconstruction, plaintiff is awarded the euro equivalent of 13,000 DM and 900 US dollars as money whose use the plaintiff should have reasonably anticipated will be lost

to the plaintiff when it failed to properly account to the plaintiff after he started to make complaints about the loss of his savings."

In its judgment delivered on 24th July 2014, the Court of Appeal dismissed the defendant's appeal. The court below agreed with the trial court on its findings of fact on material issues concerning the account. On the monies claimed by the plaintiff, the court upheld the trial court's decision and stated that he was entitled to recover 13,000DM and $900 respectively, with interest. On the status of the Deutsche Mark which had then ceased to be legal tender, the court took note of the conversion rate of the Deutsche Mark to the Euro, and ordered the exchange rate to be applied in carrying out the trial court's orders.

On the claim for damages for emotional distress, the Court below said it could not find from the plaintiff's statement of claim any averments on which the claim was founded. And also, it did not find any evidence on the record that could establish the claim. The court therefore rejected the award of damages for emotional distress. However, the court below awarded general damages of GH₵10,000. 00. The defendant has appealed against the judgment of the Court of Appeal to this court on these grounds:

a. That, the judgment is against the weight of the evidence adduced.

b. That, the justices of the Court of Appeal erred in law when they held that there is a high probability of the transfers as disclosed on exhibits C, D and E having been received by the defendant very much against the evidence led at the trial.

c. That, the Court of Appeal erred in law when it found for a fact that the trial court's decision that the plaintiff has proved and is entitled to damages for emotional distress was not borne by the evidence on record and yet proceeded to award GH₵10,000.00 as general damages to plaintiff when plaintiff never pleaded nor proved same.

d. That, the Court of Appeal misdirected itself in law when it found that even though it acknowledged that at the date of the judgment of the trial court, the Deutsche Mark had ceased to be legal tender, the court nevertheless held that any adverse consequences affecting the account in issue following the demise of the Deutsche Mark, should not be visited on the plaintiff.

e. That, the Court of Appeal further misdirected itself in law when it made the award of GH₵10,000.00 as general damages to the respondent, in clear breach of Rule 8(8) of CI 19 of 1997, as amended.

f. That, the Court of Appeal erred in law when it substituted 'proprio motu' a case for the respondent in the award of GH₵10,000.00 as general damages.

Counsel for the defendant argued grounds c, e and f together. The thrust of his arguments may be summed up as follows. First, since the Court of Appeal had rejected the plaintiff's claim for damages on ground that it was not pleaded and there was no evidence in support, there was no basis for the award of general damages. This amounted to substituting the plaintiff's case for damages for emotional distress for one of general damages. Secondly, counsel was of the view that the parties ought to have been given the opportunity to address the court on the question of general damages when it decided to rest its decision on this. The course taken by the court was thus a clear violation of the provisions of Rule 8(8) of C. I. 19. On this question, counsel stated that "the import and indeed the effect of rule 8(8) or 8(9) of the Court of Appeal Rules, 1997, C. I. 19, was considered in the case of **Ankumah v. City Investment Co. Ltd. (2007-2008) SCGLR 1064**. In its judgment, the Supreme Court (per Adinyira JSC) was emphatic that the plaintiff/appellant therein ought to have been given the opportunity to be heard on the procedural issues raised in the suit before overruling a legitimate objection to the procedural issues raised by a party who had not cross-appealed on any of the grounds of appeal filed by the plaintiff." Counsel also cited the case of **In re Ashalley Botwe Lands; Adjetey Agbosu & ors v. Kotey & ors (2003-2004) SCGLR 420**, at 466-467, per Brobbey JSC, also on the import of Rule 8(8) of C. I. 19.

Counsel continued his argument by inviting the court to apply the ratio in the Ankumah case "to hold that the Court of Appeal was in error on the said award made in substitution and to set aside the said award of damages in its entirety."

In further elucidation of the above argument, counsel made reference to the English case of **Hadmor Productions v. Hamilton (1982) 1 All E. R. 1042 H. L**. at 1056, per Diplock L.J. overturning a decision by the English Court of Appeal which had relied on a speech recorded in the Hansard without giving opportunity to the parties to be heard. Counsel said that decision was on all fours with the instant case.

As a corollary to this point, counsel made this interesting submission: "If the Court of Appeal had given the parties the opportunity to contest the matter from their different perspectives, in all probability, their Lordships in the Court of Appeal would not have made the aforesaid award of general damages....." With regard to this last submission, it should be stated that examination of Rule 8(8) of C. I. 19 should not be

based on the merits of the case or soundness of the outcome; it is based entirely on whether the rule was observed or otherwise.

For his part, counsel for the plaintiff strenuously defended the decision by the Court of Appeal to award general damages to the plaintiff. He thought counsel for the defendant was confusing general damages with special damages. He said this in reference to some questions posed by counsel for the defendant especially with regard to the cost incurred by plaintiff on air fares and other costs. Before proceeding any further, it is obvious the arguments made by counsel for the defendant was not appreciated or fully understood by counsel for the plaintiff. What counsel for the defendant was saying was that the Court of Appeal itself had concluded that there was no evidence to establish the claim for damages for emotional distress. So on what evidence did it award general damages? That led him to pose those questions on air fares etc, just to buttress the fact that there was no iota of evidence on which the award might be justified. Counsel was not saying the plaintiff was obliged to prove those factors. Thus all the copious references to distinction between special and general damages were a red herring.

Interestingly, counsel for the plaintiff cited authorities wherein award for mental distress arising from breach of contract had been made. He preceded this point with reference to the case of **Davies v. Powell Duffryn Associated Collieries Ltd (1942) 1 All ER 657** where the conditions under which an appellate court may interfere with an award of damages were outlined. These conditions are that the court acted on a wrong principle of law, or has misapprehended the facts, or has made a wholly erroneous estimate of the damage suffered. Counsel then cited the case of **Johnson v. Gore Wood & Co (a firm) (2001) 1 All ER** 481 at 516, where it was held that damages are recoverable for physical inconvenience and discomfort caused by a breach of contract and also for mental suffering directly related to that inconvenience and discomfort. In the same vein, he cited the case of **Jarvis v. Swans Tours Ltd (1973) 1 All ER 71.**

Having regard to the references made, one would think they provided a solid foundation for a cross appeal against the Court of Appeal's decision setting aside the award of damages for emotional distress granted by the High Court. But there is no cross appeal. What followed these references is not quite comprehensible and appears to be an anti-climax. To quote counsel's words: "The Court of Appea however believed and held that the result of emotional distress was not foreseeable and hence substituted the award of damages for emotional distress with general damages which in any event was also due."

Counsel did not respond to the arguments made in reference to Rule 8(8) of C. I. 19. The closest he came to addressing this question is the last statement he made under these grounds of appeal that: "In relation to whether the Court of Appeal can consider only the grounds argued before it, it is trite that an appeal is by way of rehearing and the judges on appeal have the jurisdiction to consider all matters before it on the record including matters that were not specifically stated as grounds of the appeal."

It is noted that a claim for damages is one of the remedies available to a claimant in an action founded on a breach of contract. The claimant may decide to claim damages in addition to any other remedy available to him following a breach. Thus he should make a claim for damages if the court is to consider it since damages is not a rule of evidence. It is also to be noted that there are diverse heads of damages available to a claimant, like pain and suffering in tort matters, for trespass in land claims etc. Therefore the claimant is required to make a claim for damages. He may decide to base the claim on a specific head for which he is seeking damages, though this is not an invariable rule. But if he decides to base his action on a particular head of claim, he must produce the evidence to support it. For a defendant must not be taken by surprise and so must have the opportunity to meet the claimant's case. If the claimant fails to produce evidence to prove the case, he must fail. It is not open to the court to award damages based on a different head not asked for. That will be substituting the claimant's case, contrary to the decision in **Dam v. Addo (1962) 2 GLR 200 SC.**

The Court of Appeal found that there was no pleading in respect of the damages for emotional distress sought for by the plaintiff. It also found that no evidence was adduced in support. For these reasons it rejected that claim. That should have ended this matter. Contrary to the decision in Dam v. Addo, supra, which is binding on the court below, it proceeded to award general damages when it was not claimed as a remedy. General damages do not necessarily and automatically flow from a breach of contract, as to lead to an award by the court when it is not sought as a remedy. Thus in the case of **Perestrello v. United Paint Co Ltd (1969) 3 All ER 479, (1969) 1 WLR 570** at 579 Lord Donovan referred to the need to put a defendant on notice of "damage of a kind which is not the necessary and immediate consequence of the wrongful act."

Besides, the question of general damages was not raised by the plaintiff either at the trial court or in the court below as to give the opportunity to the defendant to address it. Consequently, when the Court of Appeal decided to base its decision on it, it was required by rule 8(8) of C. I. 19 to invite the parties to address it. The said Rule reads:

"Notwithstanding sub-rules (4) to (7) of this Rule, the Court in deciding the appeal shall not be confined to the grounds set out by the appellant, but the Court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

The authorities that were cited by Counsel for the defendant and have been referred to above are apt on this point. The 'audi alteram partem' principle and the rules of natural justice underpin this particular rule, thereby assuming the status of a substantive law. Without substituting general damages for damages for emotional distress, the court below could not have awarded the damages as it did. Therefore it ought to have complied strictly with rule 8(8) of C. I. 19, which is a mandatory requirement. Failure to observe it renders the court's decision unsupportable and unjustifiable.

Moreover, the court below had found that there was no evidence to support the claim for damages founded on emotional distress. Yet it accepted the same scanty evidence as supporting an award of general damages. The standard of proof in civil matters is for the person who assumes the burden of producing evidence to lead such evidence as to enable the trier of fact to determine that he has established his case on a preponderance of probabilities. The court below was thus under a duty to consider the totality of the evidence in arriving at this conclusion. It was not sufficient to base an award of damages on the bare fact that the defendant was found to be in breach of contract when ordinarily the refund with interest should be just compensation. What then was the basis of the award in the absence of any evidence beyond the breach of contract?

In the case of **J. K. Agyarbeng & 62 others v. SG/SSB (now Societe Generale)** Suit No. J4/11/2015, unreported judgment of this court dated 11 June 2015, the plaintiff claimed, inter Alia, damages for wrongful termination of appointment. The trial High Court granted the relief for damages for wrongful termination of employment. On appeal, the Court of Appeal reversed the trial court's finding of wrongful termination. But the Court of Appeal maintained the award of damages on account of a ground which was not sought as a relief and by the pleadings. In setting aside that award, this court held that there was no claim or pleading setting out the foundation for the award; hence there was no basis for it.

For these reasons, these grounds of appeal succeed.

The next grounds of appeal argued by counsel for the defendant were grounds a and b together. At the Court of Appeal, the defendant had urged on it the need to re-appraise

the entire evidence on record before arriving at a decision. At any rate the court was bound to do that since the omnibus ground was canvassed in the Appeal. In particular the defendant's position was that it did not receive the transfers evidenced by exhibits A, B, C, D and E. So the court was bound to consider the burden of persuasion that lay with the plaintiff. The plaintiff is not satisfied with the reasoning by the court below in accepting the probability that the transfers were made after it had labelled the defendant's exhibits 3 and 8 as lacking integrity. Exhibit 3 and 8 are ledger recordings tendered by the defendant to show their record of the plaintiff's accounts. The defendant has urged this court to take another look at these exhibits 3 and 8, to decide whether they lack integrity. Counsel's arguments find support in a number of cases decided by this court; see **Oppong Kofi v. Attibrukusu (2011) 1 SCGLR 176; Tuakwa v. Bosom (2001-2002) SCGLR 61.**

For his part, counsel for the plaintiff submitted that the onus is on the defendant to satisfy this court that the two lower courts were wrong in their evaluation of the facts in evidence. He cited in support the case of **Djin v. Musa (2007-2008) SCGLR 687**. Counsel made reference to the common finding of the two lower courts that the plaintiff indeed made the transfers into his account. According to him, there was abundant evidence that the plaintiff did make the transfers electronically by SWIFT, contrary to the defendant's position that it was by post. The burden therefore shifted on to the defendant to disprove this fact of the transfers. He concluded on this note: "The defendant has not shown this court which pieces of evidence the court should have considered differently or should have inured to his benefit. The judgment follows the evidence as presented, and same should be preserved by this Honourable court."

In deciding whether or not a plaintiff has succeeded in his claim on a balance of probabilities, the court must have due regard to the case he set up by his pleadings. The plaintiff averred that he made the transfers into his foreign (Deutsche Mark) account with the defendant, through his bankers in Germany called Stadt Sparkasse Rhein-Neckar Nord in Mannheim, then West Germany, between 1990 and 1994. The total sum transferred was 14,000DM and US$900. He made a withdrawal of 1000DM, thus leaving a balance of 13,000DM and $900, respectively. The defendant has failed to pay him his money, hence the reliefs endorsed on the writ.

The defendant averred that the plaintiff made a first-time deposit of DM10,485 into the account on 4th July 1990. That since the account was in Deutsche marks, it was impossible to credit same with dollars. Later on 28th June 1995, the plaintiff transferred an amount of DM976 into his account. They averred that the plaintiff made the following withdrawals from his account: DM10,000 in or around December 1990,

DM1000 in August 1995 and DM200 in or around May 1995. Thus according to the defendant, the plaintiff made a total deposit of DM11,661 as against a total withdrawal of DM11,200, between the period 1990 and 1995. By September 1995, the credit balance on the account stood at DM11.67 and since then there has been no transaction on the account. The defendant was compelled to close the account due to insufficiency of the balance to take care of bank charges.

By way of a reply, the plaintiff denied having made any transfer of the sum of DM10,485 as pleaded by the defendant. On the dollar transfer, the normal practice, according to the plaintiff, was for the bank to convert it into Deutsche marks and credit the account. He denied having made any transfer into the account in 1995.

This was the state of the pleadings before the hearing commenced.

In proof of his case that he made several transfers into the bank account, the plaintiff tendered copies of documents evidencing the transfers from his bankers in Germany, in his name to the defendant bank. These documents are: exhibit A dated 28 March 1990, for the sum of DM10,000; exhibit B dated 19 March 1991 was for the sum of $900; exhibit C dated 02 February 1992 was for the sum of DM2,000; exhibit D dated 11 February 1994 was for the sum of DM1,000; exhibit E dated 11 April 1994 was for the sum of DM1,000. All these documents were admitted in evidence without objection. The authenticity of these documents was not put in doubt as the German bank confirmed same by exhibit F. He testified that he made only one withdrawal of DM1,000. These documents having gone in without objection and being authentic were entitled to be given whatever weight the trial court deemed appropriate having regard to the evidence proffered by the defendant.

The defendant put in evidence two ledgers indicating its transactions with the plaintiff. These ledgers confirm the total lodgments into and withdrawals from the account as well as bank charges of commissions, which were also tendered without objection.

The trial court was faced with these competing stories. The plaintiff needed only to satisfy the court that indeed he had made those transfers. And clearly exhibits A through E established that. Thus in the absence of other credible evidence to the contrary, the court's below would be justified in accepting and relying on it. At that point the burden of persuasion shifted to the defendant who now has to satisfy the court that the entries in their ledger books exhibits 3 and 8 represent the true state of the plaintiff's accounts with them. The court's below were not satisfied the defendant had succeeded in leading evidence that would lead them to reject the plaintiff's version.

There was sufficient and credible evidence adduced by the plaintiff, supported by documentary evidence to satisfy the court. This court should not disturb those findings.

In further support of the findings made by the court's below, it is noted that the exhibits tendered by the plaintiff did not show any transfer for the sums of DM10,485 and DM976 respectively into the account. It was the defendant which said that. It is equally noted that entries into the defendant's ledger books are entered by officials of the bank; the plaintiff has nothing to do with it. So it is a self-serving piece of evidence generated internally which proves nothing, without more. It cannot be wholly accepted as establishing the facts therein stated. The defendant said the transfers came in by post, contrary to the plaintiff's position that they were effected electronically by SWIFT. The exhibits A through E clearly confirm what the defendant said that they were done by post, the exhibits use the word "letter" which confirms by post. The communication by letter or post makes it easier to keep the records as evidence to support even the various transfers defendant claimed to have received. Consequently, the defendant could have produced the documents evidencing the inward transfers received from the plaintiff's bankers, which differ materially from what the plaintiff put in evidence. They could have produced evidence of the withdrawal slips the plaintiff must have used, or withdrawal advice he must have authorized. The entries do not even indicate the forwarding institution or any other details of the transfers. Only the figures have been stated. The defendant could have provided evidence of bank statements issued periodically to the plaintiff during the period in question, putting him on notice as to the state of his accounts and yet he did not complain. Or as a bank the defendant could have cross checked the authenticity of exhibits A through F with the foreign originating bank. In other words, the entries in exhibits 3 and 8 were capable of being confirmed in one way or the other, but no other evidence was forthcoming, to confirm the accuracy of the entries in exhibits 3 and 8.

In the face of these pieces of evidence, it was reasonable to accept the plaintiff's presentation on a balance of probabilities. The concurrent findings by the courts below are justified and are hereby affirmed. These grounds of appeal are accordingly dismissed.

The last ground of appeal is (d). This ground draws attention to the fact that the Deutsche Mark has ceased to be legal tender and challenges the authority or power by the High Court in making the award in the obsolete currency. The defendant is saying that the Court of Appeal did not address this question which was a ground of appeal and instead relied on a press release to order the conversion of the Deutsche marks to Euro at a certain rate of exchange. Counsel invites this court "to make a definitive

pronouncement on this aspect of the matter, in the hope that it may serve as a yardstick with which to address this and similar issues in the future."

We fail to understand the basis for this argument. The trial court acknowledged and indeed took judicial notice of the fact that the Deutsche Mark had ceased to exist and same was replaced or exchanged for the Euros. Therefore it directed that the conversion to Euros should be reflected in plaintiff's account as from December 1996 when he made a demand for his money. The trial court could have expressed this in much simpler and direct language than it did, but this does not detract from the fact that the payment to the plaintiff was to be effected in Euros since the account was to be credit in this currency as from December 1996. A court's judgment must be read as one composite document, and not piecemeal. The Court of Appeal, as we see it, was just bringing much clarity to the matter by fixing the conversion rates based on rates applicable upon adoption of the euro as the common currency for the euro zone countries, including Germany. This is what the court below said, speaking through Aduama Osei, JA: ".....it was as a result of a failure on the part of the Defendant that the Plaintiff's account had not been duly credited. In my view, if in this circumstance, any adverse consequences affecting the account in issue followed the demise of the Deutsche Mark, the Plaintiff should not be the victim of those consequences. To hold otherwise will amount to granting the Defendant the benefit of its wrongdoing. Upon the coming into being of the euro, rates of converting each of the participating currencies into euro were agreed and I think this county can take judicial notice of those rates. The rate of conversion for the Deutsche Mark was 1.95583 to €1.00, and in my view, this rate can be used to carry out the orders made by the trial court....."

The Court of Appeal stated the legal position correctly, because if you wrongfully keep a person out of his money, you are responsible for any consequential loss. Also the court was entitled to take judicial notice of the exchange rates as put out in the public domain. It was open to the defendant to challenge it by calling for fresh evidence, if the rate used by the court was not correct. There is no merit in this ground of appeal and is dismissed.

Consequently, the appeal succeeds in respect of grounds c, e and f, but fails in respect of grounds a, b and d. We accordingly set aside the award of general damages by the court below. We order the defendant to pay the plaintiff the following:

1. the euro equivalent of DM 13,000 at the rate of 1,95583DM to €1.00;

2. US$900.00;

3. Interest at the ruling bank rate, applying the euro interest rate in respect of the refund in euro and applying the US dollar rate of interest on the refund in dollars. The interest should be calculated from December 1996, which the trial court found was the date the plaintiff made a demand for his money up to the date of final payment.

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

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

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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

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

COUNSEL:

CHARLES HAYIBOR FOR THE DEFENDANT/APPELLANT/APPELLANT
T. FORSON FOR THE PLAINTIFF/RESPONDENT/RESPONDENT