IN THE SUPERIOUR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
AKUFFO (MS), J.S.C.
ANSAH, J.S.C.
OWUSU (MS), J.S.C.
BAFFOE-BONNIE, J.S.C.

CIVIL APPEAL
NO. J4/3/2009
28TH APRIL, /2010

MADINA SHOPPING MALL ASSOCIATION ... **PLAINTIFFS / APPELLANTS/ APPELLANTS**

VRS

1. ROSEHILL GH. LTD.
2. E. M. FRIMPONG ... **DEFENDANTS /RESPONDENTS/**
3. JIMMY NUFU **RESPONDENTS**

J U D G M E N T

ATUGUBA, J.S.C:

The facts of the case as stated by the Court of Appeal per Piesare J.A at pages 152-154 of the record of appeal (vol. 1) are as follows:

> "The 2nd Defendant/Respondent, E. M. Frimpong, who was the Managing Director of the Rosehill Shopping (Gh) Ltd., acquired a piece of land at Madina, and commenced construction of stores on that land. Some traders, who claimed to be members of the Madina Shopping Mall Association, expressed interest in the stores being constructed, and applied for allocation of such stores through the 3rd Defendant/Respondent, an agent of the 2nd Defendant/Respondent. Traders who applied for such stores were requested

to deposit monies ranging from ¢6[Six]Million to ¢40[Forty] Million Cedis, depending on the size of the stores required.

The evidence of the secretary of these traders Mrs. Grace Dede Kleponi was that it was orally agreed that the money deposit made by the traders, would be used for the construction of the stores, for outright purchase to them. The traders were later made to fill application forms. These application Forms were admitted in evidence as Exhibit 'E' [1,2,3, etc]

On Exhibit 'E', was a portion for the Next of Kin to be filled in. It was the case of the appellants that they were asked to fill in the Next-of-Kin because the stores were for outright purchase. This was denied by the Defendant/Respondents.

The stores were completed in about 2004, and to the surprise of the traders who had deposited money for stores, the Defendant/Respondents presented to them, TENANCY agreement papers, and insisted that the transaction was a lease, and not a sale; that, the deposit paid by each trader was only a "goodwill."

After failure of all negotiations to resolve the controversy, the appellants issued a Writ of Summons at the Lower court claiming:

[a] A declaration that the monies paid by individual members to the Defendants constituted full and final purchased price for the Stores/Shops occupied by them.

[b] An order for the defendants to provide electricity, water, toilet and other facilities for the Rosehill Height Shopping Mall in accordance with Town and Country regulations.

[c] An order for the Defendants to legally convey the Stores/Shops occupied by them.

[d] Perpetual injunction to restrain the defendants, Agents, servants, Workmen, Assigns etc from interfering in whatever manner with their use of the Stores/Shops.

[e] An order for the Plaintiff/Members to be declared the owners thereof of the Store/Shops and to be entitled to control the whole premises and employ persons to take charge of same as and when necessary.

[f] An order that none of the defendants is the owner of the Stores/Shops besides the Plaintiff/Members.

[g] An order to restrain any other person[s] from operating at the Rosehill Height Shopping Mall except with the permission of the Plaintiff/Association.

As the end of the trial, the trial judge dismissed the plaintiff/Appellants' claim on two main grounds:

[1] That the parties were not ad idem on the nature and transaction the parties had embarked upon, relying on the case:
OKAI vrs. OCANSEY [1992-93]3 GBR. 1047 CA. Where the Court of Appeal refused to decree specific performance on the ground that essential terms of the transaction had not been agreed upon. And

[2] that the transaction was a tenancy agreement."

The appellants' appeal to the Court of Appeal failed. They have appealed to this court on the following grounds:

"(i) The Court of Appeal erred in law in holding that in the absence of a power of attorney the action could not be instituted in the plaintiff's name.

(ii) Even if the name used in instituting the action as plaintiff was wrong that should not have been used by the Court of Appeal to dismiss the appeal since having regard to the matters in controversy and the parties before it the Court could have made an order putting the name of a proper person on the record as suing for himself or herself and all the others similarly placed.

(iii) The Court of Appeal misdirected itself in law in failing to appreciate that *the contract sued upon was not wholly executory but had been partly performed on both sides and therefore a reasonable amount could have been assessed as what each had to pay in addition to the deposits taken from them.*

(iv) The Court of Appeal erred in failing to appreciate that if the defendants defence was that *the transaction with each individual was an agreement for a lease* then the defendants failed to establish their case and the appeal should not have been dismissed.

(v) The Court of Appeal failed to put a proper construction on the transaction in the light of the documentary evidence on record.

(vi) Other grounds will be filed later."

As to the issue of the appellants' capacity to sue I feel that the Court of Appeal took an overly technical view of the matter.
If anything, the individual members of the Association were set out in an amended writ and that suffices.

As to the substance of the matter we agree with the reasoning and conclusion of the Court of Appeal per Piesare J. A at pages 156-158 as follows:

> "This brings me to the important issue: that is, the Validity of the transaction as a legally enforceable contract.
>
> *It was the version of the appellants that it was orally agreed between them and the respondents that the monies collected from the appellants were to be used for building the stores for them for outright purchase.* The respondents denied this oral agreement.
>
> Following the alleged oral agreement, the appellants were given allocation application forms, which they filled, and signed. This is Exhibit 'E'
>
> In the absence of any acceptable evidence of the basis of any contract, it is Exhibit 'E' that this Court should look at. *There is no mention of outright sale of the shops on Exhibit 'E'.*
>
> There is request for a Next-of Kin on Exhibit 'E'. The appellants construe this to mean that the interest to pass to them under the agreement was outright purchase. I hold the same view as the trial judge, that this view cannot hold. A next-of-kin may inherit a Licence, a leasehold or a freehold.
>
> Paragraph 11 of Exhibit 'E' reads as follows:
>
> [11] "The shop will be allocated to the applicant 10 months after payment of Minimum Deposit of ¢15 Million". And
>
> [12] "Allocation of stores shall be based on first come first served basis. *Payment of the full cost will be determined after the project is completed.*"
>
> In paragraph 12, it is not clear what "full cost" relates to. Does it refer to the full cost of deposit, or full cost of purchase-price?
>
> *It is also clear from paragraph 12, that one could not say what the "full cost" was going to be until the project was completed.*
>
> *Thus, the essential details, as to the price of the alleged outright purchase, or full deposit for a leasehold, could not have been agreed upon.*
>
> Now, the authorities are quite clear, that where an essential element of a contract has not been agreed upon by the parties to a contract, there is no valid contract.

In the case: *MAY AND BUTCHER vrs. R, HOUSE OF LORDS* [1934]2 KB 17 VISCOUNT DUNEDIN said:

"To be a good contract there must be a concluded bargain, and *a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties."*

Again, in the case *BRITISH BANK FOR FOREIGN TRADE vrs. NOVINEX LTD. Court of Appeal* [1949] 1 KB.623, 1 ALL ER. 155.

COHEN, L.J.: - had this to say:

> "A number of authorities have been cited to us, to which I do not propose to refer in detail, because in my view, the effect of the authorities is stated correctly in the learned judge's judgment where he said:- "The principle to be deducted from the cases is that *if there is an essential term which has yet to be agreed and there is no express provision for its solution, the result in point of law is that there is no binding contract."*

In the instant appeal the price of the alleged outright purchase had not been agreed upon; the rent or final cost had not been agreed upon. These are essential terms; without which there can be no valid contract. The trial judge was therefore right, in relying on the case: *OKAI vrs. OCANSEY* [1992-93]3 GBR. 104 7 CA.

I also dismiss the appeal upon this ground, that *the essential terms of the transaction had not been agreed upon by the parties. There was therefore no enforceable contract.*

Lastly, on the issue fraud. I have no hesitation in dismiss this ground. The appellants allege that there was an oral agreement that the money-deposits were for outright purchase. The application forms which they subsequently signed, did not mention sale. Yet they signed it without question. They were unwary of danger; they must be deemed to have signed for what they signed for. Exhibit 'E' does not tell a lie on the face of it.

The ground of appeal based on fraud is therefore dismissed." (e.s)

That reasoning is supported by the recent decision of this court in *NTHC LTD v ANTWI* (2009)SC GLR 117.

However subject to restitution of the monies and expenses incurred in respect of the premises by the appellants before the issue of their writ at prevailing bank rate at simple interest as at today from the date of the termination of their occupation to the date of final payment, if the appellants persist in their rejection of a tenancy from the respondent owner. The corresponding amount of rent paid by those who accepted tenancy should be deducted from the amount of the restitution.

That it is competent for us to do this is fully set out in holding (3) of NTHC *LTD v ANTWI* (2009) SC GLR 117 as follows:

> "(3) Although Order 63, r 6 of the repealed High Court (Civil Procedure) Rules, 1954 (LN 140A), appeared not to have been re-enacted in the new High Court (Civil Procedure) Rules, 2004 (CI 47), the High Court had an inherent jurisdiction to make such consequential orders as were necessary for doing justice, even if the beneficiary of such order, such as the defendant company in the instant case, had not expressly requested it. The Supreme Court would thus vicariously also have that power. Consequently, the court would, under rule 1 of the Court (Award of Interest and Post Judgement Interest) Rules, 2005 (CI 52), award interest in the circumstances of the case, in favour of the defendant company so as to avoid miscarriage of justice."

See also *HANNA ASSI (No. 2) v. GHIHOC REFRIGERATION & HOUSEHOLD PRODUCTS LTD (No. 2)* [2007-2008]SC GLR 16.

Subject to this variation the decision of the Court of Appeal is affirmed and we dismiss the appeal.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

AKUFFO (MS), JSC:-

I have already had the privilege of reading the opinion previously read by my esteemed brother, Justice William Atuguba, and am in full agreement with both the reasoning and conclusion. However, I have a few words to express on a matter that has, over the years, caused me much concern because it has arisen from time to time in cases involving commercial property. My primary purpose is simply to set out the properly applicable legal position and thereby disabuse the minds of parties to transactions involving such property and, hopefully, thereby obviate the payment by prospective tenants of unjust and unlawful claims, in the disguised form of 'goodwill', to prospective lessors.

The record of appeal shows that, in the course of the dispute between the Appellants and the Respondents, the Respondents took the position that the initial amounts of monies which they had demanded and received from the Appellants amounted to goodwill. In other words, such payments were not to be counted as advance payment of rent (or purchase price). Counsel for the Appellants, in a letter dated 13th July, 2005 (exhibit 'MA2' attached to affidavit in opposition deposed to by Kwaku Ohemeng Darko, at page 20 of the record of appeal), had complained that:-

> "It was therefore shocking and exceedingly distressful for them when they were being told subsequently that monies paid towards the purchase of the stores is a goodwill ...." (sic)

In his letter in response, dated July 25th 2005 (exhibit 'MA3' attached to the aforementioned affidavit), the lawyer for the Respondents, put his clients' positions thus:-

> "My clients reiterate that right from the onset, they proceeded to deal with your clients upon the basis that the various amounts they paid to my clients were for goodwill purposes as was and still is the practice regarding the renting of stores and commercial premises throughout the country."

In his written address before the High Court, at the close of the trial, Counsel for the Respondents argued that the value of any property is the sum total of the direct cost of its construction plus intangible and qualitative factors such as the location, available services, general environment, etc. According to counsel it is these intangibles that constitute the goodwill value of the property and any interest that may be acquired therein. Counsel, consequently, concluded that:

> "The 'goodwill' value of commercial real property or the 'premium' should not be confused with business 'goodwill' that is acquired only after tenure of operation. Goodwill in property can be acquired even before the sod is cut depending on such environmental factors as accessibility, suitability for a particular use, services facilities ...etc. It should therefore make economic sense for a premium to be paid to secure use of such property when the opportunity exists for many to acquire user rights by purchasing an interest in the property.
>
> .... As a result, securing space to trade in such an environment could easily come at a premium cost. This is not unusual, and of course, not unlawful."

The learned trial judge, of course rightly found that, in the circumstances of the matter the question of goodwill could not properly arise.

Legal text defines 'goodwill' variously as follows:-

> "A business' reputation, patronage, and other intangible assets that are considered *when appraising the business, especially for purchase*; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." (**Black's Law Dictionary, 8th Edition**)
>
> "The benefit a business has from its reputation and trade connections. It is an asset of a business and may be dealt with separately from other assets." (**Osborn's Concise Law Dictionary, 8th Edition**)
>
> "The advantage arising from the reputation and trade connections of a business, in particular, the likelihood that existing customers will continue to patronise it." (**Oxford Dictionary of Law, 6th Edition**)

Simply put, "*it is the good reputation of an established business, seen as having an actual value*" (**Chambers 21st Century Dictionary**). Thus, in more modern

business context, intellectual property, such as business name, trademarks, brand name, market share, customer base, etc will all form part of the goodwill of a software development company for example. It is for this reason that, regardless of the value of the tangible assets of a business, an interested buyer in whole or in part of that business, or prospective partner, would be willing to pay a price that is much higher, because of the perceived value or potential synergy of the intangible asset, goodwill, with his own business plans.

Generally, goodwill does not attach to new premises (in the sense of the bare building about to be let out), no matter how fine, but rather to the business or businesses carried on therein. As was aptly put by Lord Macnaghten in **Inland Revenue v. Muller and Co's Margarine Company, [1901] A. C. 224**, "it is the attractive force which brings in custom". Without this, no matter how beautiful the premises or suitable their location, if the businesses carried on therein fail to generate the requisite level of goodwill, no fruitful gains will result therefrom either to the owner or the occupants.

In sum, therefore, goodwill is built on an ongoing business, it is earned over a period of time through appropriate business practices that build good reputation, customer loyalty, name brand and such positive operational attributes; it is not magically created at the beginning of a new business. Hence, it is when the occupant sells his/her business, after building up goodwill, that the vendor might require the purchaser to pay for such goodwill, over and above the value of the tangible assets. Of course, after a while, the occupancy rate and perceived desirability of the building might also establish goodwill in the premises which will serve the owner-company and its shareholders well in the event of sale or a buy-in. But since according to the respondents' own case, they are not selling any part of the building to the Appellants there is no basis for their being required to pay any goodwill over and above the rent. Vis-a-vis a prospective landlord and tenant relationship, the question of goodwill cannot arise since any goodwill arising from appearance, location, services etc., are expected to have been factored into the rent.

The concept of goodwill, as depicted in Respondents' counsel's address, as hereinbefore quoted, is therefore quite aberrant. I have not come across any precedent which endorses any such practice or elevates it to the status of a

Ghanaian 'practice of the trade', whereby owners of commercial, or any other premises, may lawfully levy payment of 'goodwill' from their prospective tenants. At best, the factors enumerated by counsel will only serve as valuable factors in estimating the rentable value of the premises. To that extent, as already stated, they might constitute the attributes that would justify the level of the rents charged. To demand and collect any other monies under the guise of goodwill from prospective tenants is, indeed unlawful. Under **Section 25(1) (b) of the Rent Act, 1963 (Act 220)**:-

> "*A person who, in respect of any premises*
>
> *"demands or receives a consideration, whether in money or in kind or in any other manner and whether by way of rent, fine, premium or otherwise, for the grant, renewal, continuance or assignment of a tenancy ...*
>
> *"commits an offence and is liable, on conviction by the Rent Magistrate to a fine not exceeding two hundred penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment.*"

There is no doubt in my mind that, pursuant to Section 1 thereof, the provisions of the Rent Act are applicable to premises such as the one at the centre of this litigation. There is also no doubt in my mind that the extortionate practice of demanding or receiving payment of goodwill (or premium) from a prospective tenant of commercial premises, which has become so prevalent in this country that counsel for the Respondents could brazenly rely on such practice to justify his client's stance, is illegal and an offence under the abovementioned provisions.

Unfortunately, matters have come to such a sorry pass that, it appears that, over the past few decades, the Rent Act itself has fallen into disuse and is observed more in the breach that in the performance. Be that as it may, it remains on the statute books of Ghana and is still good law. Counsel, law practitioners, owners of premises, as well as prospective tenants in Ghana would be well advised to take this law into account in their transactions.

Moreover, the demand for the payment of 'goodwill' or premium by owners is a practice that must be strongly discouraged and even deprecated all the more for its inflationary tendencies on the market economy. As exemplified in this case, traders have been required to substantially pre-finance the Appellant's investment, simply

because they wish to have space in the building for the operation of their businesses. They locked up significant sums of money for a considerable period of time. One wonders what rate of inflation these traders have slapped onto the price of their wares, in order to assure a recovery of the monetary value they had lost whilst awaiting delivery of the allotted premises to them and in any case cover the overall cost of the premises.

Indeed, the application of the nomenclature 'goodwill' to the criminal practice depicted in this case is a gross misnomer, which does injustice to and is an abuse of a noble concept in intellectual property law and business accounting.

S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

ANSAH JSC.

I had the benefit of reading beforehand the judgment just read by the learned President of this court Atuguba JSC, and I agree with the facts and issues raised in the appeal as well as the conclusion to dismiss the appeal. I only wish to add the following few words of my own to it.

It was trite learning an appeal to this court is by way of a rehearing, meaning the court will not hear the parties and/or their witnesses afresh but will subject all the evidence, oral and/documentary, to microscopic scrutiny to see how far it supported the conclusions by the court. Where it so accorded with the conclusion, then it was right and ought to be affirmed. On the other hand where the evidence and the conclusion were at the antipodes, then the judgment was perverse in which case the appellate court will have to allow the appeal and set the judgment aside, or reverse it in favor of the appellant.

In this appeal, the principles that ought to be borne in mind are that the trial court has the duty to make the primary findings of facts in the case and when that

function has been discharged, an appellate court will generally be slow to interfere with the findings of facts. There has been much learning on this point of law already and Fofie v Zanyo [1992] 2 GLR 475; Praka v Ketewa [1964] GLR 423, are cited to illustrate it.

The fact was also clear that the lower courts concurred in their findings of facts that the agreement between the parties was for a lease of the storerooms to the plaintiffs; they were not sold to them. In that case, the applicable principle was that Koglex (No 2) v Field [2000] SCGLR.

There was no doubt the plaintiffs occupied the premises. Occupation was consistent with a sale or a lease and the onus was on the plaintiffs who asserted that the shops/storerooms were sold to them to prove that assertion on the preponderance on the probabilities.

They were to prove the essentials of a sale in law that was to say, by providing credible evidence on how the contract of sale was made between them and the defendants. They were to prove by credible evidence that the defendants transferred or agreed to transfer the property in the storerooms/shops to them (plaintiffs) for a money consideration, i.e., the price, or whether or not the sale was absolute or conditional. If it was a conditional sale they were to prove that the conditions agreed upon had been fulfilled so property ought to be transferred to the plaintiffs.

These are largely issues of fact to be resolved by the totality of the evidence. The trial judge found there was no sale of the shops to the defendants, a finding of fact affirmed by the first appellate court. The question was what was it that the parties agreed to sell? Were they the store whose construction was far from complete? That could not be so

and in my opinion, the lower courts were right in their finding of fact for it was supported by the evidence. I also agree to dismiss the appeal.

J. ANSAH
JUSTICE OF THE SUPREME COURT

OWUSU (MS), JSC:-

I have had the opportunity to read the lead Judgment of my respected brother, the president and I wholly agree with the conclusion arrived at by him and the reasons assigned there at.

I would however make a few remarks in connection with the capacity of the plaintiff Association which sued on behalf of the 88 members of the Association.

To this court, the Appellant filed five grounds of Appeal and indicated that other grounds will be filed later even though no such additional grounds were filed.

All the same out of the grounds filed, only two were argued i.e. grounds (1) and (v).

Ground (1) as stated is as follows:

> **"(1) The court of Appeal erred in law in holding that in the absence of a power of attorney the action could not be instituted in the plaintiff's name."**

On the issue of capacity, this is what the court per Piesare J. A said:

> **"Now, clearly, by this description of the title, the Madina Shopping Mall Association had no interest in the subject-matter of the dispute, and only sued as an ATTORNEY. Without a power of attorney therefore, the Madina Shopping Mall Association had no legal authority to prosecute the action on behalf of the affected traders.**
>
> **The action was therefore incompetent, and the trial Judge should have dismissed it on this ground."**

Madina Shopping Mall Association which originally issued the writ in its own right had with leave of the trial court amended the writ to reflect the representative capacity in which it prosecuted the claim for and on behalf of its 88 members.

In the case of the REPUBLIC VRS HIGH COURT, ACCRA; EX-PARTE; ARYEETEY (Ankrah Interested party, [2003-2004] SCGLR 398,

Kpegah J.S.C., who delivered the opinion of the court, stressed the need for such a requirement. See also the case of BULLEY VRS AKRONG [1965] GLR 469

Having held that because the Madina Shopping Mall had no power of Attorney, it lacked the legal authority to prosecute the claim on behalf of the members, the court dismissed the appeal for want of capacity.

The title of the plaintiff on the writ was amended without any objection from counsel for the defendants. This amounts to an implied admission that the plaintiff has the authority of the members to institute the action.

What is power of Attorney? From the statement of case of the Appellant, the Encyclopaedia of forms and precedents, volume 31, 1999 edition, p.495 defines it as:

> **"A power of Attorney is a formal arrangement by which one person (the donor) gives another person (the attorney) authority to act on his behalf and in his name." - - -**

L. B. Curson's Dictionary of Law, defines power of Attorney as "*Instrument authorizing one person to act for another during the absence of that other*."

Under our own law, the powers of Attorney Act, 1998 (Act 549) does not explicitly define power of Attorney, but under section 6 of the Act, subject to the other provisions of this Act, a general power of Attorney - - - shall operate to confer

(a) On the donee of the power, or

(b) If there is more than one done, - - - jointly and severally, authority to do on behalf of the donor anything which can be lawfully done by an attorney.

What the decided cases decide is that the person who sues in a representative capacity must endorse such representative capacity on the writ and go ahead to prove that he is clothed with such capacity either before or at the time the writ was issued.

A power of Attorney is not under the circumstances a sine qua non.

If his capacity is challenged then he must lead sufficient evidence to prove that he has the requisite capacity.

Does a Head of family or occupant of a stool who sues in respect of family/stool property for and on behalf of the family/stool, need a power of Attorney to be able to institute the action? The answer is clearly, No.

The plaintiff Shopping Mall gave evidence per the secretary, Mrs Kleponi for and on behalf of the Association. In her evidence in chief to a question:

"You are giving this evidence on behalf of whom?

Witness: I am giving this evidence for the Association and on behalf of its members involved in the case."

To another question, the defence are saying that the association has no right or capacity to bring an action on behalf of its members. Do you accept it?

The answer was "I don't accept it, my Lord."

Through out cross-examination, the witness was insistent that she was testifying for the Association on behalf of the 88 members.

The plaintiff's evidence that it had the authority to prosecute the claim on behalf of the members was neither challenged nor denied.

A power of attorney was therefore not a sine qua non and the court of Appeal fell into grave error when it dismissed the appeal for want of capacity.

Having dismissed the appeal for want of capacity however, the court went further to deal with the merits of what Piesare J. A. considered to be the important issue. That is the validity of the transaction as a legally enforceable contract. In the case of BULLEY already referred to, Apaloo J.S.C. (as he then was) had this to say: - - - But the question of capacity, like the plea of limitation, is not concerned with merits."

R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE, JSC:

The plaintiffs/app/app, (hereafter App) sued the Deff/Resp/Resp (hereafter Resp) at the High Court, for a number of reliefs. They lost. Their appeal to the Court of Appeal was dismissed. They are seeking to overturn the decision of the High Court as confirmed by the Court of Appeal with this third bite at the cherry.

At the High Court the appellants sued for;

a. A declaration that monies paid by the individual members of the plaintiff association constituted full and final purchase price of the shops/stores occupied by them.

b. An order for the defendants to provide electricity , water ,toilet and other facilities for the Rosehill Height Shopping Mall in accordance with Town and Country Regulations.

c. An order for defendants to legally convey the stores/shops occupied them

d. Perpetual injunction to restrain the defendants, agents, servants, workmen, assigns etc. from interfering in whatsoever manner with their use of the stores/shops.

e. An order for the members of the plaintiff association to be declared the owners thereof the stores/shops and to be entitled to control the whole premises and employ persons to take charge of same as and when necessary.

f. An order that none of the defendants is the owner of the stores/shops besides the members of plaintiff association.

g. An order to restrain any other person(s) from operating at the Rosehill Height Shopping Mall except with the permission of the plaintiff/association

h. Any other relief as the court may deem fit.

At the trial the plaintiff claimed that it is an association of 88 members registered under the laws of Ghana for the protection of its members. 1st defendant is a registered company with 2nd defendant as its managing director. The 3rd defendant is an agent of 1st defendant. In or about 2001, the 2nd defendant represented to the public that the 1st defendant is putting up stores/shops on a piece of land at Madina for outright sale, on completion. Members of the association individually showed interest. They filled out forms provided by 2nd defendant through 3rd defendant and paid deposits of ¢15million each towards the total purchase price.

Depending on the location and size of the shop/store, the final prices ranged from ¢30million to ¢60million. The building is known as Rosehill Height Shopping Mall. It was agreed verbally that toilet facilities, water and electricity will be provided and the shop would be ready within 10 months, in 2002.

At the commencement of the project, plaintiff says the 2nd defendant had no money of his own. He therefore failed to complete the project as promised and even forced them to fix glass doors to their stores at extra expense. Although defendants failed to provide water, toilet facilities and electricity to the stores/shops, they allocated the open spaces around the Mall to other traders.

Just before the Mall was to be inaugurated defendants told them that the monies they paid for the construction of the building was goodwill and that the shops/stores were for rental and they were even in arrears. To that effect, 2nd defendant

provided them with leasehold agreements to execute. The members from the association said the defendants have cheated or defrauded them. They refused to execute the lease/tenancy agreement and consulted their lawyers. After efforts to resolve the impasse failed, plaintiffs sued the defendants claiming the reliefs stated above.

The defendants' case is that 1st defendant through 2nd defendant acquired a lease of the land on which the Mall stands now from the Ga District Assembly to build the shops operate them for 25 years and then transfer to the Assembly. So the Assembly caused the design and other drawings of the Mall to be prepared. After the construction had commenced, one Mrs. Pearl Amarkwei successfully challenged the title of the Ga District assembly. So the project had to be halted. After negotiations, 1st defendant through 2nd defendant acquired the free-hold interest in the land from Pearl Amarkwei.

Meanwhile, traders, inclusive of members of plaintiff association, expressed interest in acquiring shops in the mall. Since the project has become the property of 1st defendant solely, 2nd

defendant authorized 3rd defendant to collect allocation fees from those traders or individual. These allocation fees ranged from ¢35million to ¢60million depending on the size and location of the shop in the Mall which monies were duly acknowledged in the Allocation Forms and receipted in Exhibit "P" series. The various amounts were paid mostly in installments.

According to defendants, the Mall was completed in 2003 and accordingly allocated but most of the traders or the allottees did not take possession immediately. So they had to prompt them through a publication in the Daily Graphic of 16th March, 2005. After the allocation, defendants requested the traders to execute a tenancy agreement on individual basis for the purposes of paying rent.

Some allottees according to defendants complied with the request and executed the agreement. Those people have since had electricity extended to their shops and are operating. But then members of the plaintiff association refused because they alleged that the shops were for outright purchase. They asserted that they are owners of the shops allocated to them because of the payment they made and it will be fraudulent on the part of the defendants to regard them as tenants and charge them rent.

Defendants denied that claim of the plaintiffs. In paragraph 27 of the amended statement of defence in particular, they pleaded that "nothing thereto was actuated out of fraud or in contrast to the custom and usages of commercial/ business premises letting". It is explained in other words that in the lease or letting of commercial/business premises, it is normal practice to take a fee or what the plaintiff pleaded defendants called "goodwill" aside of the actual rent. Defendants say that is exactly what they have done and so these monies paid by the plaintiff members did not see the shops to them outright.

Inspite of the long list of issues (ten in all) agreed upon by the parties, the trial judge rightly isolated one as the principal issue the determination of which would despose of the entire case. i.e. whether or not if, there was an agreement it was

lease, outright purchase or what was the nature of the transaction? After a thorough evaluation of the facts and the evidence before him, the trial judge dismissed the appellants' claim and found for the respondents. As indicated in the opening paragraph, the appeal to the court of appeal was equally thrown out, hence this appeal to us.

I have carefully gone through the judgments of both the trial judge and the learned Justices of the Court of Appeal. I have also digested the statements of case of both parties, especially that of the appellant. I must confess that in the light of the evidence adduced at the trial, together with the exhibits tendered in support of their respective cases, I cannot see where the trial judge went wrong.

In deed as rightly pointed out by the trial judge in spite of the long list of issues, the main issue that called for determination was whether the transaction between the parties was that of outright sale and purchase of the shops in question or it was for a lease or rental. The trial judge, who heard the witnesses and saw their demeanour coupled with the exhibits tendered at the trial concluded that the transaction was not sale and purchase. Appellate courts have been advised to be slow to overturn judgments based on finding of facts. See the case of Praka V Ketewa 1964 and a host.

The appeal of cases on this principle to the Court of Appeal was equally dismissed. In the appeal before this court the appellant has not canvassed anything new. He has repeated the same arguments and relied on the same exhibits which did not find favour with the two earlier courts!

The appellant seemed to be so enamoured by the contents of exhibit E series and the use of certain words and phrases like cost, price, next of kin, allocation, etc.

In support of their case that the original agreement, though oral, was for the sale and purchase of the shop, the appellants' witness opined that in the form they were made to fill after the initial oral agreement, there was a column for Next-of-kin. And this meant that the transaction was for outright sale.

This what the witness said at pg 34 vol 2 of the proceedings:

"Sometime in 2002, a request was made by 3rd defendant, through the 2nd defendant that they had acquired a piece of land where the Rosehill shopping mall is now and interested members should make payments for outright purchase of shops which will be constructed for them. There was a verbal agreement which backed this. And later followed with an application form, there was a column for the name of next-of-kin which defendants stated that the clause meant that the shops belongs to you whoever is paying."

The respondents denied making the several imputations in this evidence. In his judgment the Trial Judge (at Pgs 138-139 vol 2) said,

The heading of Exhibit "E" is "Allocation Form". There is column for name and address of next of kin, relationship with next-of-kin, type of goods to be sold and deposit paid. Then there was a promise that shops will be allocated 10 months after payment of minimum deposit on first come first served basis. But then, payment of the full cost will be determined after the project is completed.

It is seen that Exhibit "E" itself is more or less an offer to an applicant or interested party and nothing more. A next-of-kin is the person normally a relative, entitled to inherit the property of a deceased who died intestate. The deceased may have

possessed the property as an owner in his own right, or as a lessee or a mortgagee/ledgee or a licensee. The next-of-kin therefore inherits the deceased property. In this suit, P.W.4 gave evidence that he now operates his wife's shop as her next-of kin when she died after making the payment demanded. So therefore in law, it is not only the property owned outright that can be passed on or inherited by a nest-of-kin. Any interest in land or property is inheritable by a nest-of-kin. I hold therefore that the mere inclusion of the column for the provision of the name of the next-of-kin on Exhibit "E" series did not mean that the shops were to be owned outright. That interpretation is misapprehension of the law."

The appellant takes exception to this interpretation of next-of-kin given by the trial judge. As a matter of fact I am of the view that the trial judge was rather generous in his interpretation. In the case of In re Appiagyei Danka(decd): Appiagyei Danka v Appiagyei Danka 1973 2 GLR188, it was said of a next-of-kin that he/she is the nearest blood relation and the object of requiring the making of such nomination was to assist to trace and contact the relations of a deceased person.

For example if a person is working in Accra while his family is back home in the village which is not easily accessible, he could nominate his townsman or any body through whom information can easily flow to his family. In effect such a person need not even be a blood relation. Such nomination cannot and does not necessarily make a person a beneficiary and definitely cannot support the appellants' contention that it meant the transaction was that for sale!

The use of the words allocation, full cost, etc was adequately handled by both the trial judge and the Justices of Appeal. This how the Appeal Court put it.

"Paragraph 11 of Exhibit "E" reads as follows:

[11] "The shop will be allocated to the applicant 10 months after payment of minimum deposit of ₵15 Million" and

[12] "Allocation of stores shall be based on first come first served basis. Payment of the full cost will be determined after the project is completed"

In paragraph 12, it is not clear what "full cost" relates to. Does it refer to the full cost of deposit or full cost of purchase price?

It is also not clear from paragraph 12 that one could not say what the "full cost" was going to be until the project was completed.

Thus, the essential details as the price of the alleged outright purchase, or full deposit for a leasehold, could not have been agreed upon

Now, the authorities are quite clear, that where an essential element of a contract has not been agreed upon by the parties to a contract, there is no valid contract.

In the case: MAY AND BUTCHER vrs R, House of Lords [1934] 2 KB 17

VISCOUNT DUNEDIN said:

"To be good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between parties."

Like the Court of Appeal, I do not find any thing in exhibits E series that go to support the appellants' contention that the contents therein were suggestive of outright sale of the shops in dispute.

Nothing in Exhibit "E" showed that the shops then under construction were to be sold, instead of being let. There is no mention of sale or outright purchase. However, there is the use, twice, of the word "allocation". First, it is stated that allocation of shops was to happen in 10 months after the payment of minimum deposit of ₵15 million (old cedis). Secondly, it was also stated that allocation of shops was to be on first come first served basis with the full cost to be determined after the completion of the project. Aside these, there is no indication that the shops are for sale and at what price. The cost of allocation is said to be determined after completion of the project, however a deposit of ₵15 million (old cedis) is made payable towards that.

What did the word "cost" relate to? Did it relate to a sale of shops or to the allocation of shops. Again, if shops were being allocated, were they being allocated upon sale or upon letting? Exhibit "E" does not say much, save provide for the entry of personal details of the prospective applicants for allocation. Does this document represent a written memorandum of an oral agreement between the members of the plaintiff association and the defendants as rendered by its secretary – a contract by which the 2nd defendant solicited funds from the members of the plaintiff association, built a block of stores for them on a parcel of land he had acquired, with the intention that the monies paid would represent the full purchase price of a freehold of those stores? And would the provision of the name of each member's next-of-kin mean that the interest transacted in was an outright purchase of the store allocated in the Rosehill Heights Shopping Mall?

Other information demanded on Exhibit E series are also not consistent with the appellants' interpretation that the transaction was for an outright sale. For example, if the defendants indeed intended to sell the stores, what was the reason behind the demand on Exhibit "E" for the indication of the kind of goods to be sold by each applicant? Why ask for the hometown of the applicant, aside the indication of the person's place of residence and address for communication? What would the defendants need all that if they were selling outright the stores in the shopping mall. What then becomes of those occupants who signed their tenancy agreements? What relationship was envisaged to exist in one block of stores in which several persons had each a freehold interest in? How would such a structure be managed? Then there is this evidence that even as at the time when payment was being effected to the knowledge of the appellants, the respondents had only twenty-five year interest in the land. Since to their knowledge the respondent had only 25 years on the land how could they expect something more than what their own grantor had? All these are questions which the appellants did not or could not answer.

Clearly with all these pieces of evidence the trial High Court judge could not be faulted in his conclusion.

This case was initiated by the appellants and he assumed the evidential burden of proving that the transaction was one of sale and not lease. Like the trial Judge and the learned Justices of the Court of Appeal, I believe that the appellants woefully failed in this enterprise and I therefore dismiss the appeal.

The appellant has also appealed against the decision on grounds of fraud. In counsel's statement of case he submitted that the fraud being complained of was that whereas the parties had entered into a verbal agreement for the sale of the

shops by the letter dated 14th February 2005 the respondents were denying that that was the agreement entered into by saying it was an agreement to let the shops.

Here again I must say I cannot find anything to support this imputation of fraud. Flowing from my earlier discourse, I cannot fathom how the respondent could be said to have perpetrated any fraud on the appellants. It is my view that the respondents at all times knew that he was letting out his shops and has been consistent about that. If the appellant construed any action or document like exhibit E series to mean outright purchase, that will be his problem and cannot be said to be a fraudulent misrepresentation on the respondents' part.

In all I do not find any merit in the appeal and so same is dismissed.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

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