**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT**
**ACCRA, A.D.2011**

CORAM: G.T. WOOD (MRS) CJ (PRESIDING)
J.DOTSE JSC
ANIN-YEBOAH JSC
P.BAFFOE-BONNIE JSC
B.T ARYEETEY JSC

CIVIL APPEAL
NO. J4/5/2011
29TH JUNE, 2011

**AFRICAN AUTOMOBILE LIMITED - PLAINTIFF/RESPONDENT /RESPONDENT**

**VRS;**

**TEMA OIL REFINERY - DEFENDANT/APPELLANT/ APPELLANT**

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# J U D G M E N T.

## JONES DOTSE JSC:

This is an appeal by the defendants/appellants/appellants, hereafter referred to as the Defendants against the judgment of the Court of Appeal, dated 11th March 2010, which also dismissed an earlier appeal filed by the Defendants against the decision of the High Court dated 15th August 2008 in favour of the Plaintiffs/Respondents/Respondents hereinafter referred to as Plaintiffs.

The defendants it must be noted lost the action at the High Court and although lost again at the Court of Appeal, had a significant part of the awards reduced downward in their favour.

**BRIEF FACTS:-**

The plaintiffs herein won a tender to supply 600,000 litres of *"marine mix"* to the defendants for the manufacture of pre-mix fuel for use by outboard motors.

The contract document was tendered and marked as exhibit A and is dated 22nd August, 2002. It is significant to note that the contract price for a litre of the marine mix was denominated in Euro and was quoted at €1.63 per litre, whilst Goil Oil Limited, the other competitor and supplier had their price quoted as €1.71 to a litre and were contracted to supply 1,000,000 litres to the defendants.

The plaintiff proceeded to supply the marine mix to the defendants according to the sample quality that they were supplied with by the defendants.

The plaintiffs successfully made three (3) deliveries of the marine mix and were paid as per the contract terms set out in exhibit A.

The defendants however refused to accept the 4th delivery of the plaintiffs and this resulted into series of meetings between the parties herein aimed at resolving the differences i.e. reference meetings held on 16/2/2005 and 1/3/2006 respectively.

Eventually, the plaintiffs were permitted to supply the 4th and other deliveries to the defendants after almost two years of stoppage by the defendants arising from the conduct of the defendants in rejecting the deliveries.

One would have expected that, the supply and receipt of the subsequent deliveries by the plaintiffs to the defendants would have ended matters, but that was not to be.

The refusal of the defendants to pay for the 4th and subsequent deliveries as per the prices contained in exhibit A but on different rates as contained in exhibit 3 led the plaintiffs to institute an action in the High Court in which they claimed the following reliefs:-

a. Recovery of the outstanding sum of euros 144,424.83 or its cedi equivalent being monies due plaintiffs from the supply of marine mix to defendants and which defendants have failed to pay after several persistent demands.

b. Interest on the afore-said sum from 31st October 2006 to date of final payment.

c. Damages for breach of contract.

d. A mandatory order directed at the defendants to furnish plaintiffs with a new delivery schedule on the balance of deliveries.

e. Any other reliefs

f. Cost including Solicitor's fees.

The High Court after a full trial delivered judgment in favour of the plaintiffs briefly in the following terms:-

i. "114,424.83 euros or its selling rate in cedis as outstanding payments for the supplied marine mix and drums with interest from 31st October 2006 to date of payment.

ii. 71,394 euros as loss of profit on the 146,000 litres of oil that plaintiff was prevented from supplying with interest from March 2006.

iii. Special damages of 230,000 euros as costs that should reasonably have been in contemplation of defendant when it prevented the performance of this contract. Interest on this sum runs from date of judgment.

iv. General damages of 500,000 euros.

v. Defendant is also ordered to pay plaintiff's legal cost which is set at 30,000 euros. Court costs is set at GH¢3,000".

As stated earlier, an appeal filed by the defendants against the High court judgment to the Court of Appeal even though was dismissed had some significant reductions in the awards made at the High Court level.

On the 71,394 euro compensation for loss of profit on the 146,000 litres of oil that the plaintiff was initially prevented from supplying, the Court of Appeal held thus:-

1. "The appellant is equally ordered to take delivery of the remaining balance of 108,000 litres within the same period and on the same terms i.e. at euro 1.63 per litre with interest from March 2006 to the date of payment.

2. On the award of General and Special damages, the Court of Appeal set aside the award of Special damages of euro 230,000 awarded against the defendants as unproven, just as it did in respect of the 71,394 euros compensation as loss of profit.

3. The Court of Appeal varied the 500,000 euro general damages to 350,000 euro.

4. The legal and court costs of euro 30,000 awarded by the trial court was also reduced and substituted by an award of GH¢6,000.00.

5. Costs of GH¢4,000 was awarded against the defendants in the Court of Appeal.

As the defendants were still dissatisfied with the judgment of the Court of Appeal, they further appealed to this court on 24/5/2010 with the following as their grounds of appeal:

i. "The judgment is against the weight of evidence.

ii. The learned Justices of the Court of Appeal erred on the facts, by holding that there is a purported balance of "108,000 litres" of marine mix on exhibit A to be delivered by Respondents and further that 146,000 litres of marine mix was allegedly rejected by the appellant, upon delivery by respondents in March 2006, there being no such evidence on the record.

iii. The order by the learned Justices that appellants pay interest from March 2006 until final payment, on the above-named 108,000 and 146,000 litres of marine mix respectively was perverse and erroneous.

iv. Their Lordships erred in law and deviated from the settled authorities that a claim for damages for breach of contract would only entitle a plaintiff to nominal damages, awarding to respondents, the sum of €350,000 which they described as "substantial damages" and contradicted themselves with the following statements:

> "There is thus abundant evidence to warrant an award of substantial damages. Accordingly, I will set aside the sum of €500,000 and substitute an award of €350,000 as substantial damages against the appellants."

v. The Court of Appeal erred in the assessment and evaluation of the pleadings, evidence and exhibits and as a result came to wrongful conclusions, which are not sustainable on the facts, inter alia, "there was no response to the two letters, exhibits 4 & 6 which are same as exhibits S & T. Nevertheless the Appellants on 7th January, 2006 issued exhibit U authorizing the payment of €76,186.20 in favour of payment of 240 drums of marine mix as per order 40004112op.

vi. The Court erred in failing to find that the High Court could not enter "judgment for the sum of €4,320 damages for the 540 drums in which the marine mix was delivered" since the respondent failed to discharge the burden of proof as to the market value thereof, if at all.

vii. The award of "costs of GH¢4,000" in the favour of respondents against defendant/appellant/appellants was excessive and unwarranted, against the background inter alia, of the court setting aside nearly €500,000 awards and costs out of a total sum of €945,818.83 awarded by the trial judge, which meant that the appeal was very necessary."

We would have preferred dealing with the grounds of appeal in the sequence in which they had been filed. But since learned counsel for the defendants argued them randomly, we will also use the same format, hoping that by the time we are through with some of the grounds of appeal the other grounds would have been dealt with and there would be no real need to repeat the same arguments.

**GROUND V OF APPEAL**

**v. The Court of Appeal erred in the assessment and evaluation of the pleadings, evidence and exhibits and as a result came to wrongful conclusions, which are not sustainable on the facts, inter alia, "there was no response to the two letters, exhibits 4 & 6 which are same as exhibits S & T.**

**Nevertheless the Appellants on 7th January, 2006 issued exhibit U authorising the payment of €76,186.20 in favour of payment of 240 drums of marine mix as per order 40004112op.**

The main contention of the defendant under this ground of appeal is that, there had been a successful settlement of the breakdown of the original contract between the parties. The defendant therefore made heavy weather in the failure of the trial High Court and the Court of Appeal to accept the fact that, following the breakdown of the terms of agreement contained in exhibit A, the parties negotiated and settled on a new agreement as contained in exhibit 3.

From the facts, it is clear the parties agreed on the contents of exhibit A, which is dated 22nd August, 2002 and is a purchase order from the defendants to the plaintiffs for the supply of marine mix of 600,000 litres at 1.63 euros per litre.

The defendant contends very strongly that the agreement contained in exhibit A under which the earlier deliveries had been made had been settled by exhibit 3.

From the appeal record, it is clear that Dr. K. K. Sarpong, the Managing Director of the defendants at all material times in his evidence in chief and under cross-examination made it quite clear that the meeting of 16th December 2005 which was aimed at resolving the impasse between them was inconclusive.

The following question and answer by Dr. Sarpong would make the position very clear:

> *Q. "Now did you agree to the content of exhibit K and Q what was your reaction to these letters.*

A. *"My Lord subsequent to this letter I came to the conclusion that TOR and African Automobile have not reached agreement at the meeting of 16th December, so I decided to convey a further meeting, between the parties".*

Further to the above, the witness Dr. Sarpong testified as follows:-

*"We had to re-visit the issue that we discussed in our meeting of 16th December 2005 and particularly the issue of pricing and specification. Infact we talked and we had the permission of African Automobile to record the meeting. I need to emphasise that the issue of pricing came up, several times and I had to make the point and again that since Goil was supplying the same product, we cannot pay a different price. We insisted on paying what we pay Goil". Emphasis*

Under further evidence during cross-examination, Dr. Sarpong testified as follows:-

Q. "Now you see in exhibit D, at the time it was written there had been previous deliveries to you arising out of this?

A. Yes my Lord.

Q. And infact those deliveries were based on the words of the contract to them under the bidding process.

A. I have been told.

Q. Infact it is based on exhibit A

A. Yes

Q. Another contract was for supply of 600,000 litres of marine mix and at the time exhibit D was written 246 had already been supplied.

A. Yes

Q. And in fact that was based on the 1.56 euro per litre

A. That is correct"

From the above discourse between learned counsel for the plaintiff and the defendants Managing Director Dr. K. K. Sarpong it is clear that an irrevocable contract had been entered into between the parties and this had crystalised into the contents of exhibit D which had been copiously referred to.

This exhibit D was written by the defendants to the plaintiffs on 14th October 2005 and in order for its full force and effects, we refer to the contents of the letter which read as follows:-

*14th October 2005*

*"African Automobile Limited*
*Mitsubishi House*
*P. O. Box 1346*
*Accra*

*Fax: 021 232588*

***Attn: Mr. Hijazi***

*Sir,*

***OUR ORDER NO 40004112-OP***
***FOR SUPPLY OF MARINE MIX***
***YOUR REF. NO MH/OFF/051/1433***

*Reference to your letter accompanying the sample that you brought for testing, this is to inform you that our laboratory results confirm that the sample meets our specifications.*

*In view of this we are informing you to supply 354,000Lts of the Marine Mix which is the balance left to be supplied.*

*Please be informed that all the products that you will supply will be tested drum by drum in the presence of your representative if you so wish and they will be accepted only after they meet our specifications.*

*Thank you.*

*Tema Oil Refinery Ltd*

*S. T. Adomako*
*Procurement Manager"*

The question that is begging for an answer is that, has the meeting of 1st March 2006 following the inconclusive meeting of 16/12/2005 been able to set aside the contracts contained in exhibit A & D and resulted into exhibit 3 as was contended by the defendants tenable?

What should be noted is that the plaintiffs never accepted exhibits S and T and thus never responded to them. This therefore created the impression that any deliveries made by the plaintiffs were made pursuant to exhibits A & D.

In urging this court to accept ground V of the grounds of appeal, learned counsel for the defendants, Mr. Agyabeng Akrasi referred this court to the case of **Effisah v Ansah [2005-2006] SCGLR 943 at 969** per Lartey JSC, holding 6 & 7.

We have perused the erudite lead judgment of the Supreme Court delivered by Wood JSC (as she then was) with a concurring opinion by Lartey JSC but are unable to find any support that learned counsel for the defendant has ascribed to the said case.

On the contrary, we agree with learned counsel for the plaintiff, Mr. Addo Atuah that on the authority of the ***Effisah v Ansah***, there is an irresistible conclusion and finding that in real terms no settlement was reached to rescind exhibit A & D by the combined meetings of 16th December, 2005 and 1st March, 2006. What should be noted is that, in cases like the instant one, where in addition to the viva voce evidence a mass of documentary evidence was tendered during the trial, the 2nd appellate court such as this court is virtually in the same position as the trial court. This is because most of the findings of fact have been made through a perusal of the documents and we have been put in the same position as the trial court to assess the totality of the evidence.

Using the principle of law established by the case of ***Effisah v Ansah***, this court will hold and rule that quite apart from the fact that the plaintiffs have led very

credible and convincing evidence which would have entitled them to judgment in any case, the defendants case has also created so many weaknesses which all together further contribute into strengthening of the plaintiff's case.

Having therefore considered the totality of the evidence both oral and documentary, there is no doubt that the plaintiffs have succeeded in establishing real basis for their case which take its roots in exhibits A and D. This is so, because there has been no credible evidence that has been led to establish that the parties settled their contract on the basis of exhibits 3 and 4.

See also ***Kusi & Kusi v Bonsu 2010 SCGLR 60*** at 81, where Georgina Wood CJ reiterated the decision of the Supreme Court in Effisah v Ansah already referred to supra. See also ***Obeng v Bempomaa C. A Part 3, [1992-93] GBR 1027.*** It must be noted that on the strength of the above cases the conflicts if any in the plaintiffs case have not discredited the effect of the plaintiffs case. The plaintiff's case is still solid.

It should thus be noted that the plaintiff's never accepted the contents of exhibit 3 and can therefore be considered as having never supplied under that document. To our mind the Court of Appeal cannot therefore be faulted in the decision they took affirming the findings of the learned trial judge in respect of exhibits A & 3.

The Defendants next attacked the admission into evidence of evidence 22 which was tendered by the plaintiff's through Dr. Abugrie, the defendants 1st witness. Learned counsel for defendant complains that the said document was tendered through the backdoor and that, it infringes the rules of natural justice. We fail to see how this document was admitted through the backdoor.

The evidence on record is that, Tema Lube Oil Company Limited have featured prominently in the conduct of scientific tests and analysis of oil samples in this case. In this respect, one Dr. Kwakye of Tema Lube Oil, has performed creditably and there has been no evidence led to cast any doubt on the expertise of Dr. Kwakye in particular or of Tema Lube Oil Limited in general. Reference exhibits B and 2.

We have noted that the plaintiff's laid sufficient foundation before exhibit 22 was introduced and tendered. In answer to questions before exhibit 22 was tendered, Dr. Abugre, a Deputy Managing Director of the defendant's company answered that he recognised the document but that it would be difficult for him to state whether the sample which formed the basis of exhibit 22 was submitted after the earlier exhibits in 2 and B. It was after this admission that counsel for the defendant objected to the tendering of the document.

There was no valid basis for the objection. In the first place, it must be noted that the exhibit is relevant as it relates to scientific report on oil sample submitted to the Tema Lube Oil by plaintiffs for a report.

Secondly, exhibits B and 2, already tendered into evidence show that it would have been easy to determine the dates of the earlier exhibits, B and 2 and the instant one 22. The dates on exhibits B and 2 are 8th September 2004 respectively, whilst the date on exhibit 22 is 11th November, 2004.

There is therefore ample proof that exhibits B and 2 were prepared before the sample in exhibit 22 was submitted for testing and analysis.

Once the witness has admitted recognition of the exhibit but expressed doubts on the issue of date which could easily have been resolved by reference to the documents, the most important criteria is relevance and once that had been settled, there was no problem. See section 51 (2) of the Evidence Act 1975, NRCD 323. The document, exhibit 22 was therefore properly admitted into evidence.

We will therefore dismiss this ground V of the appeal as without any merit and basis whatsoever.

**GROUND IV OF APPEAL**

**iv. Their lordships erred in law and deviated from the settled authorities that a claim for damages for breach of contract would only entitle a plaintiff to nominal damages, awarding to respondents, the sum of €350,000 which they described as**

**"substantial damages" and contradicted themselves with the following statements:**

***"There is thus abundant evidence to warrant an award of substantial damages. Accordingly, I will set aside the sum of €500,000 and substitute an award of €350,000 as substantial damages against the appellants."***

The statement by the President of the Court of Appeal to the effect that:

***"There is thus abundant evidence to warrant an award of substantial damages. Accordingly, I will set aside the sum of €500,000 and substitute an award of €350,000 as substantial damages against the appellants."***

**has been taken out of context by learned Counsel for the appellants to launch the basis of the ground of appeal herein.**

Learned Counsel argued that the award of 350,000 euros from the trial court award of 500,000 euros amounts to a non-judicial exercise of discretion and offends the principles upon which general damages for breach of contract are awarded.

Learned counsel for the appellant then referred this court to a long line of cases to support this line of reasoning. Prominent among these cases are the following:

1. ***Attorney-General v Faroe Atlantic Co. Limited [2005-2006] SCGLR 271 holding 4***
2. ***Delmas Agency Ghana Limited v Food Distributors International Limited [2007-2008] SCGLR 748***

The arguments of defendants on this ground of appeal unfortunately created the impression that the Court of Appeal had no basis for the award of 350,000 euros as general damages and thus exercised their discretion unjustifiably or wrongly.

In response, learned counsel for the plaintiffs referred copiously to evidence on record to support the basis for the award of the substantial damages against the defendants.

For example, if reference is made to the evidence in chief of PWI and the many frustrating events perpetrated by the defendants against the plaintiffs in their execution of the contract for the supply of this marine mix which is the raw material used for the manufacture of pre-mix fuel knowing very well that the end product is distributed only by the defendants on behalf of the Government of Ghana, then the inhumanity and callousness of the defendants in the several impediments put in the way of the plaintiffs is really gargantuan and is mind boggling.

It must be noted that the plaintiffs could not have put the product to any other use as the end product the pre-mix is solely distributed by Government. Any attempt to frustrate the plaintiffs therefore will amount to locking up of their funds and also space for storage of a special product.

In support of their contention for the award of the 350,000 euros, learned counsel also referred to some cases notable among them the following:-

1. ***Jenkins v Bushby [1891] 1 ch. 484 which was relied upon in the Ghanaian case of***

2. ***Kyenkyenhene v Adu [2003-2004] SCGLR 142 at 155, where Kay L.J stated thus:***

> ***"In a question of discretion, authorities are not of much value. No two cases are exactly a link and even if they were, the court cannot be bound by a previous discretion to exercise its discretion in a particular way, because that would be in effect putting an end to discretion."***

3. ***Standard Chartered Bank v Nelson [1998-99] SCGLR 810 at 812 holding 3***

4. Finally the celebrated case of ***Hadley v Baxendale 1854 9 Exch 341***

In our considered opinion, before any appellate court can justifiably conclude that an award of substantial damages by a trial court was either excessive, unjustifiable and amounted to non-judicial/wrong exercise of discretion and therefore inconsistent with laid down principles of law established over the years, there must be an overview of the entire evidence on record to either support the award of substantial damages or the failure of such an award.

In the instant case, we have observed that the Court of Appeal took pains to refer in detail to the many instances of blatant and arbitrary conduct of the defendants in not only frustrating the plaintiffs in the discharge of their part of the contract, but that there was an invisible hand teleguiding the conduct of the defendants. This is because not only did the conduct of the defendants not make any business sense but it also lacked candour and good faith.

In order to establish the falsity of this ground of appeal and why it must fail, we deem it proper at this stage to refer in extenso to portions of the lead judgment of the President of the Court of Appeal who put the matter i.e. conduct of the defendants beyond per adventure as follows:-

> *"As regards the award of euro 500,000 general damages against the appellant, the appellant has not demonstrated to this court why this should not stand. When this suit begun, each party presented itself as the victim of high handedness, callousness and what have you, at the instance of the other. At the close of the trial it became abundantly clear that the appellant rather than the respondents could not acquit itself of blameworthiness for all the obstacles and impediments in carrying out the contract. The appellants created as many excuses as there were deliveries by the respondents and each time the latter tried to accommodate them until they could no longer bear them. The resultant unjustified refusal to accept supplies under the contract from the respondent created the discomfort of finding places to store these products. Of course these difficulties so created, more by the neglect of appellants than the suppliers, were within their contemplation being long time operators in the oil business. If businesses in this country are to run in the fashion exhibited particularly by the appellants, no private*

*company either indigenous or foreign would be attracted to do business. It is quite evident that but the frustrating tactics arising out of the internal indiscipline exhibited or employed by the appellants, the whole contract would have been carried out by now."*

The above statement could not be further from the truth. Indeed we would have descended more heavily on the defendants in similar fashion. A perusal of the appeal record, especially the many exhibits which were tendered during the trial gives ample credence to the fact that the defendants intentionally put impediments in the way of the plaintiffs, deliberately calculated to frustrate them. Can the defendants be permitted to benefit from this gross display of naked show of power and negligence where there are contractual terms to be complied with? We do not think so.

This is because, the plaintiffs detailed out their reliefs in their endorsement on the writ of summons. Reference relief C coupled with that are the averments in paragraphs 21, 22, 23, 24 and 25 of the statement of claim as amended. Aside from the above averments, the plaintiff's tendered exhibit E, dated 16th October, 2006 which was tendered without objection.

It must be noted that this exhibit E, is a well prepared document which has detailed the various instances of the defendants conduct which have resulted into the breach of the contract and the resultant damages.

In order for a full appreciation of this exhibit, it is considered worthwhile to reproduce this exhibit E in order to lay bare all the facts and circumstances upon which the trial court and the Court of Appeal based their award of damages for breach of contract.

*"The Managing Director*
*Tema Oil Refinery (TOR) Ltd*
*Tema*
*Attn: Dr. K. K. Sarpong* *16th October 2006*

*Dear Sir*

***SUPPLY OF MARINE MIX***

*We refer to your letter ref: PROC/WLQ/wg/06/331 dated 5th October 2006 and react as follows:-*

1. *Our letter dated 26th September was obviously aimed at securing a definitive delivery plan for your order No. 40079780P dated 10/5/06 and*

2. *The part of your order No. 4000041120P dated 22/8/02 which has been frustrated by your deputy Ali Abugri who continues to obstruct and frustrate this order even as of to date.*

3. *Despite a well documented business transaction and our compliance to all of the agreed arrangements your Ali Abugri created an issue that was not german to those arrangement and despite the futility of his manufactured issue he was determined to "fight it out" even if it should lead him to ignore both TOR'S management decisions and cost TOR over a million U.S. Dollar.*

*Now, to the facts:*

4. *TOR confirmed an order on our company for 600,000 litres of a specific product i.e. Marine Mix. On TOR's request, we provided a sample; the sample was approved by TOR's laboratory.*

5. *We made three deliveries and each time samples were taken, tested and approved by TOR's laboratory.*

6. *When we came to make the 4th delivery we were told that Ali Abugri has given instruction that TOR cannot take delivery because what we were coming to deliver was not what TOR had ordered. This notwithstanding that the product was identical to the previous deliveries and that no sample of the new delivery was taken for test. In short this was an unjustified and arbitrary decision by Abugri.*

7. *We wrote to complain about your deputy's decision insisting that what we came to supply was what you had ordered and exactly like what we had already delivered.*

8. *You formed a committee to look into the manufactured issue created by your deputy. At a meeting convened at your instance in your office and attended by a representative from Tema Lube Oil Company (TLOC) who had been invited by the committee. The Committee concluded and we agreed that a sample from the consignment that TOR refused to receive be taken and tested by TLOC to determine its conformity with your order or otherwise.*

9. *We provided the sample. TLOC tested the sample and confirmed its conformity.*

10. *In contradiction of the agreements reached in committee Ali Abugri persisted that the consignment shall not be received.*

11. *We wrote to you complaining. Your General Manager (legal/admin) responded in April 2005 "The management of TOR has decided that you resume delivery of Marine Mix to TOR as per the existing local purchase order". In defiance of his management's decision Ali Abugri continued to persist and deny the delivery?*

12. *In October 2005 your procurement Manager wrote to us"… this is to inform you that our laboratory (test) results confirm that the sample meets our specifications. In view of this we are informing you to supply 354,000 litres…"Nevertheless TOR's Abugri maintain his "position and denies delivery"*

13. *On 31st October we wrote to TOR (attention: your procurement manager) demanding that:*

    a. *TOR honours its commitment and takes receipt of the consignment of Marine Mix it had ordered.*

    b. *Pay the losses we suffered as a result of your deputy Ali Abugri's decision to dishonor TOR's contractal commitment.*

14. *You invited the undersigned for a meeting at TOR to resolve the issue your deputy had created. Due to the inaccuracy of the record of*

*proceedings of that meeting and the meetings that followed all aimed at resolving the manufactured issue created by your deputy who unabated persisted in frustrating the delivery of your order we had to write to your deputy, our letters dated 19th January 2006 and 13th February 2006 refer.*

15. *We regret to note that your letter dated 5th instance yet again takes us back to square one. We therefore find ourselves compelled by your action to claim damages we suffered as a result of your actions in the sum of (Euro) €1,275,621 as detailed in our statement attached hereto as under:*

| | |
|---|---|
| *Lost revenue on your order* | *€1,196,333* |
| *Loss incurred in chasing after* | *€ 79,288* |
| *Total losses* | *€1,275,621* |

*In summary, in defiance of an unequivocal agreement between us, the consequent TOR's management decisions and all those agreements reached in committee designed to address the arbitrary manufactured issue created by your Deputy. It has been the machinations of the said Deputy that have rendered all attempts at resolution null and void. The consequence of this has been to cause substantial financial damage to your company that now leaves us with no alternative other than to pursue our rightful due. This irrespective of the irreparable damage caused to our previously excellent business working relationship.*

*But for sake of etiquette we would have copied the creator of the issue your deputy Ali Abugri.*

*Yours faithfully*

*David T. Morrel (Executive Director)*
*African Automobile Limited"*

The above constitute sufficient reason why the defendants should be held liable to have caused the mess into which the plaintiffs found themselves in. As a direct consequence, it must be noted that, apart from the lame excuse that the parties settled the matter by exhibit 3, the defendants have not been able to explain to the satisfaction of the Court their inability to perform their part of the contract which consisted only in their taking delivery and paying for it.

Under the circumstances, the defendants must be held liable for the acts of commission or omission that have resulted into damages for the plaintiffs.

The locus classicus on the rule regarding remoteness of damage in contract which are applicable when the damages being claimed are general or unliquidated is to be found in the decision in ***Hadley v Baxendale [1854] 9 Exch 341***. In this case, the plaintiff's mill was brought to a standstill by the breakage of their only crankshaft. The defendant carriers failed to deliver the broken shaft to the manufacturer at the time they had promised to do, and the plaintiffs sued to recover the profits they would have made had the mill been started again without the delay. **The Court rejected the claim on the ground that the facts known to the defendants were insufficient to show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person.**

Expatiating on the judgment of the court Alderson B, explained the rationale for its judgment thus:-

> "*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it.*
>
> ***Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the***

***defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.*** But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from, such a breach of contract." Emphasis supplied.

Chitty on Contracts, General Principles, 25th Edition, paragraph 1692 states as follows:-

> *"The principles laid down in* ***Hadley v Baxendale*** *(referred to supra) have been interpreted and restated by the Court of Appeal in 1949 in* ***Victoria Laundry (Windsor) Ltd. V Newman Industries Ltd. [1949] 2 K.B.528*** *and by the House of Lords in 1967, in* ***Koufos v C. Czarnikow Ltd. (The Heron II) [1969] 1 A.C. 350"***

The learned authors then summarised the effect of these decisions as follows:-

> ***"A type or kind of loss is not too remote or consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question) it was within their reasonable contemplation as a not unlikely result of that breach."***

From the above formulations, it is our considered view that, the conduct of the defendants in the instant appeal, given their state of knowledge of the facts as depicted from the appeal record made it clear that the defendants were aware of the following:

1. That the plaintiffs having been prevented from delivering the marine mix contrary to the terms of the contract and made to secure storage and

thereby locking up their funds were incurring losses so long as the default in accepting delivery persisted.

2. From the given facts, the defendants had sufficient knowledge or were reasonably expected to know all the contract details.

In our opinion therefore, it is clear that the defendants should fairly and reasonably be considered as having contemplated that the plaintiffs will suffer substantial damage as a result of their breach of contract.

Lord Reid in his opinion in the (The Heron II) case already referred to supra, stated the proposition so succinctly as follows:-

> "*The crucial question is whether on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*

On the basis of the above principles of law and what appears hereunder, we are of the considered view that the Court of Appeal cannot be faulted in their award of substantial general damages.

In the case of ***Attorney General v Faroe Atlantic*** already referred to supra, what the Supreme Court per Dr. Twum JSC stated is not different from the basic principle stated in the ***Hadley v Baxendale*** case referred to supra.

The Supreme Court per Dr. Twum JSC in the Attorney General v Faroe Atlantic case stated the law on the award of general and special damages at page 290 of the report thus:-

> *"My Lords, in my view, a claim for damages for breach of contract will entitle the plaintiff to nominal damages only unless the plaintiff gives particulars of special damage. No particulars of general damage are ever ordered. See* ***London and Northern Bank Limited v Newness [1900] 16 TLR 433****.*

***General damages are such as the law will presume to be natural or probable consequence of the defendants act. They arise by inference of the law and need not therefore be proved by evidence. Hence they may be averred generally as was done in this suit."***

Continuing, Dr. Twum JSC stated further as follows:-

*"Special damages, on the other hand, are such a loss as the law will presume to be the consequence of the defendant's act,* ***but depend at least, on the special circumstances of the case.*** *They must therefore always be explcity claimed on the pleadings. See* ***Hayward v Pullinger & Partners [1950] I A.E.R 581."***

Even if we were to take holding 4 of the above cited case without going into the body of the case it is clear again that the defendants have clearly misconstrued the true and total effect of the said decision.

It is therefore clear that the ***Attorney General v Faroe Atlantic*** case would be deemed to have approved the dictum of Kay L. J. stated in the case of ***Jenkins v Bushby*** referred to supra that in a question where a judge decides to exercise a discretion such as is evident in the award of damages in this case, no two cases are of the same type such that the court would be bound by a prior exercise of discretion. The court no doubt recognised the special circumstances of the case and therein lies the difference between each case.

Secondly, as matters stand now in this case, the conduct of the defendants have become so notorious from the record of appeal that the court is enjoined to take judicial notice of same. As a result, damages of the type awarded are to be deemed as the natural and probable consequence of their conduct towards the plaintiff's in this case.

For example, any business minded person would have realised that defying the clear instructions and directives of the management of the defendants which requested the plaintiffs to resume delivery of marine mix to the defendants as per the existing local purchase order would not only lead to blatant defiance of the defendants management decision but will also lead to loss to the plaintiffs if they

are prevented from delivering. But this is what PW1 Dr. Ali Abugri is on record as having done with relish and from his testimony is unrepentant.

Again, if you refer to exhibit M, written by the Plaintiff to the Defendant's per D.W.2, Dr. K. K. Sarpong, it catalogues all the brazen breaches of the contract as well as the impediments and frustrations put in the way of the plaintiffs by defendants, orchestrated mainly by DWI, Dr. Ali Abugri. In all this, it appears the Managing Director of the defendants Dr. K. K. Sarpong was either not on top of his job or was sidelined by very powerful forces within his own establishment.

Our justification for this is captured in the following cross-examination of DW2 Dr. Sarpong by learned counsel for the plaintiffs.

Q. At the last adjourned date I suggested to you that there was no co-ordination in your outfit and you denied it?

A. Yes I did

Q. Now Doctor Sarpong I want you to look at exhibit 22 as well as exhibit B?

A. Yes my Lord I have looked at them.

Q. These are the reports emanating from the committee that was set up on your rejection of the 50,000lt marine mix supplied by the plaintiff do you recognise it?

A. I have never seen this report

Q. This report emanated from your own outfit?

**A. I said I have not seen it. TOR is a very big company, the managing director will not see every document, I came to this court because there was a disagreement, I need not see the report.**

Q. Would you still stand by this denial that there was no co-ordination?

**A. As managing Director I am not expected to know everything I got to know because there was a disagreement, on that basis I will say there is co-ordination.**

Q. Doctor, I am suggesting to you rather firmly that exhibit 22 and exhibit B. confirm that there was absolutely nothing wrong with the 50,000 litres premix delivered to you?

A. I disagree with you, from what my deputy told me there was disagreement and that is what I relied on.

Q. Doctor Sarpong, again, I put it to you that finally that there was no basis for your rejection of the marine that was delivered to you?

A. I disagree with you, my experts told me that there was a problem, if there was no problem I don't believe that we would have an outcry of the premix from the outboard motors.

Q. What you supplied to the fishermen was premix and not marine mix fuel?

A. You are right, but you agree with me that we formulated premix fuel using the marine mix and so far as I am concerned my experts told me that the marine mix was the source of the problem.

Q. I put it to you that your experts were wrong in their information that they passed to you?

A. I have absolute trust in my experts.

Q. You know that the problem could also have arisen in the formulation by your own office.

A. I expect that my experts would be here to give the answer.

Q. When the perceived problem broke, you did not invite the plaintiff to come and empty your tank, you invited Goil to come and empty the tank.

**A. I don't know, I can't answer that.**

Q. It is on record in this court that Goil was invited to empty your tanks?

**A. You are telling me**

Q. I put it to you that you invited Goil to empty the tanks because you knew they were the problem?

A. My Lord if indeed my experts invited them I am not aware of it, so I can't provide the answer.

The above lends credence to our observation that DW2 was not on top of the decisions that caused the problems in the instant case.

As a result we are of the considered view that the award of the substantial damages of 350,000 euros by the Court of Appeal to the plaintiffs has not infringed the principles stated in ***Attorney General v Faroe Atlantic*** and see also ***Delmas Agency Ghana Limited v Food Distributors International Ltd., [2007-2008] SCGLR 748 holding 3 where*** the Supreme Court held as follows:

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

In the instant case, the plaintiffs succeeded in proving the damages which they were awarded, and on the evidence it is quite apparent that the plaintiffs have suffered damage which they have been able to prove and are therefore entitled to it.

In our understanding, nominal in the context used is relative. This is especially so as in this instant, the several breaches of the contract, impediments, frustrations

and deliberate acts perpetuated by high officials of the defendants are so numerous and well calculated that it will be dangerous and unfair to stick to the nominal damages principle. Each case therefore must be considered on its on merits and circumstances. Especially as in this case where the plaintiffs detailed out the losses in their statement of claim and were able to prove it.

We note also the invitation made to us by learned counsel for the defendants to use the principle enunciated in holding 2 of the ***Delmas Agency v Food Distributors*** case to hold that the Court of Appeal improperly applied the principles on assessment of damages.

There is no doubt that this court correctly stated the principle that should guide an appellate court in the award of damages in the Delmas Case. However, in this case, the Court of Appeal cannot be said to have incorrectly or improperly applied the principles in the award of damages by considering irrelevant matters.

In this case, all the matters taken into consideration were relevant and live matters, perpetuated by the defendants themselves and for which they must be held for the natural and probable causes of their conduct.

In dismissing this ground of appeal, we think it is necessary to reiterate the fact that a Court of law must not only take into consideration the prevailing economic forces that are at play in the global economic order, but also consider the net effect of the defendant's conduct and its negative effect on the financial fortunes of the plaintiffs in view of the plethora of evidence that was led at the trial court. See ***Standard Chartered Bank v Nelson*** holding 2already referred to supra.

The appeal on this ground of appeal is also dismissed.

**GROUNDS II AND III OF APPEAL**

**ii. The learned Justices of the Court of Appeal erred on the facts, by holding that there is a purported balance of "108,000 litres" of marine mix on exhibit A to be delivered by Respondents and further that 146,000 litres of marine mix was allegedly rejected by the**

**appellant, upon delivery by respondents in March 2006, there being no such evidence on the record.**

**iii. The order by the learned Justices that appellants pay interest from March 2006 until final payment, on the above-named 108,000 and 146,000 litres of marine mix respectively was perverse and erroneous.**

The crux of this ground of appeal finds expression in the orders made by the Court of Appeal to the effect that the defendants should arrange to take delivery of the outstanding balance of 146,000 litres of marine mix which they rejected upon delivery within a period of three months after the delivery of the Court of Appeal judgment at the rate of 1.63 euro per litre, with interest from March 2006 when delivery was turned down to date of payment.

The Court of Appeal further ordered the defendants to take delivery from the plaintiffs of the remaining balance of 108,000 litres within same period and at same interest rate.

The defendants take issue with the above orders. Contending that the figures are arithmetically incorrect, and that after the 4th consignment on 21/12/2005, there is no evidence that any further deliveries were made until July, 2006 because of absence of delivery schedule.

In keeping with the noble traditions at the Bar, learned counsel for the plaintiffs, Mr. Addo Atuah has conceded that the Court of Appeal must have been in error with the extra figure of 108,000 litres as an outstanding delivery. Having done the arithmetic calculations, it is patent and clear that the outstanding supply due and for which the plaintiffs should be directed to deliver and the defendants ordered to accept is 146,000 litres and no more or less.

With this variation, this court accordingly sets aside the order of the Court of Appeal in respect of the 108,000 litres of marine mix. Save for the above variation, the other orders of the Court of Appeal in respect of the 146,000 litres of marine oil, with payment of interest for the duration stated therein on the terms of 1.63 euro per litre are affirmed.

**GROUNDS I AND VI OF APPEAL**

**i. The judgment is against the weight of evidence.**

**vi. The Court erred in failing to find that the High Court could not enter "judgment for the sum of €4,320 damages for the 540 drums in which the marine mix was delivered" since the respondent failed to discharge the burden of proof as to the market value thereof, if at all.**

These grounds of appeal have been predicated upon the erroneous impression that the submission that the new price contained in exhibit 3 will be accepted by this court. With the earlier decision that there was no acceptable settlement which varied the contract terms as per exhibit A to exhibit 3, these grounds of appeal must necessarily collapse headlong.

Learned counsel for defendants referred this court to the case of ***T. K. Serbeh &Co. Limited v Mensah [2005-2006] SCGLR 341*** holding 3 & 4 to support the further contention that credible evidence of the value on the open market of the converted empty barrels or drums of oil ought to be given before any award can justified.

In this respect, it must be noted that the evidence by the plaintiff's on the 540 drums in which the marine mix was delivered to the defendants is very much overwhelming. There is evidence as per exhibit G for instance that, specific demand had been made by plaintiffs for the drums but as has been consistent with the defendants, they refused to comply with those demands. Additionally, the plaintiff's invoiced the defendants for the said drums as per invoice on the 540 drums attached to exhibit G.

In the absence of any other credible evidence from the defendants to contradict the value attached to the drums by the plaintiffs, the trial court and the Court of Appeal were right to accept the values placed on them by the plaintiffs.

Whilst admitting the fact that *(as was held on the authority of* ***Serbeh v Mensah*** *already referred to supra)* that the burden of proof as to the market value of the

drums rested with the plaintiff's, the invoice attached to exhibit G which was admitted into evidence without objection clarified the position and rather emphasise the plaintiffs compliance with the said principle of law. On the whole, it is surprising that learned counsel for the defendants sought to question the proprietary of the management style of the plaintiffs. On the contrary, it is the defendants and their top management exemplified in DWI and DW2 which calls for swift condemnation. Indeed if businesses are to be conducted as was done by the defendants in this case, then all businesses will collapse and run into serious debt. We believe the time has indeed come for state officials to be surcharged with such colossal losses if it can be established as it has in this case that the losses were occasioned by their recklessness.

It must also be noted that the defendants did not deny the averments pleaded by the plaintiffs in their statement of case. In any case they also did not contradict their evidence on the prices, reference exhibit G.

This principle has been firmly stated by the Supreme Court decision in ***Western Hardwood Enterprises Limited v West African Enterprises Limited [1998-99] SCGLR 105,*** that where the pleadings of the parties were adidem on a given issue, the plaintiff was not bound to lead evidence to emphasise that point. It would have been necessary for the plaintiffs to have led evidence on the price if the defendants had contested that fact and the evidence in exhibit G on the price of the drums. In view of the apparent admission of the price, the plaintiffs were entitled to the award.

Under the circumstances, these grounds of appeal are also dismissed.

**GROUND VII OF APPEAL**

**vii. The award of "costs of GH¢4,000" in the favour of respondents against defendant/appellant/appellants was excessive and unwarranted, against the background inter alia, of the court setting aside nearly €500,000 awards and costs out of a total sum of €945,818.83 awarded by the trial judge, which meant that the appeal was very necessary.**

This ground of appeal is postulated on the basis that because the defendants were largely successful at the Court of Appeal, no costs should have been awarded against them, or if at all, then only nominal costs. Learned Counsel for the defendant made copious references to the awards of the trial court that the Court of Appeal slashed and reduced downwards in favour of the defendants. In support of the above contentions, learned counsel referred the court to the following cases:

1. ***Bank of Ghana v Nyarko and Anr [1973] 2 GLR 265 and***
2. ***Guardian Assurance Co. Ltd v Khajat Trading Store [1972] 2 GLR 48***

Responding to the above submissions, learned counsel for the plaintiffs submitted that since the appeal was unanimously dismissed by the Court of Appeal, it follows that, the plaintiffs as the successful party must be compensated for in terms of costs.

In this regard, learned Counsel referred the court to the case of ***Juxon-Smith v KLM Dutch Airlines [2005-2006] SCGLR 438 at 442***

and concluded that there is no evidence on record to fault the exercise of discretion by the Court of Appeal in awarding costs against the defendants despite their huge success at the Court of Appeal.

We observe that, the defendants in their appeal against the judgment of the High Court dated 12th August, 2008 appealed against the whole judgment. How did that appeal end? That is now history. Suffice it to be that even though the Court of Appeal significantly reduced some of the awards as was rightly pointed out by learned Counsel for the defendants, the appeal was in the main dismissed. It is generally accepted that costs follow a successful litigant unless the prevailing circumstances make it quite certain that costs should not be awarded. In all these circumstances, the courts exercise their discretion which is based on the circumstances of each case. No two cases are ever similar in this respect.

In the instant case, we have reviewed the entire record and we are of the considered view that there are no real, imagined or putative grounds upon which

this court will disturb the exercise of discretion of the Court of Appeal to award costs. Having reviewed the entire evidence, we are of the view that the costs so awarded were in order, appropriate and to the point.

Considering the totality of the facts of this case, we do not think it is appropriate to disturb the award of costs of GH¢4,000.00 in favour of the plaintiffs.

This is because in the case of ***Bank of Ghana v Nyako & Anr*** already referred to supra, the trial High Court had awarded costs of ¢750.00 in favour of the plaintiffs therein whose damages for wrongful dismissal were assessed at ¢7,881.84 and ¢10,832.40 respectively as at June, 1972. On appeal inter alia against the award of costs, the Court of Appeal: coram Apaloo JA *(as he then was),* Lassey JA and Archer JA *(as he then was)* held as follows:-

> ***"Although the award of costs was discretionary it must not only reflect the result of the suit but must also bear a reasonable relation to the amount of work, that the preparation and conduct of the suit must have involved."***

The Court of Appeal concluded that, since the said case was not complicated, the costs of ¢750.00 in 1972 was excessive.

In the instant case, it is quite clear that this has been a complicated case to handle, with a lot of exhibits and calculations to deal with, not to mention the various contractual documents that have to be taken into consideration. Such was the complicated nature of the case that the Court of Appeal also found itself in error in the calculations it made on the volume of litres of marine oil left to be delivered by the plaintiffs reference to 108,000 and 146,000 litres of marine oil.

Secondly, if consideration is given to the facts germane to the institution of the instant case, then it follows that costs must definitely follow the event.

We are therefore of the opinion that on the basis of the decision in the ***Bank of Ghana v Nyako*** case, the award of costs by the Court of Appeal reflected the work that was put into the preparation of the pleadings and conduct of the case by

the plaintiffs. As a result, it is not considered worthwhile to disturb the exercise of discretion by the Court of Appeal.

This principle was reiterated by the Supreme Court in the case of ***Juxon-Smith v KLM Dutch Airlines [2005-2006] SCLGR 438 at 442*** where the court speaking with one voice through Georgina Wood (Mrs) JSC as she then was stated as follows:

> ***"The appellate court had thus rightly substituted the correct findings on the evidence and re-assessed the quantum based on correct findings. The re-assessment was not so clearly erroneous that it ought to be set aside.***
>
> ***The court would therefore not disturb the award by the Court of Appeal, bearing in mind that the award was discretionary and the appeal was not from one discretion to another."***

It is thus clear that even though the Court of Appeal had re-adjusted the awards in a significant manner downwards, the award of costs being discretionary, this court is unable to disturb that exercise of discretion. This ground of appeal is thus accordingly dismissed.

**CONCLUSION**

In concluding this case, we would want to reiterate our strong reservations about the arbitrary manner in which the top management staff of the defendants at all material times to the inception of this case conducted themselves.

In the result, save as was varied by this court in respect of grounds II and III of the grounds of appeal where the balance of marine mix left to be delivered by the plaintiffs to the defendants was settled at 146,000 litres, the entire appeal herein is dismissed as unmeritorious and mischievous.

Save for the above variations, the Court of Appeal judgment of 11th March, 2010 is accordingly affirmed.

**[SGD] J. V. M DOTSE**
**JUSTICE OF THE SUPREME COURT**

**[SGD] G. T. WOOD [MRS.]**
**CHIEF JUSTICE**

**[SGD] ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**[SGD] P. BAFFOE-BONNIE**
**JUSTICE OF THE SUPREME COURT**

**[SGD] B. T. ARYEETEY**
**JUSTICE OF THE SUPREME COURT**

**COUNSEL;**

**ADJABENG AKRASI FOR THE APPELLANT.**
**ADDO ATTUAH FOR THE RESPONDENT**