IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2013

CORAM: J. DOTSE JSC (PRESIDING)
ANIN-YEBOAH JSC
P. BAFFOE-BONNIE JSC
A. A. BENIN JSC
J. B. AKAMBA JSC

CIVIL APPEAL.
No J4/24/2013

19TH JULY, 2013

KAMA HEALTH SERVICES LIMITED **PLAINTIFF/RESPONDENT/RESPONDENT**

VRS.

UNILEVER GHANA LIMITED **DEFENDANT/APPELLANT/APPELLANT**

JUDGMENT

BENIN, JSC:-

What began as a simple and straight-forward transaction between two Ghanaian registered limited liability companies over ten years ago has unfortunately led to a protracted litigation dating back to 30th June 2004. On the said date, the Plaintiff/Respondent/Respondent, hereinafter called the Respondent, brought an action against the Defendant/Appellant/Appellant, hereinafter called the Appellant, at the High Court seeking these reliefs:

1. Interest on the cedi equivalent of US$500,000.00 from 5th December 2002 to date of final payment at the current Bank Rate.
2. Special damages.
3. General damages for breach of contract.

4. Costs.

The facts which gave birth to the action before the High Court were the following. The Appellant sold property numbered 1-3 & 10-12 situate at Kumasi, popularly called SNR 1 SAT Building, which forms part of Kumasi Part 1 lands, to the Respondent at a fee of US$500,000.00, payable in three instalments over a given period of time. Having received part payment in terms of the agreement, the Appellant gave the documents on the property to the Respondent. The Respondent was given possession and it started collecting rents from the sitting tenants. The Respondent began the process of registering the property at the Land Title Registry; publications were made in the newspapers about the intended registration, as required by law. A number of objections were raised, prominent among which were those raised on behalf of the Golden Stool of Ashanti whose occupant is the Asantehene. As a result of these objections the registration could not go through principally because of the Asantehene's claim that his consent was not sought before the sale. Consequently the Respondent treated the sale transaction as having failed and therefore refunded the rents to the Appellant but the latter returned same to the Respondent. The Appellant's position was that as far as it was concerned the Respondent was the new owner since it had been given all the necessary documents to the property, including the consent of the Lands Commission, and had been placed in possession. Eventually the Respondent refunded the rents to the tenants. The sale contract was subsequently cancelled by the act of both parties, but obviously upon the Respondent's initiative contained in a letter put in evidence as Exhibit P. Following the termination of the contract, the Appellant refunded the cedi equivalent of US$500,000.00 to the Respondent; but it failed or refused to pay any other sum that was demanded by the Respondent in Exhibit P. Hence the action mounted at the High Court seeking the reliefs set out above.

The trial High Court heard oral testimony in proof of the issues settled at the directions stage which were:

a) Whether or not the sale was mutually abrogated.
b) Whether or not the defendant gave title to the plaintiff.
c) Whether or not the defendant is entitled to interest, damages and costs.

The trial court gave judgment in favour of the Respondent to recover interest and other charges found to have been proven on the evidence. Costs were also awarded in favour of the Respondent. The Appellant was dissatisfied so it lodged an appeal to the Court of Appeal on a number of grounds which are not relevant to recall here. The Court of Appeal virtually upheld the trial court's decisions in respect of the interest, special damages and costs in a reasoned decision handed down on 30th May 2011. But unlike the High Court which awarded interest applying local bank rates, the Court of Appeal based the award of interest applying the US dollar rate for the reason that the contract sum was denominated in US dollars. The Appellant was not satisfied hence the appeal to this Court. Four grounds of appeal were filed namely:

a) The Honourable Court of Appeal erred and committed a miscarriage of justice when it failed to consider the case of the Appellants that the contract between the parties did not provide for payment of interest because the purchase price of the property was denominated in dollars to preserve the value of the price.
b) The Court of Appeal erred when it upheld the trial High Court's refusal to follow the Supreme Court's decision on the law that interest is not payable on the refund of purchase price by a vendor to a purchaser upon rescission of a contract for sale of property and thereby occasioned a miscarriage of justice.
c) The Court of Appeal erred in law when it held that once the Respondent had paid money to the Appellant pursuant to a contract of sale of property, the Respondent was entitled to interest when it abrogated even though Respondent had been given possession during the pendency of the contract.
d) The honourable Court of Appeal misapprehended the facts and evidence led at the trial High Court and thereby came to wrong conclusions in their decision when they held that Appellant was liable to pay interest and all incidental expenses after the abrogation of the contract.

Counsel for the Appellant argued grounds (b) and (c) together, followed by ground (d) and finally ground (a). In their statement of case, Counsel for the Respondent answered all the grounds together, since in their view all the

grounds of appeal dealt with the claim and award of interest. We propose to deal with all the grounds of appeal together since they are interwoven and depend on the same facts and sometimes the same arguments and reasoning. At the end of the day, we will identify which of the grounds, if any, succeeds or otherwise.

On Grounds (b) and (c), Counsel for the Appellant submitted that *".....in the contract for the sale of a property once a purchaser had been put into possession and exercised acts of ownership and thereafter abrogates the sale contract, the purchaser is not entitled to interest."* Counsel relied mainly on the decision of this court in **AKOTO V. GYAMFI-ADDO & ANOTHER (2005-2006) SCGLR 1018**, hereinafter referred to simply as the Akoto case. Counsel's view is that the facts in the Akoto case are on all fours with the instant case; therefore, the Court of Appeal was bound to follow it and not distinguish it from the instant case. Hence the Court of Appeal decision was given per in curiam and had occasioned a grave miscarriage of justice, Counsel submitted.

On Ground (d), Counsel for the Appellant submitted that "*parties to a contract are bound only by the terms of the contract executed between them; therefore an obligation not provided for in the contract cannot be imposed on the parties. Thus the Court of Appeal misapprehended the facts and evidence led at the trial court and thereby came to the wrong conclusions in its judgment and imposed terms not provided for in the contract of sale."* Counsel made reference to the fact that under the terms of the agreement the Appellant was not required to seek the consent of any other person except the Lands Commission. In short the Appellant was not required under the contract to obtain the consent of the Asantehene. Counsel also submitted that the Respondent did not demand a covenant of title from the Appellant and was thus not entitled to recover even the purchase price, much more interest.

On Ground (a), Counsel for the Appellant argued that the parties did not provide for the payment of interest because the contract sum was denominated in US Dollars in order to preserve the value of the price. That explains why the Respondent received more cedis at the time the Appellant refunded the principal sum than would otherwise have been the case if the refund had taken place two years earlier. The fact that parties did not provide for interest and also used US Dollars as the denominator was the reason why

the Appellant did not claim interest when the Respondent defaulted in paying the third instalment on time, Counsel explained.

We shall refer to the responses of Counsel for the Respondent as we analyse the case. The facts in the Akoto case were simple. The owner of the property in question sold it to the purchaser and obtained full payment. By a subsequent agreement the purchaser rented the same property out to the vendor as tenant. The problems that brought the two parties to court were in connection with the tenancy. In the course of that tenancy litigation, the tenant who was the former owner and vendor, offered to refund the purchase price to the new owner and landlord and actually paid it into court. This was accepted by the purchaser/landlord. The former owner thus recovered the property and ceased to be tenant. The purchaser/landlord then sought to recover interest on the sum he paid for the house. The Supreme Court rejected this claim.

Counsel for the Appellant referred to holding 1 in support of their argument. It reads*: "The general principle for the award of interest to a party was that such party had been unjustifiably kept out of money due to him or her for the relevant period. In the instant case, the sum of ¢95m paid by the defendants to the respondent under the sale transaction entered into in 1996 became legally vested in the Respondent. She was thus entitled to keep the defendants out of that sum until the parties mutually agreed to the rescission of the sale transaction by the refund in 2000 of the purchase price by the Respondent. The trial High Court had therefore rightly held defendants were not entitled to interest on the amount of ¢95m refunded by the Respondent".*

Counsel for the Respondent argued that the Akoto case was distinguishable from the instant case and went on to indicate a number of distinctive features in the two cases, thereby supporting the position of the Court of Appeal. Among others, Counsel for the Respondent pointed to the following material aspects of the two cases that distinguish them. First the fact that there was no challenge to the title of the vendor in Akoto's case, in short there was no adverse claim, hence no encumbrance to the title. Next the purchaser had obtained legal title to the property. Also the purchaser was in possession legally.

We accept the arguments put up by Counsel for the Respondent. It is to be noted that the most significant distinction between the two cases is that in the Akoto case legal title in the property had passed to the purchaser; whereas in the present case legal title could not pass from the Appellant to the Respondent as a result of the former's failure to obtain the requisite consent of the Asantehene in order to make the sale unimpeachable. The parties as well as the courts below did acknowledge the need for the Asantehene's prior consent, save that the Appellant sought to play down this requirement saying it was not an obligation under the terms of the contract of sale between them. That it was only obliged to provide the consent of the Lands Commission which it did provide.

Furthermore, Counsel for the Appellant submitted that *"the Appellant did not make a covenant as to its title to the property in the contract of sale. The Respondent therefore had no basis of rescinding the contract on the basis of title.*" To this Counsel for the Respondent replied that under section 22 of the Conveyancing Decree, 1973 (N.R.C.D. 175) there was an implied covenant by the Appellant to give good legal title.

Once again Counsel for the Respondent is right for the Appellant is under an obligation to ensure that it had title to pass, that obligation arises by operation of law under the Conveyancing Decree, 1973 (N.R.C.D. 175), section 22(1). It provides that:

> **In a conveyance for valuable consideration there shall be implied the covenants for right to convey, quiet enjoyment, freedom from encumbrances and further assurance, in the terms set out in Part 1 of the Second Schedule.**

Besides, lands situate within Kumasi District are required to be registered by virtue of the Kumasi Land Title Registration-Declaration of Registration District (Kumasi District K.1) Instrument, 1994 (LI 1590). Thus unless title can be registered under this law a purchaser does not acquire the legal title.

We have already made reference to the vendor's covenants under the Conveyancing Decree. The vendor has an obligation to sell property free from all encumbrances except those that were known to the purchaser. The position

of the law as stated in the book titled Law of Property authored by Megarry & Wade, 6th edition, pp. 686-7, para. 12-067 is that "*A vendor is under a two-fold obligation as to title of the property which he is selling. First, he must disclose to the purchaser prior to contracting all latent defects in title save those of which the purchaser is aware. Secondly, by the contractual completion date he must both have the title which he has contracted to give and be able to prove that fact.*"

The title which the Appellant contracted to give the respondent was one which should have no encumbrances. Clause 2.4 of the contract between the parties- exhibit B- has this relevant provision which has so far escaped the attention of everybody: '*The last instalment amounting to 10% of the purchase price shall be paid by the Purchaser upon production of the* Lands *Commission written consent* ***and transfer of title****.*" The emphasis is supplied. The Appellant had contracted to transfer title, meaning legal title to the Respondent before the third and final instalment was paid. But the record is clear that it was unable to do so, it was not enough just to get the consent of the Lands Commission as Counsel for the Appellant strenuously argued, it had to transfer legal title as well. Transfer of title is not merely handing over any documents to the purchaser, but documents that enable the purchaser to secure the legal title. Transfer of title, as used in clause 2.4 of the contract satisfied the law as stated in the reference book quoted above, it also satisfies the statutory law, namely s. 22 of the Conveyancing Decree. The Appellant was thus bound to honour the term of the agreement and the statute law. Thus even without this provision in the contract, the Appellant was bound by section 22 of the Conveyancing Decree to give good legal title as well as quiet enjoyment to the Respondent.

The Appellant's position was that the contract of sale did not require it to secure any other person's consent except that of the Lands Commission. Yet that was not the only requirement for it was also to transfer title and was required by law to give good title. In the circumstances of this case it could not give legal title without the Asantehene's consent as that went to the root of the contract. That explains why the Appellant belatedly sought the Asantehene's aid as per Exhibit W dated 8th April 2002. In that letter the Appellant did not challenge the Asantehene's claim that his consent was required to the sale, which he, the Asantehene, had made clear in an earlier letter, Exhibit T dated 7th January 2002 addressed to several persons including the Lands Commission and the Respondent. The Appellant's own assignee, the Lands Commission, did not dispute the Asantehene's claim. Neither the Appellant nor the Lands Commission was able to challenge the Asantehene's claim of right to give consent for any disposition of the Kumasi Part 1 lands; indeed they admitted it, for in subsequent dispositions the Appellant went for the Asantehene's consent; see Exhibit X.

The position then was that the Appellant did not secure the requisite consent of the Asantehene to enable it make a conclusive sale of the property and thus was in breach of the covenant for the right to convey and pass on quiet enjoyment under section 22(1) of the Conveyancing Decree and the contract as well. The authority of the Akoto case does not apply here, so the Court of Appeal was right in that regard. Indeed as was stated by Wood JSC, as she then was, in the Akoto case at page 1033 it was not a straightforward case of a sale which did not materialise for which reason interest should not be paid. In the present case the sale did not go through so the case of Akoto will not be applicable. Indeed in the Akoto case this Court did not lay down any proposition of law that where a purchaser has been placed in possession of property he cannot recover interest on the contract sum if the agreement is rescinded. The Court made it clear interest would not lie because the contract was perfected, legal title had passed and the purchase price was legally vested

in the vendor. How could the Court have asked the vendor who owned the money legally to pay interest on his own money to a third party? The position here is different since the Appellant had not passed legal title to the Respondent and was thus legally not vested with the purchase price; it still remained the money of the Respondent.

The act of possession that the Respondent exercised over the property was done in the belief that title had passed to it until they were met with challenges following the publication in the newspapers of the intention to register title to the property. The tenants then refused to pay rents to the Respondent, according to the unchallenged evidence on record. The Respondent was even dragged before court in two suits in connection with this same title issue. The Respondent could not be compelled to hold on to the property in the circumstances described above. An abrogation, albeit unilateral, would thus be justified.

It's an incidence of every sale of land for valuable consideration that the purchaser be granted quiet enjoyment. Thus possession that is challenged to the extent that the tenants even refuse to pay rents to the purchaser on account of challenges to his title will not be considered as possession in the eyes of the law; it is anything but quiet enjoyment.

The position then is that the Appellant, having failed to give legal title to the Respondent, could not claim to have given them possession. Whatever rent the tenants paid to the Respondent before they stopped paying was for the Appellant who still had legal title to the property. Hence the Respondent was justified in surrendering the rent to the Appellant and subsequently refunding same to the tenants for it had no legal right to it.

What then was the position when the Respondent could not get the legal title to the property? The Court of Appeal made a reference to a statement appearing at pages 727-728 of the Law of Contract by Cheshire, Fifoot and Furmston 14th edition, chapter 22, and concluded that it was applicable to the facts and circumstances of this case. It reads: "The word 'ineffective' is not a term of art. It is here chosen as a comprehensive expression, free from technical associations, to include a variety of cases where the plaintiff has paid money to the defendant in pursuance of a transaction which he believes to be

a contract, but which turns out in fact to be nugatory. The transaction may indeed have began as a valid contract, but have been rendered ineffective by the default of the defendant, or through the operation of the doctrine of frustration.....If the plaintiff has paid money to the defendant in pursuance of a valid contract and the defendant then fails completely to carry out his part of it, the plaintiff is offered an option. He may either rest his claim on the basis of the contract and seek damages for its breach or he may treat the contract as at an end and sue in quasi-contract for the return of the money". Case cited in support was **WILKINSON V LLOYD (1845) 7 QB 27**. The reference above is an accurate representation of this case, as held by the Court of Appeal. In the case of **WILKINSON V. LLOYD**, supra, the plaintiff agreed to buy shares in a private company from the defendant. It was a requirement for each shareholder to be approved by the directors of the company. The plaintiff received a transfer of the shares from the defendant and paid for them. Meanwhile, before the payment and without the plaintiff's knowledge, the directors had passed a resolution refusing to allow any transfer of the shares by the defendant. The transfer was thus not approved by the directors. The shares depreciated in value. The plaintiff treated the contract as discharged by the defendant's failure to secure an effective transfer of the shares, and sued in quasi-contract for the return of the money. The court held that the defendant was bound to procure the assent of the directors and to take all necessary steps to invest the plaintiff with the property in the shares, that his failure to do so went to the root of the contract and that the plaintiff could recover.

In the instant case the Respondent opted to ask for the abrogation of the contract when it was frustrated in its efforts to secure the legal title. It wrote a letter, Exhibit P, to the Appellant setting forth the terms of the termination, which were a refund of the purchase price, plus interest and also refund of incidental expenses. The Appellant accepted to terminate the contract and refunded the cedi equivalent of the purchase price. But it did not honour the other claims. Both the trial High Court and the Court of Appeal held the Respondent was entitled to the interest and special damages, though for different reasons. Both courts below were right in the conclusion reached for the reason that the agreement having failed due to the default of the Appellant, the Respondent was entitled to interest for the money that had been paid to the Appellant and was deprived of its use. The principle

underlying the payment of interest was earlier stated in the case of **HOLLAND WEST AFRICA & ANOR V. PAN AFRICAN TRADING COMPANY & ANOR. (1976) 2 GLR 179** holding (3) that 'if a breach of contract had deprived a plaintiff of the use of a sum of money or other capital asset, the defendant must be presumed to have agreed to pay interest for the period between the date when the cause of action arose and the date of the judgment'.

The position taken by the Appellant follows the restrictive rule applied in the English case of **BAIN V. FOTHERGILL (1874) L.R 7 HL 158** which prevented a purchaser or lessee on a failure of title from claiming damages for the loss of his bargain, limiting him to a restoration of the status quo ante. That rule was abolished by the Law Reform (Miscellaneous Provisions) Act 1989. But historically in England that rule was originally introduced in the case of **FLUREAU V. THORNHILL (1776) 2 Wm. Bl. 1078; 96 ER 635**; but even in that case Blackstone J. laid down that interest on deposit paid for the sale or lease of land which had failed was recoverable. There were other cases which accepted that deposit plus interest thereon was recoverable for failure of title: see **BERNALES V. WOOD (1812) 3 Camp. 258; FARQUHAR V. FARLEY (1817) 7 Taunt. 592; 129 ER 236; HODGES V. EARL OF LITCHFIELD (1835) 1 Bing. N.C. 492; 131 ER 1207.** The principle is the same whether it is deposit or the full purchase price that has been paid. The rule in BAIN V. FOTHERGILL prevailed for a long time because it emanated from the House of Lords.

The situation following the abolition of the rule in BAIN V. FOTHERGILL is that the courts in England can award damages and/or interest in addition to ordering a refund of the deposit or purchase price, as the case may be. So for instance interest by way of damages was awarded in the case of **BUSHWALL PROPERTIES V. VORTEX PROPERTIES (1975) 1 W.L.R. 1649**, which was reversed on appeal on another ground, see **(1976) 1 W.L.R. 591 C.A.** The English legislation is not applicable here, we are aware of that. We only made reference to it to show that the underlying principle that Counsel for the Appellant is pursuing here has been abolished in the country of its origin because of the obvious injustice the rule brought in its wake. But in England whilst the restrictive rule in BAIN V. FOTHERGILL persisted, the courts sought to mitigate the losses of the purchasers and lessees by awarding as damages the value of the loss of use or loss of profits. Thus notwithstanding the decision

in BAIN V. FOTHERGILL, the English courts tried not to send away a purchaser of property without a form of compensation after he has paid money to a vendor who failed to give him title.

We cannot at this stage go back to the post BAIN V. FOTHERGILL period before the reforms of 1989. We consider it worthwhile to follow those decisions which enable a purchaser to recover interest on money he paid to buy land but which failed to materialise for failure of title to pass. The purchaser has been kept out of his money and the vendor who could not give him legal title must not only refund the deposit and/or purchase price that he has received, but must pay interest as well as pay all legitimate expenses incurred by the purchaser in pursuing the title.

Thus apart from the interest, the Respondent is also entitled to recover the amount legitimately spent in the process of registering the title which failed. It is recoverable as special damage resulting from the breach of the covenant to give title and also breach of clause 2.4 of the contract to transfer title which failed. The courts below were right in this regard. Moreover, it was within the contemplation of the parties that the Respondent would spend money to register the title deeds given to it by the Appellant hence the claim to recover damage on this is not remote.

There was this question whether interest should be paid when the contract sum was denominated in US Dollars in order to preserve the value of the money against any depreciation in the cedi, see paragraph 18 of the statement of defence. Parties to a contract might choose a particular currency in order to guarantee to themselves the value of the contract sum; but liability to pay interest does not depend on what currency was used to denominate the contract sum. The type of currency used becomes relevant when the rate of interest is to be applied, for different rates of interest are applicable to transactions conducted in foreign as distinct from local currency. See **ROYAL DUTCH AIRLINES (KLM) V. FARMEX LTD. (NO. 2) (1989-90) 2 GLR 682 SC,** followed in **BUTT CHAPEL HILL PROPERTIES LTD. (2003-2004) 1 SCGLR 636 and NATIONAL INVESTMENT BANK LIMITED V. SILVER PEAK (2003-2004) 2 SCGLR 1008**. So too is interest not payable on account of the fact that the value of the principal sum has diminished as a result of factors like inflation or devaluation of the currency; interest is payable because the vendor has kept the purchaser's money under a contract which has failed as a result of the vendor's default.

The Appellant also raised the issue that the parties did not include interest as a term in their contract. Parties need not provide in their contract that interest shall be paid in the event of a breach. Interest payment follows failure of a contract under which payment has been made, as a form of damages for breach of contract.

It is observed that relief 1 endorsed on the writ was modified in paragraph 15 of the statement of claim and it now reads: 'Interest on the said cedi equivalent of US$500,000.00 from the date the various payments were made to the defendant till date of final payment at the prevailing bank rate.' What is the effect of this variation in law? The reliefs which are stated in the statement of claim and on which facts have been pleaded will supersede the endorsement on the writ. The statement of claim gives the particulars of the relief sought and states the grounds upon which the plaintiff is before court. That enables the defendant to plead, and any objection is to be raised by the defendant at this point or he will be deemed to have waived it. A case is contested on the basis of the pleadings hence the relief endorsed on the writ which was varied in the statement of claim will stand as amended to the extent of the variation. This is distinguishable from the situation where a relief endorsed on the writ is not repeated in the statement of claim, in which case the party is deemed to have elected to abandon that relief. See the case of **ANTWI V. AMPONSAH and ANOTHER (1964) G.L.R. 531**, holding 1. For that reason the claim for general damages endorsed on the Respondent's writ which was left out completely in the statement of claim is deemed to have been abandoned. Be that as it may, the evidence on record supports an award based on the three separate occasions that the instalments were paid, which is in accord with paragraph 15 of the Statement of Claim.

The trial court found as a fact that the Appellant had kept the Respondent's money for two years before refunding same. Much as an appellate court should refrain from disturbing findings of fact made by a trial court, it will not shirk its responsibility of setting aside those findings of fact which are not borne out of the evidence on record. In fact the trial court's finding flies in the face of the terms of the contract of sale, the parties' pleadings and most

importantly the evidence on record. The contract of sale enjoined the Respondent to pay in three instalments. The plaintiff's claim for interest was based on various times the payments were made. The evidence from both parties was that the payment was in three instalments spread between January and August 2001 and the refund was done in December 2002. So it's simply not correct that the Appellant kept the Respondent's US$500,000.00 for two years as the trial court found. This error was re-echoed by the Respondent. That finding is accordingly set aside.

The 75% of the contract sum was paid in January 2001, according to the defence in a suggestion made in cross examination which the Respondent did not deny. The actual date the second instalment of 15% was paid does not appear clearly on the record, but there was some indication it was paid in July 2001. We shall return to this shortly. The third and final instalment of 10% was paid in August 2001. The refund was effected in December 2002 in the cedi equivalent of US$500,000.00 which at the time amounted to four billion, one hundred and sixty two million five hundred thousand cedis (¢4,162,500,000.00), now GH¢416,250.00. The parties had opted to use the prevailing selling rates at the Standard Chartered Bank if any payment was to be made in cedis.

But as to what rate of interest to apply, it is not very clearly stated. The pleadings asked for the prevailing bank rate. But before the action commenced the Respondent's Solicitors Ntrakwah & Co. had made a demand for not less than 30% per annum as per Exhibit 1 dated 9 January 2003. At the hearing the Respondent testified to taking loans in local currency at rates of interest ranging between 46% and 49% per annum. Counsel for the Respondent

submitted that the rates applied on the loans should be used by the court in awarding interest.

We think the trial court was justified in applying the prevailing bank rate. This is because the parties had not agreed on any other rate of interest to apply as they were entitled to do by law. The relevant provision is contained in Rule 1 of C.I.52 namely Court (Award of Interest and Post Judgment Interest) Rules which provides as follows:

If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated (a) at the bank rate prevailing at the time the order is made, and (b) at simple interest,

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner the court shall award that rate of interest calculated in that manner.

The Court of Appeal took the view that the contract was denominated in US dollars and for that reason the interest rate to apply should be that applicable to US dollar transactions. With respect the Court of Appeal erred because the sale contract gave the parties the option to pay the money due under the contract in local currency which option was exercised by both parties in paying for the property and in making the refund. Having exercised that option the parties thereby intended to be bound by local bank rates of interest, if need be. It is not the currency denominated in the contract which matters but the currency agreed to be used and actually used and accepted by the parties for the transaction that should determine what currency rate of interest should

apply. But even then since the parties had the option to pay in cedis, it could be said that the contract was equally denominated in the cedi.

Thus the Respondent will be entitled to recover interest at the rate which was then prevailing at the Bank, which according to the Respondent's owner in his evidence was 26% per annum. He even used this figure to calculate how much interest had accrued on the amount. Given the fact that the figure quoted by the Respondent was not challenged at all, and no contrary figure was produced and the fact that it was close to the date of the trial court's decision, and given the fact that it was far below the 46% and 49% interest rate the Respondent paid on loans raised to pay for this property, it was the best available evidence so we will accept it as reasonably true. From the endorsement on the writ, as varied by paragraph 15 of the statement of claim, whereby the Respondent claimed interest from 5th December 2002, it is clear it was on that date they received the refund of the purchase price. Thus in place of the judgment given by the trial High Court we will enter the following judgment: the Respondent is adjudged to recover interest at the rate of 26% per annum on the 75% of the amount refunded from 31st January 2001 to 5th December 2002. Since the date of payment of the second instalment is not precisely known, but it is admitted it was paid, we have to look at what evidence is available on record to make some meaning out of it. The parties had contracted that the second instalment would be paid after the deed of assignment had been made in favour of the Respondent. Going by Exhibit A which also incorporates the deed of assignment, this deed is dated 14th May 2001 so it will be safe to say that the second instalment was paid after this date. Thus the evidence of the Respondent that after the first instalment the balance was paid in July 2001 could only be with reference to the second instalment since there is undisputed evidence that the final instalment was paid in August 2001. Thus the Respondent would be adjudged to recover interest at the rate of 26% in respect of 15% of the sum refunded from 31st July 2001 to 5th December 2002. In respect of the final instalment the Respondent is adjudged to recover interest at the rate of 26% per annum on the remaining 10% of the sum refunded from 31st August 2001 to 5th December 2002.

In respect of the monies paid towards registration of title, both the trial court and the Court of Appeal held the Respondent was entitled to recover same as special damage. That cannot be faulted for reasons advanced above. The amount involved, according to the receipts Exhibits U and V, is seventy million and four hundred old cedis (¢70,000,400.00) now GH¢7,000.40.

All the sums found due would attract interest under Rule 2(1) of C.I. 52 from the date of the High Court's judgment to date of final payment at the same rate of 26% per annum on simple interest basis. The Court of Appeal's order affirming the High Court's award of costs will stand since there is no appeal against it.

None of the grounds of appeal succeeds; the appeal is accordingly dismissed.

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

(SGD) **J. V. M. DOTSE**
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

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