IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)
PWAMANG JSC
OWUSU (MS.) JSC
AMADU JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/67/2021

23RD NOVEMBER, 2022

UNIEX GHANA LIMITED ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

ROCKSHELL INTERNATIONAL LIMITED ..... DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

PROF. MENSA-BONSU (MRS.) JSC:-

1. The appellant in the instant case has brought this appeal involving contracts that were signed on behalf of two companies by persons who described themselves as

being "friends". Subsequently, the enforceability of the contract became an issue when they were deemed unenforceable because the objects were tainted with immorality and therefore contrary to public policy.

Facts and Background:-

2. Sometime in December, 1983, the Government of Ghana, through its agency the AESC, awarded a contract to defendant/respondent (herein referred to interchangeably as 'defendant' or 'respondent', as the context allows) for the production and supply of granite for a Sea Defence Wall at Keta on the southeastern coast of Ghana.
3. On or about 28th January, 1986, a works Certificate No. 12, was issued on behalf of respondent to Government of Ghana for the sum of ¢553,056,000 (old cedis). This claim, however, remained unpaid for over two decades despite repeated demands made by respondents.
4. On 30th December, 2004, respondent company, represented by its Executive Chairman, Dr Tei, entered into agreement with plaintiff/appellant company, (herein referred to interchangeably as 'plaintiff' or 'appellant', as the context allows). The plaintiff company, which described its business as financial consultancy, and represented by its Chief Executive, Mr Dan Markin, was contracted to follow up on the claim with Government of Ghana for a fee. The agreed fee payable was set down as a percentage (20%) of any monies realized by defendant/respondent from claimant. This agreement was marked as "Exhibit A" in the proceedings.
5. More than one year on, nothing appeared to have been achieved under that contract. On 13th January, 2006, the respondent, by its Executive Chairman, for reasons that appeared inexplicable, entered into a second Consultancy agreement, marked "Exhibit C", by which respondent now agreed to pay appellant, represented by its Chief Executive, 50% of any part of the claim that could be realized, if he was able to secure payment.

6. The appellant claims he performed a number of services towards securing payment, and expected to be paid when the respondent received any payments. However, after he had rendered those services, he heard nothing for some time and upon enquiry, was informed that payment had, in fact, been made to respondent company.
7. Plaintiff therefore served the respondent Company with a formal demand notice dated 9th February, 2009. making a demand for payment of 50% of the sum of eight million and three hundred thousand United States Dollars (US$8,300.000) which was the sum that had been received.
8. The respondent refused to pay contending that it was not bound by the agreements and that the contract was null and void since its Executive Chairman had not sought authority from the Board before making that commitment.
9. The Executive Chairman, at first denied ever entering into any agreement with appellant within the terms of Exhibit C. Later he indicated that the appellant had procured his commitment by fraudulently misrepresenting that he had political connections he could use to assist to facilitate the processing of the claim. However, contrary to his boast, he failed to perform and so had done nothing to earn that kind of money.
10. Following the refusal to pay him on the contract, the appellant caused a writ to be issued on 27th February, 2009, claiming 50% of the sums paid to respondent as well as interest on the said account. It also sought orders for any future payments made on Certificate 12 to be paid into court for disbursement to both plaintiff/appellant and defendant/respondent, in accordance with Exhibit C of 13th January 2006.
11. The Writ of Summons and Statement of claim were subsequently amended on 3rd March 2009.
12. The defendant/respondent contended in its Statement of Defence that if there was an agreement at all it was not binding on the company as it had been executed by the Executive Chairman of defendant/respondent, Dr Ras Tei, and Chief Executive of plaintiff/appellant company, Dan Markin, in their personal capacity.

13. They also contended that even if the agreement was binding on the company, it was tainted by fraud as it was procured by fraudulent misrepresentation to the effect the plaintiff/appellant would use its connections with the officials of the new Government (which had come into office in January, 2001,) to obtain relief for respondent.
14. Respondent further alleged that the agreement of 13th January 2006 was champertous and therefore illegal, contrary to public policy and unenforceable.
15. Trial Judge dismissed appellant's claims as unenforceable on the grounds, inter alia, of being contrary to public policy. The court explained that the agreement of 2006, Exhibit C, could not be enforced because it was tainted by immorality. Nor could the 2004 agreement, (Exhibit A), since it had been superseded by Exhibit C. The plaintiff appealed to the Court of Appeal, but on 5th February, 2013, it affirmed the trial Court's decision and dismissed the appeal. The plaintiff/appellant has now appealed to this honourable Supreme Court.
16. On 20th February 2014, Plaintiff filed notice of appeal with seven (7) grounds (**a-g**) of appeal and an alternative ground (**h**).
17. The grounds of appeal are

> *(a) The Court of Appeal erred in affirming the trial Court's judgment on the ground the Plaintiff/Appellant/Appellant failed to dislodge the presumption of correctness of the determination made by the High Court when the court had erroneously applied the principles of evidence and drew [sic] wrong inferences from proven facts.*
>
> *(b) The Court of Appeal erred in affirming the trial High Court's judgment on the ground that Plaintiff/Appellant/Appellant failed to dislodge the presumption of correctness of the determination made by the trial High Court when it was evident that the trial Court had ignored substantial evidence on record which supported Plaintiff/Appellant/Appellant's version of events.*

(c) The Court of Appeal erred in affirming the trial High Court Judge's reliance or over-reliance on the demeanor of Dr. Ras Tei in the determination of his credibility as a witness when there was overwhelming evidence on record of Dr. Tei's lack of candour and other evidence on record which pointed to a contrary and irresistible finding.

(d) The Court of Appeal erred in affirming the trial High Court's finding that Dr. Ras Tei was a truthful witness when it was evident that the effect of her own ruling on other issues on trial completely undermined her holding in that regard.

(e) The Court of Appeal erred in failing to consider favourably or at all the substance of the grounds of appeal raised by the Plaintiff/Appellant/Appellant against the judgment of the trial court, when an assessment of those grounds would have proved the judgment of the trial High Court Judge to be perverse.

(f) The Court of Appeal erred gravely when it failed to consider the effect on the Defendant/Respondent/Respondent case of its failure to call Mr. Hall, a material witness.

(g) The Judgment was against the weight of evidence.

(h) The Court of Appeal erred in failing to consider the effect of Exhibit A and its holding that Exhibit 'C' was unenforceable, and if it had it would have held Exhibit 'A' as enforceable within its terms.

Case for the appellant

18. The appellant's evidence was that it had a valid contract with the respondent which had to be enforced. It claimed that it had rendered services on the contract which obliged the respondent to honour the cotract. The CEO explained that at the time

he secured the contract to intervene, the respondent Company, through its General Manager, had already written a letter to the Attorney General accepting the much reduced sum of twenty billion old cedis (2,000,000) equivalent to two million dollars (US$2,000,000).

19. The appellant claimed that when he intervened, he observed that the respondent's willingness to compromise a principal sum of US$9,000,000 to accept a paltry sum of US$2,000,000 at simple interest instead of the compound interest the bank was charging, would raise suspicion in the minds of the officials of the new government, that the original sum was heavily inflated. He therefore advised that a letter be written to withdraw the compromise letter sent, and this was done. Further, that he provided the draft from which the content of the withdrawal letter was sourced.
20. He claimed further that he compiled documentation based upon which negotiations were done after the compromise letter had been withdrawn.
21. The appellant's plaint against the decision of the Court of Appeal was that in the judgment dismissing the appeal, the court had stated that it agreed with the findings of the trial judge which found Dr Tei's testimony more credible that Mr Dan Markin's testimony, and would not intervene.

    The Court of Appeal had observed per Aduamah-Osei JA thus:

> "*I have noted and pondered over her observation that it took cognizance of the likelihood of Dr. Tei misrepresenting the facts and had, for that reason, kept him under close observation throughout the period of his testimony. As the trial court indicated, its determination that Dr. Tei was entitled to credit was the outcome of that close observation. I think the conclusion the trial court arrived at in respect of Dr. Tei's testimony is plausible. In the absence, therefore the evidence from the record that the trial court's statement that it had tested the credibility of Dr. Tei's testimony was ill-founded. I*

should hesitate in substituting the trial court's conclusions with this court's conclusions.

Indeed the record does not give me cause to doubt what is stated in the judgment as to the manner in which Dr. Tei's testimony was considered and accepted, and I do not feel inclined to reverse the determination the trial court made in respect of that testimony. I will say in conclusion that the plaintiff has failed to dislodge the presumption of correctness in favour of the determination made by the trial court. This court will therefore defer to that determination, even if on the record our own conclusion on the issue would be different."

This, the appellant took issue with.

22. The appellant further contends that the trial court misled itself in drawing conclusions about the credibility of Dr. Tei as a witness, and that the Court of Appeal was wrong to rely on those findings and dismiss the appeal.

23. Again the appellant contests the allegation that its representative made misrepresentations to Dr Tei which were fraudulent as set down in the Statement of Defence) thus:-

"10. During the said discussion in order to induce Dr. Tei to enter into a contract with him, Mr. Markin made the following representations:-

(a) That he (Mr. Markin) was a financial consultant and a broker (an assertion he had previously made to induce Dr. Tei to sign the letter dated 30th December 2004, and

(b) That the Plaintiff Company was a financial and brokerage firm (an assertion he had previously made to induce Dr. Tei to sign the letter dated 30th December 2014 [sic]."

25. Characterising these allegations as "wild", the appellant submits in paragraph 37 that the trial Judge

> *"should have dismissed the wild allegations of political connections when she found that Dr. Tei and Mr. Markin used to be close friends and had in fact transacted business together, Dr. Tei could therefore not claim that he did not know Mr. Markin or Appellant and the nature of its business. Respectfully that was a clear finding that Dr. Tei was dishonest both in terms of Respondent's pleadings on the point and his own testimony in support thereof."*

The appellant further submits querulously in paragraph 44

> *"If indeed the alleged fraudulent misrepresentation about political connections was at the root of the execution of Exhibit 'A' then there was no earthly reason why a repetition of the same misrepresentation in particular, at the time that a real offer had been made by Attorney-General and accepted by Respondent, would induce Dr. Tei to execute yet another agreement based on the same misrepresentations of political connections, this time, for enhanced fees. It just does not make sense."*

24. What was then the basis for supposing that the Plaintiff's claim to being a financial consultant was fraudulent? As far as he was concerned, there was a valid contract made between them and he was entitled to the contract sum agreed. Further, even if the second Agreement marked 'Exhibit C' (hereinafter known as Exhibit C) was unenforceable, the first Agreement marked 'Exhibit A' (hereinafter known as Exhibit A) ought to be enforced.

Case for Defendant/Respondent

25. The Respondent submitted that sometime in 2005, Mr. Markin paid Dr. Tei a visit at his residence and informed him that he had links with some top Ministers in the New Patriotic Party (NPP) Government and that they had agreed to help him retrieve the money owed to the defendant. However, they were demanding some of the money as their share, but that the amount was so high that he would have to be paid 50% of the claim in order to take care of the demand of the said Government Ministers.

26. The respondent further submitted that Mr Markin made the following representations to him that induced him to sign Exhibit C.

> *a. that he (Mr. Markin) was a financial consultant and a broker (an assertion he had previously made to induce Dr. Tei to sign the letter dated 30th December 2004.*
>
> *b. that Plaintiff company was a financial brokerage firm (an assertion he had previously made to induce Dr. Tei to sign the letter dated 30th December 2004.*
>
> *c. that he had negotiated the payment of the claim with the then Chief of Staff, Kwadwo Mpiani and the then Minister of Foreign Affairs Nana Akuffo [sic] Addo as well as the Minister of Finance and Economic Planning the late Kwadwo Baah-Wiredu, and that payment will be made once they see that there was a written agreement between Defendant Company and Plaintiff for the payment of 50% of the claim to Plaintiff Company."*

28. The respondent's witness claims that as Executive Chairman of the company, he was persuaded by this allegation of influence to sign a contract committing 50% of the funds being claimed to the appellant Company. He claimed that Exhibits A and C were entered into by Mr. Dan Markin of the appellant company and Mr. R. S. D. Tei of defendant

company as friends, and in their personal capacities; and that the defendant company had no knowledge of them until sometime in 2008

29. The respondent contends further, however, that the appellant in no way worked to facilitate the payment of his claims by Government of Ghana in respect of the Keta Sea Defence Wall as he had undertaken to do.

30. The Respondent further contended that the agreements are illegal and therefore unenforceable because Dr. Tei was induced to enter into them based on fraudulent misrepresentation made by Mr. Dan Markin of using his political connections to influence the payment of Respondent's claim against the Government.

31. The High Court found that Exhibit C had superseded Exhibit A, but that Exhibit C was unenforceable, as having been procured by a fraudulent mis-representation perpetrated on the Executive Chairman of respondent by the representative of appellant company, Mr. Dan Markin. She also found that the testimony of the Respondent's Executive chairman was more plausible as his demeanour showed that he was a truthful witness.

32. The Court of Appeal affirmed the judgment and indicated that it was doing so based upon its deference to the lower court as a trial court. In consequence, the appellant had failed to dislodge the presumption of correctness in favour of the determination made by the trial court. The Court of Appeal also agreed with the trial court's finding that the Executive Chairman of respondent company was induced to enter into Exhibit C based on fraudulent misrepresentations made by Mr. Markin as to his political connections; and his ability to use those political connections to secure payment of the claim. It further held that the trial High Court was right in its holding that Exhibit C was against public policy and therefore unenforceable.

33. The respondent maintains that there is nothing wrong in the judgments of the two lower courts and that the appeal should be dismissed.

The Appeal

34. The appellant recognized the overlapping and verbose nature of the grounds and so argued six of those grounds (**a, b, c, d, e, f** and **g**) together, and then an alternative ground of '**h**' which sits alone. Ground '**g**' of the grounds of appeal is the omnibus ground, that the judgment is against the weight of the evidence. In consequence of the significance of that ground when pleaded, it will be addressed first, following which grounds '**a**-**f**' would also receive composite treatment. Ground '**h**', as the alternative ground, is argued last, and will be so discussed.

Ground 'g'

35. The appellant has pleaded in ground '**g**' that the judgment is against the weight of evidence. Having so pleaded, it is trite law that an appeal is in the nature of a re-hearing, and that this puts an obligation on an appellate court to review the entire proceedings to make up its own mind about the evidence led. See the oft cited authorities of **Tuakwa** v **Bosom** [2001-2002] SCGLR 61, **Agyeiwaa** v **P&T Corp** [2007-2008] 2 SCGLR 985; **Oppong** v **Anarfi** [2011] 1 SCGLR 556; **Empire Builders Ltd**. v **Topkings Enterprise Ltd. & 4 Ors** (2020) J4/10/2019 dated 16th December 2020; and **Gregory & Tandoh IV** v. **Hanson** [2010] SCGLR 971.

36. In **Tuakwa** v **Bosom** (supra), p.65 Akuffo JSC (as she then was), held that,

> *"an appeal is by way of a re-hearing particularly where the appellant, is the plaintiff in the trial in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the*

probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence".

37. **Oppong** v **Anarfi** (supra) also provided another opportunity for the Supreme Court to restate, the principle per Akoto-Bamfo JSC at p 565

> *"There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led. Even though it is ordinarily within the province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence."*

38. Therefore, the appellate court is obliged to give the evidence another look, and to analyse the entire record, but the appellant has the obligation to point out exactly what evidence had not been correctly assessed or applied in his favour. In **Djin** v **Musah Baako** [2007-2008] SCGLR 686, the Supreme Court held per Aninakwah JSC held at p.691

> *"It has been held in several decided cases that where an (as in the instant case) appellant complains that a judgment is against the weight of evidence, he is implying that there were* ***certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him.*** *The onus is on such an appellant to clearly and properly demonstrate to the appellate*

*court the lapses in the judgment being appealed against. (*emphasis supplied).

39. It is clear, therefore that it is in the many grounds of appeal filed, that the appellant has sought to point out what evidence should have been applied in his favour.

Concurrent findings

40. It is also trite law, that when an appellant seeks to attack concurrent findings of fact by the two lower courts, then he has an even loftier barrier to surmount. However, this is not an insurmountable barrier, and the Supreme Court has set down clear rules as to when concurrent findings of fact may be overturned by a second appellate court. See **Achoro** v **Akanfela** {1996-97] SCGLR 209; **Koglex Ltd. (No.2)** v Field [2000] SCGLR 177; **Takoradi Floor Mills** v **Samir Faris** [2005-2006] SCGLR 883; and **Ghana Commercial bank Ltd. (No 1) v Plange & Others (No 1); Ghana Commercial Bank Ltd (No 1) v Boateng & Others (No 1) (Consolidated)** [2013-2014] 1 SCGLR 743.

41. In **Achoro and Anor v Akanfela and Anor** (supra), the Supreme Court, speaking through Acquah JSC (as he then was) set down the grounds upon which an appellate court could depart from the concurrent findings of lower courts at pp. 214-215 thus:

"Now in an appeal against findings of facts to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which is peculiarly within the bosom of the two lower courts or tribunals, this court will not interfere with the concurrent finding of the lower courts unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts. It must be established, e.g, that the lower courts had clearly erred in

the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied.

42. Despite these principles, a second appellate court may interfere with the concurrent findings of the lower courts if an appellant can make a strong case for such action. See cases such as **Koglex Ltd (No.2)** v **Field** [2000] SCGLR 175; **In re-Korangteng (Deceased); Addo** v **Korangteng** (2005-2006) SCGLR 1039; **Fosua & Adu-Poku** v **Dufie (Deceased) & Adu-Poku Mensah** [2009] SCGLR 310; and **Ghana Commercial Bank Ltd. (No 1) v Plange & Others (No 1); Ghana Commercial Bank Ltd (No 1) v Boateng & Others (No 1) (Consolidated),** (supra)

43. In **Ghana Commercial Bank Ltd. (No 1)** v **Plange & Others (No 1); Ghana Commercial Bank Ltd (No 1)** v **Boateng & Others (No 1) (Consolidated**), (supra) the Supreme Court, per Adinyira JSC at p. 754, numerated instances where concurrent findings may be interfered with to include:

"(i) where the findings of the trial court are clearly not supported by the evidence on record or where the reasons in support of the findings were unsatisfactory; (ii) improper application of a principle of evidence or where the trial court had failed to draw an irresistible conclusion from the evidence; (iii) Where the findings were based on a wrong proposition of the law, such that if that proposition was corrected, the finding would disappear; (iv) Where the finding was inconsistent with crucial finding on record'.

44. In **Koglex Ltd (No.2) v Field** (supra) the Supreme Court stated per Acquah JSC p. 185 that

"Instances where such concurrent findings may be interfered with are:-

(i) where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory.

(ii) Improper application of a principle of evidence; … or where the trial court failed to draw an irresistible conclusion from the evidence….

(iii) Where the findings are based on a wrong proposition of law…

(iv) Where the finding is inconsistent with crucial documentary evidence on record.

The very fact that the first appellate court had confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment is like the trial court's also justified by the evidence on record. For an appeal, at whatever stage, is by way of re-hearing and every appellate court has a duty to make its own independent examination of the record of proceedings"

45. Again in ***Fosua & Adu-Poku*** v ***Dufie (Deceased) & Adu-Poku Mensah*** (supra), the Supreme Court per Ansah JSC held at p. 331

"A Second appellate court would justifiably reverse the judgment of a first appellate court where the trial court committed a fundamental error in its findings of fact but the first appellate court did not detect the error but affirmed it and thereby perpetrated the error. In that situation it becomes clear that the miscarriage of justice had occurred

and a second appellate court will justifiably reverse the judgment of the first appellate court.

Thus stated, it cannot be said an appellate court cannot set aside a judgment where two lower courts had made concurrent findings of facts.

It is thus the duty of an appellate court to re-hear the case and even to overturn concurrent findings of fact as appropriate. This court is, thus, obliged to re-hear the instant case and make up its own mind on the issues before it.

Grounds '**a**'-'**f**'

46. In these grounds of appeal which are argued together, the appellant raises issue with the assessment of evidence by the trial court, and the Court of Appeal's statement as regards the responsibilities of an appellate court. The Court of Appeal said:

"The matters that constitute the peculiar circumstances of any given case or matters that are played out before the trial court, they are therefore matters that are better appreciated by the trial court than the appellate court. Thus would explain the high level of respect that the appellate court accords the trial court's exercise of discretion with the evaluation process. We find therefore that where findings of fact made by the trial court have reasonable support from the record, the appellate court defers to those findings and does not disturb them even where on the evidence on record, the appellate court's conclusion would be different."

47. The appellant contends, in para. 33 of Statement of Case, that the Court of Appeal's position as stated, constituted "*an abdication of the appellate role*". These are indeed, harsh words for an appellate court. However, this biting criticism by the appellant reflects a misapprehension of the duty of an appellate court when embarking on its duty to re-

hear any case submitted to it. What the Court of Appeal stated, was correct in respect of its approach to findings of fact by a trial court. By its statement, the Court of Appeal was not saying that even if the finding could not be supported on the evidence available, that it still would never interfere, but that it would do so only in circumstances when other factors undermined the effect of the contemporaneous circumstances.

48. There is a long line of authorities that laid down the law. Thus, where an appellate court makes findings of fact that are influenced by contemporaneous circumstances such as the observable demeanor of witnesses, an appellate court would, of necessity, have to treat those findings with respect, and not interfere except for good reason. In ***Kyiafi*** v ***Wono*** [1976] GLR 463 at 466 Ollenu JA (as he then was) also counselled appellate courts thus:

> *"It must be observed that the question of impressiveness or convincingness are products of credibility and veracity, a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinion it forms of the veracity of the witness. That being so, the court of first instance is in a decidedly better position than the appellate court. Different considerations apply in the case inference to be drawn from established facts… these [principles] maybe summarised as follows: where the appellate court is satisfied that the reasons given by the trial court in support of the findings are not satisfactory, or where its findings are not satisfactory, or where it irresistibly appears to the appellate court that the trial court has not taken proper advantage of having seen and heard the witnesses then in such a case the matter will become at large for the appellate court in which case the appellate court is under a duty to give such a decision as justice of the case requires and if need be reverse the decision of the trial court and substitute its own*

judgment for it. In any other case, the appellate court should not interfere with findings of fact made by trial court."

49. Wise words of counsel indeed. Therefore, treating the observations and defensible conclusions of a lower court with respect by an appellate court cannot, by any stretch of imagination, be characterized as an "*abdication of the appellate role*". Rather, that approach is dictated by a responsible exercise of the power of re-hearing for one who was not present to make such observations directly, and which no written record could adequately capture.

Assessment of evidence

50. Following from the previous point, the Court of Appeal, commenting on the appellant's complaint about the manner in which the trial court assessed the evidence, came to its conclusions and stated that

> "*The choice the trial court herein had to make between the conflicting testimonies of Dr. Tei and Markin is a feature of a major responsibility trial courts assume at the end of trials.*
>
> *This is the responsibility of evaluating the evidence adduced for the purpose of resolving facts in issue and the facts relevant to the facts in issue. Indeed, a judgment cannot be considered satisfactory when it is not based on or arise from unresolved facts. In the process of resolving the facts, the trial court may have to decide which witness to believe and which statements of a witness it ought to accept or reject. Principles have evolved in the course of time that guide the court as it tries to make up its mind one way or the other on the evidence."*

51. The Court of Appeal then stated on pp. 16-17

"*We find therefore that where findings of fact made by the trial court have reasonable support from the record the appellate court defers to those findings and does not disturb them even where on the evidence on record the appellate court's conclusion would be different. … findings of fact made by a trial court are presumed to be correct and the party who disputes their correctness bears the burden of dislodging the presumption by demonstrating otherwise from the record.*"

52. Further Aduama- Osei JA speaking on behalf of the Court of Appeal stated

"I have read the record with particular attention to the testimonies of Dr. Tei and Mr. Markin as well as the trial Court's assessment of the testimonies. In respect of the trial Court's assessment of the testimonies, I have noted and pondered over its observation that it took cognizance of the likelihood of Dr. Tei misrepresenting the facts and had, for that reason kept him under close observation throughout the period of his testimony. As the trial court indicated its determination that Dr. Tei was entitled to credit was the outcome of that close observation. I think the conclusion the trial court arrived at in respect of Dr. Tei's testimony is plausible. In the absence, therefore of evidence from the record that the trial court's statement that it had tested the credibility of Dr. Tei's testimony was ill-founded, I should hesitate in substituting the trial court's conclusion with this court's conclusion. I will say in conclusion that the plaintiff has failed to dislodge the presumption of correctness in favour of the determination made by the trial court. The court will therefore defer to that determination even if on the record our own conclusion on the issue would be different."

53. In response to plaintiff's criticism of the Court of Appeal's deference to the trial court, the respondent cited ***In Re Okine (Decd) & Anor*** v ***Okine & Ors*** [2003-2004] SCGLR 582 in support. In that case, Prof Kludze JSC stated at p.607

> *"There is a long line of cases to the effect that, even if the appellate court would have come to a different conclusion, it should not disturb the conclusion reached by the trial court. This is because the trial court is presumed to have made the correct findings. Therefore, where the evidence is conflicting, the decision of the trial court as to which version of the facts to accept is to be preferred, and the appellate court may substitute its own view only in the most glaring of cases. This is primarily because the trial judge has the advantage of listening to the entire evidence and watching the reactions and the demeanour of the parties and their witnesses….. Therefore, unless it is apparent that this advantage of seeing the witnesses and evaluating their testimony for credibility has been woefully abused, the conclusion of the trial judge should be respected. In other words, where the evidence can reasonably support the conclusions of the trial judge, the appellate judges should not order a reversal just because their assessment and comparison, or their view of the probabilities, may be at variance with those of the trial judge. If the evidence can lead to two or more plausible conclusions, the conclusion of the trial judge should prevail, even though a different judge might come to a different conclusion".*

54. The appellant has taken issue with these statements from the Court of Appeal, particularly as regards the seeming inviolability of findings of fact made by a trial court. In reality, as has been pointed out in ***Koglex Ltd (No.2)*** v ***Field*** (supra), the Supreme Court per Acquah JSC has stated that the findings of fact by a trial court may be interfered

with by an appellate court, *"where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory."*

55. Thus, in ***In re Korangteng (Deceased); Addo*** v ***Korangteng*** (supra), when the Court of Appeal held that the findings of fact as made by the trial judge, were inconsistent with the documentary evidence, the Supreme Court agreed with the Court of Appeal and affirmed its decision. Therefore it is incorrect to state that an appellate court can never differ with the findings of fact of a trial court, but it accords the trial court's observation some amount of respect.

Assessment of credibility of witness

56. The appellant has also taken issue with the assessment of the evidence by the trial court. He submits that the trial court was wrong in placing so much weight on the demeanour of one witness, and holding that testimony as more credible than that of the appellant's witness. Does the appellant have reasonable basis for his complaint?

57. The Evidence Act 1975 (NRCD 323) provides a list of attributes that a trial judge may use in assessing the credibility of a witness. Section 80 (2) states as follows:

> *"(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to*
>
> *(a) the demeanour of the witness;*
>
> *(b) the substance of the testimony*
>
> *(c) the existence or non-existence of any fact testified to by the witness;*
>
> *(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;*
>
> *(e) the existence or non-existence of bias, interest or other motive*

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

The demeanour of a witness is thus an important element in assessing evidence, but it is not the only one.

58. In assessing the evidence that led the court to conclude that the contract was unenforceable on grounds of immorality, the trial Judge stated (At page 450)

"In respect of the pleadings as to the representations made by Mr. Markin, Dr. Tei testified that, Mr. Markin had informed him on several occasions that he had seen some government officials who had assured him that they could intercede to get the defendant's claim settled. He said he signed Exhibit C because Mr. Makin told him he had to show the agreement to those officials to assure them that they would be paid.

59. The trial judge further subjected the quantum of the plaintiff's claim to examination and said (page 451)

"The Plaintiff had also pleaded that the increase was in recognition of its effort and competence. I suppose that this relates to work done by the plaintiff before the second agreement was signed. The question therefore arises as to exactly what financial and consultancy services the plaintiff had provided before Exhibit C was signed to warrant the considerable increase."

The trial Judge was unable to accept the appellant's version because she could not believe his services were worth that much.

60. When the trial Judge made this statement, it became clear that there was more afoot than an assessment of what sums the plaintiff had charged.

> *"There are marked similarities in the agreements which are the subject matter of this suit and the agreement between Faroe Atlantic Company requested by Dr. Tei and the Plaintiff. Plaintiff's transaction in the Faroe Atlantic and Delta Foods Limited were introduced to show that plaintiff had been providing consultancy services for Dr. Tei prior to the agreements in this suit. However, an important point that came out of the Faroe Atlantic issue is that similar representations about political connections were made by the Plaintiff which came to nothing. That is the only way to explain an agreement made in respect of a case being handled by the late Mr. Peter Ala Adjetey which Faroe Atlantic had lost before the Supreme Court. Dr. Tei said the Faroe Atlantic agreement was signed after Mr. Markin had made representations of seeing influential people to reverse the Supreme Court decision. He said Mr. Markin was promised US$1,144,660 per Exhibit T if he pulled it off but the money was not paid because the plaintiff failed to deliver.*

61. This was a very telling observation, indeed, by the trial Judge. It showed not only that the Chief Executive of the appellant Company and the Executive Chairman of the respondent Company were not the casual acquaintances that the respondent witness made them out to be, but that the agreement in the instant case was not the first one between them either.

62. The evidence showed that they had previously worked together on a case, *Faroe Atlantic*, that had been lost by Dr. Tei. In that instance, the plaintiff was promised a fee in excess of one million dollars if he could use the "political connections" he claimed to have, in favour of Dr. Tei and his *Faroe Atlantic*. He was unable to deliver, and so, as Dr Tei testified, the money was not paid. If Dr. Tei, having dealt with the plaintiff in the earlier case of *Faroe Atlantic* during which he had made the same boasts but had been unable to deliver, how could he have executed a later agreement based upon the same boasts if he did not have cause to believe plaintiff truly did have those connections, and that some difference in arrangements had occurred, making it now likely that there would be a different result?

63. Therefore from such evidence, the trial Judge drew the following conclusions on the credibility of the witness thus:

> *"I do recognize that Dr. Tei could have motive for misrepresenting the facts. I therefore assessed his credibility carefully in the three days that he was in the witness box and have carefully considered the evidence. I found him to be an honest witness and I am convinced of the truth of his testimony and find as an act that Mr. Markin made representations to Dr. Tei about "using" political connections and paying government official to push through defendant's claim, representations which induced the defendant to enter into the agreement Exhibit C.*

64. This conclusion was fiercely criticized by the appellant. Although the demeanor of the witness was not the only consideration the trial court used in evaluating evidence, it did heavily influence the conclusions drawn. Even though one can question the honesty of someone who enters into an agreement to pay $1 million to another to use his political connections in his favour as in the *Faroe Atlantic* case, the court had the difficult task of choosing which testimony was the more credible, and it did so.

65. The appellant rightly points out in paragraph 47 that the reliability of a witness is "*actualised by testing the credibility and testimony of the witness whose evidence is under consideration against established facts and other testimony on record*." Indeed, there would have been nobody answering to the epithet "convincing liar", if there was never occasion when a person with a demeanor of credibility was contradicted by the nature of the information he was putting forward.

66. The words of Apaloo JA (as he then was) in **Logs and Lumber Ltd** v **Oppon** [1977] 2 GLR 263 CA at page 270 could not have put the case better. He outlined the circumstances when a court could place reliance on the testimony of the single witness if the witness is

1. an honest witness;
2. there is nothing in his background to cast doubt on his veracity;
3. that he has no motive to misrepresent facts or be biased, and
4. his evidence is in no way tainted i.e. he is not an accomplice."

67. These grounds are surely not intended to describe the testimony of a party to a suit without resort to further proof. In **Mansah & Anor v Donkor** [1980] GLR 825 per Korsah J (as he then was) at p. 830, the judge observed

> *"I see no reason why the foundation for an impression formed by a court of record should escape the rule that the court must furnish the reasons for its decision. 'To my mind, it is not sufficient for a court to say that 'from the demeanour of the witness the court finds the testimony unreliable.' The demeanour of the witness the court finds the testimony unreliable." The demeanour which actuated this impression must be expressed.' It must be stated whether the witness was over-zealous on behalf of the party; exaggerating the circumstances; assuming an air of bluster or defiance;*

answering without waiting to hear the question; forgetting facts where he would be open to contradiction; minutely remembering others which he knows could not be disputed; reluctant in giving adverse testimony; replying evasively; pretending not to hear the question for purposes of gaining time to consider the effect of his answer etc. To give a carte blanche to a court to reject or accept the testimony of a witness upon a reason that is unexpressed would, in my view, be to pander to injustice."

68. The demeanour of the witness kept "under close observation" may have been consistent with sincerity, but did the evidence emanating from him bear out that impression of sincerity? The trial Judge seemed to think so, and the Court of Appeal had no basis to disagree.

69. The trial Judge, again, justified the basis of her preference for the testimony of the respondent' witness. She argued thus

"Even if one accepts that the plaintiff provided genuine financial consultancy and brokerage services, there is still no credibility of the alleged fact, and there I am not persuaded that the touted services are the genuine basis of the enhanced fees. The prospect of excessive profit has been held to be a factor that might be properly taken into account in deciding whether a commercial interest was genuine."

70. One may disagree with these conclusions. In the "wheeler-dealer "world of "financial dealings" there is nothing strange about such an agreement. If a businessman who testifies himself that "*originally, they should have given us US$10,000,000.00 that was the cost of the job*" but we had put up a claim of US$12,000,000.00" would he be a stranger to "*excessive profit*"? Indeed his willingness to compromise the claim and accept the rather paltry sum of $2,000,000 because he was under pressure from the Banks,

suggests that what was owed to the bank was considerably less than the $12,000,000 claimed for the job. Anyway, by the conclusion the court came to, it accepted the evidence, and therefore held that Exhibit C was induced by representations made by Mr. Markin as to his political connections and his intention to use such connections to secure payment of the claim.

71. For a person who, far from being a stranger to the courts, had previously litigated two major cases against the Government i.e. *Delta Foods* and *Faroe Atlantic* respectively, in the capacity of Executive Chairman, his apparent naivety seemed put on. The decision that rested on his demeanour as assessed by the trial Judge upon three days of testimony in the witness box and the trial judge cannot be faulted for being persuaded of the truth of his testimony. If all things considered, the judge found him a more credible witness in comparative terms, than the other party, one cannot quarrel with that conclusion, even if one may disagree, somewhat. The Court of Appeal was not wrong in supporting the conclusion of the trial judge, and in dismissing the appeal.

Fraudulent Misrepresentation

72. Was the respondent witness induced by fraudulent misrepresentation to sign the contract? What then is a fraudulent misrepresentation? A representation is said to be fraudulent when it involves a statement of fact which the maker knows to be false or at least in which he has no belief that it is true. It must have been made (i) knowingly; (ii) without belief in its truth; and (iii) recklessly, careless whether it be true or false. As Lord Blackburn explained in **Brownlie** v. **Campbell** (1880) 5 App Cas 925 at 950

> " *[W]henever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; … when a statement or representation has been made in the bona fide belief that it is true, and the person who has made it afterwards comes to find out that it is untrue, and discovers what he should have*

said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too…"

73. It is not enough that the misrepresentation was made. It must have operated on the person's mind and caused him to embark on a course of action based on that understanding. As Christine Dowuona-Hammond the learned author of '*The Law of Contract in Ghana*' Frontiers Printing and Publishing Company, Accra 2011 Chapter 11; p. 219, explains,

"An operative misrepresentation consists of a false statement of fact made by one party to another, before or at any time of the making of a contract which is intended to and does in fact induce the other party to enter into the contract."

Thus the misrepresentation by the party concerned may be in words or by conduct; the statement must be one of an existing fact ie relating to a past or present state of affairs; it must be addressed to the party who was misled; and it must have operated on the mind of the person to induce him to enter the contract. See also: ***Smith*** v ***Chadwick*** (1884) 9 App. Cas. 187.

74. However, when the person is also claiming that the representation of "political connections" was fraudulent and that he was induced to sign by the fraudulent misrepresentations of political connections then a person's credibility is stretched somewhat. This is because there was evidence that the witness had previous experience of signing such an agreement with appellant; and that the appellant could not deliver on it; and yet the witness could be induced to sign two more such agreements with the same

person? If misrepresentations of "political connections" had been made in 2004, to no good end, what was the basis for continuing to believe in same and acting on the belief more than a year later, even when there appeared to be no track record of success? This clearly does not accord with logic, and makes his claim of having relied on the "fraudulent misrepresentations" of "political connections", difficult to credit. In short, the misrepresentations may have been made, but they did not induce the Executive Chairman to enter into those agreements.

75. In any case, there was evidence that they had more than a passing acquaintanceship. The appellant cited the cross-examination of the witness Dr. Tei and the revealing answers he gave.

> *Q. Prior to this Exhibit "Q" Uniex have been working with you towards claiming the money for the contract relating to energy between Faroe-Atlantic and Government of Ghana, is that correct?*
>
> *A. He never worked, if he had worked, he would have been paid. He tells stories and at the end of it, no result. He was to go and see Chief Justice Acquah, he was to go and see the President and nothing resulted in any fruitful way. Peter Ala Adjetey was handling the matter in court and he approach [sic] us that we could do it a court [sic] short. He told me to sign the agreement they let them pay us the money. I signed but nothing came of it.*
>
> *Q. The time you signed this agreement, you had lost the case at the Supreme Court, you asked him to make a research from Parliament for you and find out whether your lawyers have brought your case or not, is that not the basis of this agreement.*

A. It was not the basis of this agreement.

Q. As a result of this UNIEX generated a report and gave to you?

A. He brought this report but nothing fruitful came out of it and he demanded no paper claim, no money was paid."

76. Upon further cross-examination Dr. Tei remained resolute about the obvious untruth that, it was Mr. Markin's constant fraudulent touting of political connection that enticed him to engage the appellant and its representative Mr. Dan Markin.

Dr. Tei testified thus:-

Q. I am suggesting to you that you tasked Uniex to undertake these tasks not because of any representations made to you in relation to a politician?

A. It was all about representations and politicians, he said he was a politician, he was with the past Government and that he was an adviser to both past and present Government."

77. It is hard to credit the fact that one who had had dealings with the respondent on previous occasions by relying on his claims of political connections and he had failed to deliver whatever was promised, could be induced by him with the same "boasts", to put his signature to a new and enhanced agreement of Exhibit C even after he had failed to deliver on the original agreement, Exhibit A. Did he really believe what he now calls appellant's "empty boasts" enough to put his hand to two contracts with the same personality? We think not.

78. The respondent also quotes the trial court's judgment that

"What was unearthed with absolute certainty was the fact that the Respondent had on its own taken monumental steps toward pursuing its case such that the only logical conclusions to be drawn regarding the Executive Chairman's decision to enter into Exhibits A and C was some promise of 'political connections' which could potentially fast track the payments of the Respondents claim by the Government."

It was hard to disagree with the trial judge that, objectively, there had to be an undisclosed reason for the Executive Chairman to enter into two separate agreements even after the first agreement yielded nothing.

79. What could cause a man of the world and an experienced businessman, to enter into an agreement with an old acquaintance and business associate after a first agreement of the same kind had ended on an unsatisfactory note? It is even more incomprehensible and bizarre that the second agreement had more enhanced benefits than the first one, and yet the other party had not demonstrated any more capacity to deliver on the agreement, than on the previous ones. What was the real nature of the agreement? There certainly is more to this story than meets the eye, and the real truth may never be known.

80. The appellant denies that he made any fraudulent misrepresentations and contests the allegation that he did no work pursuant to the contract. He gave some evidence of steps he took under the contract to ensure a successful outcome. Under cross-examination, Mr. Dan Markin the following exchange took place

Q. With respect to Rockshell what was the financial consultancy that you were going to do for Rockshell?

A. We analysed the financial claims that ought to be done, because as at then they looking at simple interest. We told them that by their own contract, it stated that the prevailing Bank regulations must apply to the contract.

We took the contract, analyzed it and told them what it ought to be and sometimes if you want to look at the present value of the sum that existed as at then including interest"

81. The trial Judge then made findings of facts as follows:-

"I have weighed the facts and probabilities of the two versions, and I am convinced that Dr. Tei's account of what provoked the execution of Exhibit C is the more reasonable and plausible account. I find and hold that the evidence is of sufficient weight to satisfy the burden of persuasion."

The Court of Appeal stated that even if they would have decided differently on the facts they would defer to the analysis of the trial judge. It was a correct statement of law and we cannot disagree.

Was the Board aware of the agreement?

82.The respondent tried to wiggle out of the liability incurred under the contract by denying knowledge and approval of the acts of the Executive Chairman. According to the respondent and its witnesses, the Executive Chairman himself and the company's Finance Director, the Board had no knowledge of Exhibit A and Exhibit C until December 2008 when plaintiff made the demand for payment for his services.

83. This evidence was undermined by a document marked 'Exhibit 8', dated 22nd January, 2007, and signed by Dr. Tei , the witness himself. In that letter, "Exhibit 8", Dr. Tei stated

"consequently on 12th January 2007 the Board of Rockshell International has resolved and I have been instructed to bring the following to your notice:-

1. that the agreement dated 13th January 2006 is abrogated forthwith;

2. that Uniex shall cease forthwith any representation of Rockshell International in this matter;

3. that henceforth Rockshell International shall be represented by two retained lawyers only; and

4. that upon receipt of payment of the claim by the Government, Rockshell International shall make reasonable payment to Uniex for its efforts to date."

That letter, thus, purported to abrogate "*the agreement dated January 2006*"; and to offer terms of payment, citing a Board resolution of 12th January 2007. Which agreement was the Executive Chairman referring to when, in the witness box, he claimed to have signed the subsequent agreement when blind? When the appellant queries in paragraph 68 of the Statement of case

"If the Respondent's Board of Directors was not aware of Exhibit C until December 2008 then what other agreement (signed in 2006) was Exhibit 8 seeking to terminate in January 2007?"

It is hard to disagree with the conclusion drawn by the appellant.

84. The trial judge rightly discounted the evidence of the respondent that the company was not bound by the agreements because the board was not privy to the signing of Exhibits A & C.; and that the Board only got to know of the agreement in 2008. The learned trial Judge stated thus

"Dr. Tei is the Executive Chairman of the defendant company, a director and chairman of the Board of Directors. He nominates directors to serve on the board. He said he has managed the company for the past 40 years and is the majority shareholder. I would therefore think that his acts

bind the company as provided in Sections 137 and 142 of the Companies Act…..

I accordingly reject defendant's argument that Exhibits A and C are matters between individuals and hold that the agreement do qualify as documents executed between two corporate entities which will be binding on the defendant but with this caveat – in the event that there are no vitiating factors invalidating them."

85. This determination made by the trial judge, again calls into question the credibility of the Executive Chairman. Was he telling a lie when he stated that in the letter that the board had resolved, and he had been instructed to bring "*the information to the notice of the appellant*"? The fact that he could give testimony that contradicted the contents of a letter he himself had signed should have caused the trial court to be more wary of describing him as an "honest" witness. The caution level should have been raised further when another witness denied that any Board meeting had taken place during that period or any Resolution tabled and adopted on this matter. Which of the two witnesses was speaking the truth?

86. During the proceedings, the respondent oscillated between two defences: that the contract was not binding on it, because its board did not know of it; and that the contract being founded on immorality, was unenforceable. Although the trial court made definite findings about knowledge of the agreement that the Board must have had, respondent still persisted in that line of argument in this appeal.

87. The Court of Appeal also upheld the defence of unenforceability on grounds of public policy, leading the appellant to train all his guns on the supposed evidence of immorality underlying the contract that was sought to be enforced, that the trial court accepted.

Agreements that are unenforceable on grounds of immorality (*ex turpi causa*)

88. An agreement that is valid may still be unenforceable on grounds of public policy if there are vitiating factors that render it improper for the law to lend its weight to its enforcement.

89. At common law, contracts deemed 'ex turpi causa', i.e. founded on immorality, are considered illegal and unenforceable. Such a contract may be contrary to statute; promote sexual immorality, or advance objects that are contrary to law or to moral prescriptions. Whatever be the basis of the "immorality" tag, it is against public policy for the law to lend its support to its enforcement, as that would be tantamount to shooting itself in the foot. See discussion in Jill Poole, *Casebook on Contract Law* (13th Ed) Oxford University Press 2016, chapter 16; also Christine Dowuona-Hammond, *The Law of Contract in Ghana*, supra, pp. 250-272. In the *locus classicus* of ***Holman*** v ***Johnson*** (1775) Comp 341, Lord Mansfield explained the rationale underlying the principle *ex turpi causa* at p. 343 thus:

> *"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal fact. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law in this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.*

90. The effect of illegality on the enforceability of a contract which was executed in a manner that did not comply with existing statute came up in ***City and Country Waste Ltd*** v ***Accra Metropolitan Assembly*** [2007-2008] SCGLR 409. In that case, the plaintiff was a limited liability company which carried on the business of waste collection, disposal and management and also provided landfill services for the city of Accra. The defendant, a statutory body under the Local Government Act 1993, Act 462, entered into an agreement with the plaintiff in 1997, for waste disposal and landfill service within the city of Accra. The agreement had a lifespan of seven years from the date of its execution; and further provided that the parties had the option of renewing for a further seven years. The plaintiff provided services under the contract for two years, when the defendant wrote a letter terminating the contract. The plaintiff brought action against the defendant for breach of contract in June 2002, claiming, inter alia, an order to compel the defendant to pay for services rendered and damages for contract. The defendant resisted the action contending that the contract was contrary to its Standing Orders as well as its parent Act, which mandated the use of Tender Boards in the formation of such contracts. The defendant therefore counterclaimed for a declaration that the procedure adopted was contrary to law and therefore the contract was a nullity as the breach of its statute rendered its enforcement contrary to public policy. On the evidence, the trial court found that the contract was illegal because its formation contravened statute, but exercised a discretion to make some award to the defendant for the services performed and also damages. On appeal to the Court of Appeal the court reversed the decision of the High Court and held that the agreement was legal and enforceable. The defendant/appellant brought this appeal to Supreme Court, contending that the contract was contrary to statutory provisions and therefore illegal. Although the Supreme Court dismissed the appeal, it specifically reversed the Court of Appeal's decision to the effect that the contract was legal and enforceable; and held per Date-Bah JSC at p. 425

> "*The doctrine of illegality of contract offers a defence against the enforcement of the obligations of a contract. This proposition is often expressed in the Latin maxims ex turpi*

causa non oritur actio, and pari delicto potior est condition defendentis. However, the rules relating to when a claim of illegality will be upheld by the courts as such a defence are complicated and confusing."

91. Again, a contract with illegal objects such as the commission of a crime cannot be enforced by either party. Where the parties enter into an agreement to do an act that amounts to a crime, the contract is unenforceable. The point is made by the English Court of Appeal in **Archbolds (Freightage) Ltd** v **Spanglett Ltd** [1961] 1 Q.B. 374 (CA), by Lord Justice Pearce who stated the law thus

"If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law."

92. Here lies the answer to the riddle posed by the respondent when he pleaded fraudulent misrepresentation. He had agreed with the appellant to pay bribes to government officials. This amounted to a conspiracy to corrupt public officials and was plainly illegal. That being the case, no court would render assistance to the appellant in the endeavor to collect on the agreement. The respondent's Executive Chairman tried to look good by testifying that he had been induced by fraudulent misrepresentation to enter into the contract with the appellant, and so would not pay him. In reality, the aim of the respondent's witness was to provide money for purposes of corrupting public officials, which was a crime, and such an agreement would be unenforceable by either party. There was therefore more than one ground to hold that the agreement in the instant appeal, was against public policy and was unenforceable.

93. Another circumstance when public policy could defeat the enforceability of an otherwise valid contract, is where the contract is based upon immorality, sexual or otherwise, such as when it is found to be champertous. What is a champertous agreement and why is it considered immoral?

94. 'Champerty' is defined in *Black's Law Dictionary* 7th Edition (Brian Garner editor in Chief) West Group Minn 1999 p. 224 in two senses:

> *1. "An agreement between a stranger to a law suit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds.*
>
> *2. "The act or fact of maintaining, supporting or promoting another person's lawsuit".*

'Champerty' is also sometimes referred to as "Maintenance" which is defined in Black's Law Dictionary, supra at p.965 as *"Assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case, meddling in someone else's litigation".*

95. At common law, the pursuit of litigation, even by lawyers on contingency basis, is contrary to public policy and unenforceable. Although this position has been altered by legislation in some jurisdictions, the rule remains in respect of other persons outside the legal profession. In Cheshire, Fifoot and Furmston's *Law of Contract* (14th Ed.) Butterworths, Lexis Nexis Reed Elsevier (UK) Ltd. 2001 p. 419, The authors, define 'champerty' or 'maintenance' thus:

> *"'Maintenance' may be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. Champerty is where there is further agreement that the person who gives the aid shall receive a share of what may be recovered in the action."*

Treitel, the Law of Contract also defines it thus:

> *"It has been said that to be champertous, the agreement must amount to 'wanton or officious intermeddling with the disputes of others', to which must be added the notion of a division of the spoils."*

See *Treitel, the Law of Contract* (14th Edition) Edwin Peel (ed. Sweet & Maxwell, (Thompson Reuters) London, 2015 Chapter 11-012 p. 536;

96. In the English case of ***Re Trepca Mines Ltd (Application of Radomir Nicola Pachitch*** [1962] 3 ALL ER 351, a High Court in the United Kingdom upheld the rejection of the applicant's proof in the winding up of a company. Dissatisfied, and wishing to appeal against the decision of the High Court, the applicant entered into a champertous agreement with a third party from France. That third party was to provide funds for the appeal and would thereupon be entitled to a percentage (i.e. 25%) of what should be recovered if the appeal was successful. The applicant also retained a Solicitor who was then instructed by him to act in accordance with the third party's instructions. The third party paid the Solicitor four thousand Pounds sterling for purposes of pursuing the appeal. The champertous agreement between the applicant and the third party was signed in the Solicitor's office, and so he was aware of the arrangements. Eventually, the appeal was won and the order of the High Court was discharged. The Solicitor later delivered a full bill of costs, and the applicant resisted payment, arguing that the champertous nature of the agreement of which the Solicitor was fully aware, made all those costs non-recoverable. On this point, inter alia, the Solicitor brought the instant appeal.

97. Lord Denning M.R, dismissing the appeal held at p. 355 E) that,

> *"Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse…*

> *There is however one species of Maintenance for which the common law rarely admits of any just cause or excuse, and that is Champerty. Champerty is derived from campi partition (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds… The reason why the common law condemns champerty is because of the abuses to which it may give rise.* ***The common law's fears that the champertous maintainer might be tempted, for his own personal gain to inflame the damages, to suppress evidence or even to suborn witnesses.*** *These fears maybe exaggerated but be that so or not the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law.* (emphasis supplied.)

98. Had Lord Denning been operating in our jurisdiction, he might have added "corruption of public officers and other corrupting influences" to the list of the "common law's fears" in justifying why clamping down on champerty or maintenance was good public policy.

99. In the instant case, the Court of Appeal speaking through Aduama Osei JA opined that

> *"It is clear to me, from the arguments advanced in this appeal that the whole point in this appeal is about the trial Court's evaluation of the evidence. As Counsel for the Plaintiff noted in his filed submissions, offering money as an inducement for some gain is a crime. I think we can also so agree that it is against public policy for a person to be hired for money or valuable consideration, where he has access to persons of influence, to use his position to procure a benefit from the Government. The Plaintiff's grievance in this appeal is not about the trial court's decision as to what constitutes an*

agreement against public policy and the enforceability of such an agreement. It is about the trial court's evaluation of the evidence, as a result of which, in its view the trial court wrongly determined that agreement or agreements in issue were against public policy and therefore unenforceable."

The Court of Appeal therefore affirmed the findings of the trial court.

100. A lot of ink was spilt on the proof or otherwise of the immoral assurances and political connections that the appellant was said to have offered as the basis of the two contracts. Yet, in reality, the conclusion of the trial judge and Court of Appeal remain unassailable. This is because, as noted by the Court of Appeal, the terms of the two agreements were champertous. With that characterization, whether or not the contract had been motivated by promises of corrupt political connections, or not, ceased to matter.

101. Was the agreement, in fact, champertous and so unenforceable? The evidence in the instant appeal shows that, the plaintiff admits to being the one who advanced the filing fees and even filed the documents on behalf of respondent. What was the plaintiff's interest in doing this when he was not a lawyer or a lawyer's clerk? He was stirring up litigation under the guise of providing "financial consultancy" (whatever that meant), which he claimed to be his line of business. However, no proper business could be founded on the giving of encouragement to his clients to engage in litigation, or to the interference in proceedings the clients had already lodged in the courts. The agreement was clearly champertous and therefore unenforceable.

Ground (**h**)

102. The appellant argues an alternative ground '**h**', seeking to cut his losses and enforce Exhibit A. Although the trial court had held that Exhibit A had been superseded by Exhibit C and the Court of Appeal had affirmed the findings, the appellant still believed that Exhibit A was severable from Exhibit C and could be enforced all on its own, This was because he believed that it was different in kind from the contract in Exhibit C, and so even if Exhibit C had been held to be unenforceable on grounds of immorality, that would

not affect Exhibit A. Unfortunately, the contract in Exhibit A, even if it were considered to be still in existence, was not different in kind and quality. Therefore, as demonstrated below, the issues that affect Exhibit C in respect of illegal and champertous agreements, affect Exhibit A as well.

103. This means that Exhibit A could have no existence separate and independent of Exhibit C when it superseded it anyway, and extinguished its life. The agreements were made in furtherance of a criminal conspiracy to corrupt public officials and were also champertous. Consequently, neither was unenforceable.

104. The Court of Appeal was right to uphold the judgment of the trial court. The appellant is not entitled to any of his reliefs. This appeal fails in its entirety and is accordingly dismissed.

PROF. H.J.A.N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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