IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)
PWAMANG, JSC
AMEGATCHER, JSC
OWUSU, JSC
AMADU, JSC

CIVIL APPEAL
NO. J4/56/2020

27TH MAY, 2021

MET CAPITAL GROUP LIMITED ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

1. GUARANTY TRUST BANK GHANA LTD.
2. LINKSFEILD RIDGE REALITY LTD — **DEFENDANT/CROSS APPELLANT/ CROSS APPELLANT**

J U D G M E N T

OWUSU (MS.), JSC:-

On 13th February, 2020, the Court of Appeal, Accra, dismissed all the grounds of appeal filed by the plaintiff/appellant/appellant (to be referred to as plaintiff). It also dismissed Grounds (i), (ii), (iii), (iv), (v), (vii), and (viii) of the 1st Defendant's/cross appellant/appellant (to be referred to simply as 1st Defendant) cross-appeal. Ground (vi) was upheld, whilst ground (ix) was upheld in part with regard to the sum to be refunded.

Dissatisfied with the decision of the Court of Appeal, the Plaintiff filed the instant appeal to the Supreme Court on the following grounds;

a. *The Courts below occasioned for the Plaintiff a grave miscarriage of justice when despite the positive evidence on record, being 1st Defendant's own record, held that 1st Defendant actually issued the three Bank Guarantees just because Plaintiff had erroneously believed that, the said Bank Guarantees had been issued.*
b. *That the findings of the Learned Justices that Plaintiff should refund bank charges associated with the issuance of the Bank Guarantees out of the cash collateral (US$550,000.00) is not borne out of the evidence on record.*
c. *That the refusal of the Court of Appeal to enhance the award of general damages assessed at five million Ghana cedis (GHc5,000,000.00 by the trial court in the special circumstances of this suit is against the weight of evidence.*
d. *That the Courts below ought to have exercised their discretion to enhance damages in the sum of thirty million Ghana cedis (GH¢30,000,000) to compensate for at least the direct costs and losses incurred by Plaintiff as a result of the actions and inactions of the 1st Defendant.*
e. *Additional grounds to be filed upon receipt of the Record of Appeal.*

The 1st Defendant/cross-appellant/cross-appellant also appealed to this Court on the following grounds;

(a) *The Court of Appeal failed to pay due and/or proper regard to the dictates of binding precedent and legislation which prevented the 1st Defendant from returning the blocked funds to Plaintiff without due authorization of 2nd Defendant.*
(b) *In affirming the award of the High Court of general damages for Plaintiff in the sum of five million Ghana cedis (GH¢5,000,000.00), the Court of Appeal erred in accepting the High Court's finding that, failure by 1st Defendant to transfer back to the Plaintiff the blocked sum of US$550,000 (less the bank charges), was the reason for the suspension by the Security Exchange Commission of Plaintiff's license,*
(c) *The Court of Appeal erred in affirming wholly the basis upon which the High Court awarded Plaintiff general damages in the sum of GH¢5,000,000.00*

(d) The judgment in relation to the portions complained of, was against the weight of evidence.

BACKGROUND OF THE CASE

Following discussions between the Plaintiff a non-bank financial institution which provides financial and fund management services represented by its Managing Director, the 1st Defendant bank in Ghana and 2nd Defendant, a customer of 1st Defendant, an Agreement was reached between the parties for the issuance of three Bank Guarantees totaling US$550,000 to secure the delivery of Oil Products from Nigeria to Ghana at the instance of 2nd Defendant. As a condition for the issuance of the Bank Guarantees, 1st Defendant requested for Cash Collateral in the sum of US$550,000. The Plaintiff based on the discussions between the parties, issued written instructions to 1st Defendant on 7th January, 2016, Exhibit "D" to commence the transaction. The Bank Guarantees were to last for a period of 30 days. The Cash Collateral deposited in 2nd Defendant's account by Plaintiff was to be blocked in a pledged account. It is the case of the Plaintiff that, 1st defendant failed to carry out the instructions as contained in Exhibit "D" and allowed 2nd Defendant to withdraw the Cash Collateral of US$550,000 in bits over a period of six (6) months hence the action in the High Court against Defendants jointly and severally claiming inter alia the following reliefs;

a. Special Damages of Ten Million United States Dollars {US$10,000,000) or its cedi Equivalent of Forty Million Cedis (GH¢40,000,000.00) for loss of income.
b. General Damages of One Hundred Million Ghana Cedis (GH¢100,000,000) for breach of duty of care to the Plaintiff.
c. General Damages of Thirty Million Ghana Cedis (GH¢30,000,000) for defamation.
d. Recovery of the sum of Five Hundred and Fifty Thousand United States Dollars (US$550,000) (blocked funds).
e. Interest on the Five Hundred and Fifty Thousand United States Dollars (US$550,000).
f. Cost including Legal fees.

In its Defence, the 1st Defendant denied Plaintiff's claim and avers that, it complied with the Written instructions of the plaintiff. Consequently, it is not liable to any form of losses incurred by the Plaintiff.

The 2nd Defendant after causing an appearance to be entered on its behalf did not file a Defence nor participate in the trial.

At the trial, the Plaintiff testified through its Managing Director and closed its case, 1st Defendant testified through its representative and called two witnesses.

At the end of the trial, Plaintiff's relief (a), the claim for Special Damages of Ten Million United States Dollars or its cedis equivalent for loss of income was refused. Plaintiff's relief (b), the claim for general damages was granted and it was awarded five million Ghana cedis (GH¢5,000,000). Its claim for thirty million Ghana cedis (GH¢30,000,000) for defamation was refused. The Plaintiff's relief (d), the claim for the recovery of Five Hundred and Fifty Thousand United States Dollars (US$550,000), the Cash Collateral from the defendants jointly and severally was granted. Per Plaintiff's relief (e), it claims interest on the sum of Five Hundred and Fifty Thousand United States Dollars, that is the Cash Collateral it deposited into the 2nd Defendant's account was also granted to be calculated from February, 2016 at simple interest to date of judgment.

Dissatisfied with the Judgment of the High Court, the Plaintiff appealed to the Court of Appeal. The 1st Defendant also filed Cross Appeal before the Court of Appeal. The appeal and cross appeal were dismissed save that the Bank charges and fees which were to be deducted from the Cash Collateral of USD550,000.00 to be refunded to the Plaintiff.

Still, not satisfied with the decision of the Court of Appeal, the parties have appealed to the Supreme Court.

It is noted for the record that, the Plaintiff did not file additional ground of appeal as indicated in its Notice of Appeal.

From the lengthy submissions by counsel for the parties, the issue for determination in the appeal before us is the award of general damages of five million Ghana Cedis to the

Plaintiff. Whilst the plaintiff complains that the amount is woefully inadequate, the 1st Defendant insists that the amount is excessive and harsh.

In her judgment, the High Court held as follows;

> *"From the evidence on record, although the conduct of the 1st Defendant in failing to return the Cash Collateral to the Plaintiff's account at the end of the transaction gave the 2nd Defendant the opportunity to dissipate same causing the Plaintiff to suffer the forgoing financial injuries, I did not think the Plaintiff should be entitled to the specific losses he has asked for but as I have earlier ruled, it should be entitled to damages for that breach of duty*".

She concluded on the reason for awarding Plaintiff general damages of five million Ghana Cedis this way;

> *"The liability of the Defendants to pay damages to Plaintiff in contract flow from the breach by 1st Defendant of the terms of the Exhibit "D", which formed the contract between the Plaintiff and 1st Defendant. I have also concluded previously in this judgment that in tort, the 1st Defendant breached its duty of care owed to the Plaintiff which caused the Plaintiff to suffer losses. In assessing the measure of damages to be awarded to the Plaintiff, I have given consideration to the peculiar facts of the case and all the hardships the Plaintiff has suffered after February 2016 when the Cash Collateral ought to have been returned. It is therefore my considered opinion that the Plaintiff should be entitled to damages which I hereby assess at Five Million Ghana Cedis (GH¢5,000,000.00)".* (See page 587 to 588, Volume 2 of the Record of Appeal).

So, the question is, what were the hardships the trial Judge took into consideration in awarding the general damages of five million Ghana Cedis?

In his witness statement and testimony before the trial court, the Plaintiff's Managing Director cataloged a list of hardships the Plaintiff went through or suffered as a result of the failure of 1st Defendant to return the Cash Collateral of Five Hundred and Fifty

Thousand United States Dollars to its account by February, 2016. These include the following:

1. *Cheques issued by Plaintiff for the payments to its clients were all dishonored.*
2. *The returned cheques have caused embarrassment to the Plaintiff ranging from complaint made to the Police and the Plaintiff's regulator, the Securities and Exchange Commission.*
3. *The Supplier further blacklisted the Plaintiff Company.*
4. *Plaintiff has since not been able to pay returned cheque amounts due the supplier and it has since accrued interest cost and charges.*
5. *The Plaintiff was unable to turn around the funds entrusted to its care as fund manager thereby causing operational embarrassment and mishaps which has led to loss of potential income and all manner of legal tussle against it.*
6. *The refusal of 1st Defendant to release the funds to the Plaintiff in February, 2016 after the expiry of the three financial instruments meant Plaintiff's resources for investments were reduced and its returns on investments diminished such that the Plaintiff suffered hardships such that some employees had to be laid off which also triggered labour related issues.*
7. *The refusal of 1st Defendant to release the funds to Plaintiff has led the latter inability to undertake similar transactions it has committed itself to executing to earn a respectable margin thereby causing Plaintiff loss of potential income.*
8. *The refusal to release the funds to Plaintiff has contributed to its inability to honour its payment obligations and this has led to the following unfortunate incidents;*

    a. *Several complaints made by irritated clients to several police stations one of which led to the Plaintiff's Managing Director being locked up at the Airport Police Station cells from 15th April – 18th April 2017 on a charge of breach of trust and conspiracy to commit crime.*
    b. *There have been personal physical attacks on the Plaintiff's Managing Director which resulted in bodily harm and his vehicle, Toyota Camry GW-1562-16 was ceased by angry clients.*

c. *Complaints from Plaintiff's clients to its regulator to suggest that Plaintiff is a fraudulent organization and that it should not be trusted. This has painted Plaintiff company in a bad light and caused it to loss its dignity among colleague players.*

d. *This has caused Plaintiff Company not been able to pay salaries and SSNIT on behalf of its workers leading to criminal summons instituted against it and the Directors by the state.*

e. *The complaints by clients of the Plaintiff had led to the suspension of the Plaintiff's operating license by SEC thereby causing it to halt operations, which suspension was published in Ghanaian newspapers as well as various online portals.*

f. *Plaintiff's landlord has ejected Plaintiff from its business premises due to its inability to settle the annual rent required by the landlord.*

g. *That in an attempt to resolve these difficulties, the Plaintiff's Managing Director had to sell personal businesses and also pledged personal assets belonging to Directors and the said funds were assessed at a very expensive interest cost with penal charges to be charged on default.*

In arguing the appeal, counsel for the Plaintiff invited this court to enhance the general damages awarded the Plaintiff taking into consideration the hardships suffered by it on account of 1st Defendant's refusal to return the Cash Collateral back into its account. Counsel for the Plaintiff also insisted the 1st Defendant did not issue the Bank Guarantees as it claimed. Therefore, the Court of Appeal erred in ordering bank charges and fees to be deducted from the Cash Collateral 1st Defendant has been ordered to refund to the Plaintiff.

We think the argument of counsel for the Plaintiff on the issuance of the three bank guarantees is flawed. In the first place, the plaintiff pleaded and testified that the three bank guarantees were issued and tendered Exhibit "F", "F1" and "F2" to back its claim. The law is that;

"Where the evidence of one party on an issue in a suit was corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stood uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the Judgment) the court found the corroborated version incredible or impossible". See the case of **ASANTE v BOGYABI [1966] GLR 232.**

Grounds (a) and (b) of the Plaintiff's appeal fail and they are dismissed.

This brings us to the cross-appeal of 1st Defendant.

Counsel for 1st Defendant in his submissions, argued ground (a) and (d) together. The import of these two grounds is that, the Court of Appeal failed to pay due and proper regard to the dictates of binding precedent and legislation which prevented 1st Defendant from returning the blocked funds to Plaintiff without the authorization of 2nd Defendant. He referred us to a number of foreign decisions and the case of **BUTT v BARCLAYS BANK GHANA LTD [2008] GMJ 188, 192 CA,** *section 17 of the Borrowers and Lenders Act, 2008 (Act 773)* and *section 146 of the Deposit-taking Institution Act, 2016 (Act 930)* and submitted that, aside statutes, a valid mandate is required in order to permit a bank to activate activity on a customer's account. Therefore, the instructions contained in Exhibit D to block the funds in 2nd Defendant's account could not be done. It was only the 2nd Defendant that can give instructions for the funds to be blocked.

He argued that, the nature of the transaction the parties contracted was a contract of guarantee in favour of the 2nd Defendant with Plaintiff being the guarantor. The 1st Defendant agreed to open letters of credit (LCs) in favour of 2nd Defendant to import Oil Products. The Plaintiff guaranteed 1st Defendant's risk for providing the Letters of Credit to 2nd Defendant by offering the Cash Collateral against 1st Defendant's risk or loss if the transaction between the 2nd Defendant and third parties did not go through and 1st Defendant lost money. He continued that, by Banking practice, even though upon Plaintiff's instructions, the Cash Collateral was transferred into 2nd Defendant's account,

the latter was the customer of 1st Defendant and the party who now has the mandate over the funds had to formally instruct 1st Defendant to issue the guarantee before it did. He therefore submitted that, the actual guarantees had to be issued not on the basis of Exhibit "D", but upon the direct instructions of 2nd Defendant. This was the only way to give Exhibit "D", business efficacy.

With all due respect to counsel for 1st Defendant, Exhibit "D" formed the basis of the contract between Plaintiff and 1st Defendant. If the latter felt the instructions contained in Exhibit "D" cannot be carried out, it should have made this known to the Plaintiff. It is too late in the day for 1st defendant to say it was impossible to carry out the instruction in Exhibit "D". Besides, by Section 5 (1) of the Contracts Act, 1960 (ACT 25), a contract can be made for the benefit of a third party. We are not persuaded by this argument. The lower courts therefore did not put a strained interpretation on 1st Defendant in the circumstances of the transaction. On the contrary both the High Court and the Court of Appeal were right when they held that 1st Defendant is bound by Exhibit "D".

On the issue that, the general damages of five million Ghana Cedis awarded the Plaintiff was harsh and excessive, counsel for the 1ST Defendant went through the list of hardships Plaintiff alleged it suffered and submitted that, the trial judge failed to consider the issues of foreseeability and remoteness. Thus, the damages claimed by Plaintiff was not within the reasonable contemplation of the parties as arising from the default of 1st Defendant. He referred us to the cases of **MULVENNA v ROYAL BANK OF SCOTLANT (2003) AER 439** and **TRANSFIELD SHIPPING INC. MERCATOR SHIPPING INC (THE ACHILLEAS) (2008) 4 ALL ER 159,** and submitted that it is not every foreseeable loss that is claimable in damages. He continued that; the law will sometimes provide a cut-off point for damages even if they are foreseeable but unusual in the ordinary scheme of things. In addition, he argued that, in determining whether or not the damage is foreseeable or remote, the basis being contractual, the courts would ascertain whether or not the kind of damage under consideration is consistent with commercial practice or proportionate to the risk undertaken by the party or the benefit the party stood to gain.

So, the question is, what were the alleged hardships the Plaintiff suffered that the trial Judge took into consideration in awarding the general damages in contention.

In her judgment, the trial Judge held and rightly so that;

> *"I find in the circumstance, the conduct of the 1st Defendant to be unacceptable and hold that the 1st Defendant failed to transfer the Cash Collateral back into the Plaintiff's account contrary to the terms of Exhibit "D" and that failure was deliberate".* (See page 577 Volume 2 of the Record of Appeal).

She further held that, the Plaintiff was not entitled to the estimated profit of two million, two hundred and fifty thousand Unites States dollars within a maximum period of 30 days, translating to loss of income of not less than ten million United States dollars as the time of the issuance of the writ of summons. In rejecting that claim the trial judge that;

> *"How was Plaintiff expecting to make a profit on the sale of products which were never delivered? I do not think the failure of the suppliers to deliver the said oil products can be laid at the door step of the 1st Defendant".* (See page 580 Volume 2 of the Record of Appeal).

The trial judge also refused to take into consideration in awarding general damages to Plaintiff the contracts contained in Exhibit "L" and "M series". She held that;

> *"… the Plaintiff cannot claim the specific profits that would have flowed from these specific contracts had they been executed because at the time Plaintiff entered into the contract with the 1st Defendant, these specific contracts were never in the contemplation of the parties, nor did the Plaintiff make the 1st Defendant aware of these contracts and so the resultant loss of profits under these contracts cannot flow from the 1st Defendant's breach. In other words, I find that they are too remote in relation to the default of the 1st Defendant".* (See page 583 Volume 2 of the Record of Appeal).

The Plaintiff also claimed it suffered reputational damage among its peers and market operators in the securities industry from the numerous complaints lodged against it by its

clients to its regulator; the Stock Exchange Commission (SEC). These complaints according to Plaintiff led to the suspension of its operating license by the regulator. Plaintiff also alleged it was unable to pay rent and was evicted from its corporate offices. In addition, it was unable to pay its workers SSNIT Contribution. The cheques issued by Plaintiff to pay its clients matured investments too were dishonoured and it tendered Exhibit "S" SERIES, "U", "V" "G", "H" and "K" to back its claim.

The trial Judge in her Judgment held that, the above predicaments cannot be taken into account in awarding damages to the Plaintiff. This is because;

> *"……. I find that the cheques were dishonoured due to Plaintiff's own conduct of issuing those cheques at a time when it was aware there were insufficient funds in its accounts. In these circumstances, it would be unjust to hold the 1st Defendant liable for Plaintiff's own conduct or for any fees and charges that were levied on those returned cheques by the 1st Defendant".* (See page 587 Volume 2 of the Record of Appeal).

Therefore, contrary to counsel for 1st Defendant's submission that the trial Judge erroneously accepted the sufficiency of the Exhibits tendered by the Plaintiff as the kind of damage suffered by it by reason of 1st Defendant's breach of its obligation to return the cash collateral to Plaintiff without considering the issues of foreseeability and remoteness. The trial Judge in fact did consider the Exhibits one by one and came to the conclusion that, the alleged hardships cannot be claimed by the Plaintiff as at the time the contract was executed between the parties, these alleged hardships it suffered were never within the contemplation of the parties nor did Plaintiff make 1st Defendant aware of these contracts. Therefore, the trial Judge addressed the issue of remoteness and foreseeability.

Grounds (a), (b), and (d) of the cross appeal fail and they are dismissed.

We now turn our attention to the five million Ghana Cedis general damages awarded Plaintiff.

The law is that, General Damages are presumed to be the natural or probable consequence of the Defendant's acts. The law implies general damages in every infringement of an absolute right. See the case of **DELMAS AGENCY GHANA LTD v FOOD DISTRIBUTORS INTERNATIONAL LTD [2007-2008] SCGLR 748 holding (3) of the headnotes** where their Lordships held that;

> ***"Special damages is distinct from general damages. General Damages is such as the law presume to be the natural and probable consequence of the defendant's act. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damages in every infringement of an absolute right. ……. Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and proved it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate".***

See also the case of **NATIONAL INVESTMENT BANK & WESTEC SECURITY v ROM ENGINEERING LTD [2015-2016] 1 SCGLR 766, 769,** holding (3) where their Lordships on the award of general damages have this to say:

> ***"The award of general damages, though regulated by settled principles, like all acts of judicial discretion, must be applied on case-by-case basis.*** (our emphasis) ***In the instant case, it was clear that the plaintiff had exaggerated the extent of items removed from the factory premises and presented the court with a version that was unreliable as was found in exhibit B. On the whole, in the absence of cogent evidence of the materials taken by those who had broken into the factory premises, such as inventory, which to be good, could not be limited only to that of July 2009, as there must be credible evidence of the machinery holding of the company over a period to establish the reasonable probability that, in the light of those inventories, as at the date of the attachment, the extent of loss claimed to have been suffered by the plaintiff was more likely to be true……".***

In awarding general damages to the Plaintiff, the trial High Court Judge held among other things as follows:

> *"The liability of the Defendants to pay damages to the Plaintiff in contract flow from the breach by 1st Defendant of the terms of the Exhibit "D", which formed the contract between the Plaintiff and the 1st Defendant. I have also concluded previously in this judgment that in tort, the 1st Defendant breached its duty of care owed to the Plaintiff which cause Plaintiff to suffer losses. In assessing the measure of damages to be awarded to the Plaintiff, I have given consideration to the peculiar facts of the case and all the hardships the Plaintiff has suffered after February 2016 when the Cash Collateral ought to have been returned. It is therefore my considered opinion that the Plaintiff should be entitled to damages which I hereby assess at Five Million Ghana Cedis (GH¢5,000,000.00)".*

Relating the cases referred to supra to the case under consideration, having come to the conclusion that, the alleged hardships the Plaintiff claimed it has suffered as a result of the 1st Defendant's default in returning the Cash Collateral cannot be laid at the doorstep of the latter, we think the award of Five Million Ghana Cedis general damages is on the high side. Whilst we concede that the conduct of 1st Defendant is reprehensible because, Plaintiff as a financial service provider needs its capital to meet its financial obligations such as paying clients their investment capital and their returns, when the capital is held back, it is deprived of other business opportunities such as the one that resulted in the present action. Coupled with the fact that, the 1st Defendant held onto the Cash Collateral for forty-three (43) months. We however think the general damages of Five million Ghana Cedis awarded Plaintiff is rather on the high side. We say so for the simple reason that the 1st Defendant was ordered by the High Court to refund the Cash Collateral with interest which the latter had paid. Ordinarily, this Court will not interfere with the exercise of a discretion by the lower Courts unless the exercise of that discretion was not done judiciously. Having ordered 1st Defendant to refund the Cash Collateral with interest, we think the award of GH¢1.5 million general damages would be appropriate in the peculiar circumstances of this case.

Save the award of general damages which is varied, ground (c) of the cross of appeal is succeeds in part.

The Plaintiff's Appeal fails and it is accordingly dismissed. The 1st Defendant's Cross Appeal succeeds in part. The general damages of GH¢5 Million is hereby varied to GH¢1.5 Million.

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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