IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA, A.D.2014

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
ADINYIRA (MRS), J.S.C.
BAFFOE-BONNIE, J.S.C.
AKOTO-BAMFO (MRS), J.S.C.

CIVIL APPEAL
NO. J4/39/2013

31ST JULY 2014

NDK FINANCIAL SERVICES LTD. **PLAINTIFF/RESPONDENT/APPELLANT**

VRS

HAROLD NTORINKANSAH **DEFENDANT / RESPONDENT**

GLICO GENERAL INSURANCE **2ND DEFENDANT/APPELLANT/ RESPONDENT**
ADDICENT FOODS LIMITED
HANSAS COMPLEX

MILLICENT NTORINKANSAH **3RD DEFENDANT / RESPONDENT**

JUDGMENT

ATUGUBA, JSC (FOR THE MAJORITY)

This is an appeal by only the 2nd Defendant/Appellant/Respondent against the judgment of the Court of Appeal dated the 15th day of November, 2012. The only part of the decision complained of as per the Notice of Appeal is "The part of the judgment allowing ground (a) of the grounds of appeal." The grounds of appeal are per the said Notice of Appeal as follows:

"(a) the learned Justices of the Court of Appeal, erred in law when they held

that Sub-section (1) of Section 44 of the Insurance Act, Act 724 is not limited to contracts of insurance created under the Motor Vehicle (Third Party Insurance) Act but every contractor (sic) of insurance entered into by the insurer after the commencement of Insurance Act, Act 724

(b) The learned Justices of the Court of Appeal erred in law when they held that the credit guarantee bonds issued in favour of the plaintiff/Respondent by 2nd Defendant/Appellant were contracts of insurance.

(c) The learned Justices of the Court of Appeal erred in law when they held that the credit guarantee bonds issued by Glico to the 1st Defendant was silent on the specific sum that Glico would pay should the 1st Defendant default in paying credit to facilities granted it by NDK and therefore lacked certainty contrary to the provision under section 44(1) of the Insurance Act, Act 724.

(d) The learned Justices of the Court of Appeal erred in law when they failed to consider the fact that the guarantee bonds were issued by the 2nd Defendant/Appellant…."

Brief Facts

In this case the Plaintiff/Appellant (hereinafter called the Plaintiff) and the Second Defendant/Respondent (hereinafter called the defendant) are two financial institutions, which worked together to secure financing for two companies controlled

in part by Harold Ntorinkansah, Hansas Complex and Addicent Foods Limited. The credit facilities extended to the companies called for a repayment schedule on a monthly basis, with insurance added to the total borrowed. The credit facility contracts mandated that in the event of a default, "the whole amount of the outstanding loan and all accrued interest and other amounts owing hereunder will become repayable forthwith and demand in writing made by NDK at any time."

As a prerequisite for issuing these credit facilities, the plaintiff further required the companies to secure credit guarantee bonds from an insurance company in order to guarantee payment, which in this case was the Second Defendant. Upon the defendant's securing of this repayment guarantee, the Plaintiff extended the credit facilities to the companies.

The Second Defendant issued several credit guarantee bonds, covering the amounts extended as a part of the credit facilities to the defendant companies. The purpose of these bonds was to ensure the repayment of the Plaintiff should any type of future default occur on the part of the 1st Defendant. Each credit guarantee bond stated the specific sum for which the bond covered.

The relevant part of these guarantee contracts reads that, "*If the Customer shall fail to repay to the Bank the said facility then we Glico…will upon demand of the Bank pay to the Bank any sum that is due and owing to the facility. This guarantee shall remain in force so long as there is any sum due and owing from the Customer to the Bank on the facility".* (e.s) This contract is the basis for the Second defendant's liability in the case that the Defendant should default on any part of their obligations to the Plaintiff.

Months after the signing of this contract, the Defendant failed to make good their obligation to service the credit facilities put forth to them by the Plaintiff.

Upon their default, the Plaintiff began the action that is presently before the court to regain the capital extended to the Defendant.

The Second Defendant refused to honor its obligation as created by the guarantee bond, seeking to invalidate the contract based upon allegations and accusation of improper dealings between the plaintiff, the Defendant, and employees of Glico Insurance itself.

Issues on Appeal to the Supreme Court

The lower courts settled many of these accusations, and as such, only at issue in the present appeal before the Supreme Court, is the further claim by the Second Defendant that the credit guarantee bonds are invalid under the Insurance Act, 2006 Act 724. Specifically, the Second Defendant points to section 44(1) of Act 724, which states that, "*Subject to subsection (2) a contract of insurance entered into by an insurer after the commencement date is void if it is a contract under which the insurer undertakes a liability the amount, or maximum amount of which is uncertain at the time when the contract is entered." (e.s)*

The Second Defendant maintains that because the credit guarantee bonds issued were in fact contracts of insurance without clear limits of liability, the law invalidates them. The Plaintiff takes the opposite view, namely that the guarantee bonds are not insurance contracts, and thus Act 724 is not relevant to the dispute.

Further at issue before this Court, is the proper scope with which to extend section 44. Subsection 1 of the Insurance Act prohibits insurance contracts containing unfixed limits of liability; section 44 subsection 3 further reads that, "*This section applies to motor insurance contracts despite anything to the contrary in the Motor Vehicles (Third Party Insurance) Act, 1958 (No. 24). "*(e.s) The plaintiff promotes the interpretation found by the High Court, which uses subsection 3 to limit the scope of subsection 1 to only those insurance contracts involved with motor vehicle insurance. On the other end of the spectrum, the 2nd Defendant advocates a reading of subsection 3 in line with that of the Court of Appeal, which held that subsection 3 merely seeks to ensure that all contracts of insurance, and especially motor vehicle insurance contracts, be specifically limited by a maximum amount of liability.

Decision of the Court

The High Court and the Court of Appeal have split concerning the proper scope of Act 724. Though subsection 3 makes mention of the Motor Vehicles Act, the High Court erred in interpreting that subsection to limit the scope of the Act to those types of insurance contracts. The true meaning of the Act, based upon accepted methods of statutory interpretation, is more in line with the holding of the Court of Appeal, that

all insurance contracts in which the insurer undertakes liability for an uncertain amount will be invalidated by the law.

A subjective purpose approach to statutory interpretation is currently the most favoured method of statutory interpretation. Recently ruling for the Supreme Court, in *Republic v High Court, Accra; Ex Parte Yalley (Gyane & Attor Interesed Parties)* [2007-2008] SCGLR 512, Wood CJ said:

> "It is well established, that as a general rule, the correct approach to construing statutes is to move away from the literalist, dictionary, mechanical or grammatical to the purposive mode…. In other words, the ordinary meaning projects the purpose of the statutory provisions and so readily provides the correct purpose-oriented solution."

Following the approach advocated by her Ladyship, the meaning of Act 724 is clear; all insurance contracts must indicate how much liability the insurer exposes itself to, and failure to do so will invalidate the contract. This reading of subsection 1 of the Insurance Act to include all insurance contracts elucidates the mention in subsection 3 of motor vehicle insurance contracts. Because subsection 1 makes no difference between types of insurance contracts, all insurance contracts must thereby conform to the requirements of the Insurance Act. As the Motor Vehicle Insurance Act created special requirements for motor vehicle insurance contracts, the mention of these contracts specifically in subsection 3 is meant purely to diminish any doubt that subsection 1 also applies to motor vehicle insurance contracts. Further, it is impossible to coherently read subsection 3 as limiting the scope of subsection 1 to only motor vehicle insurance contracts, as proposed by the High Court.

Subsection 2 of section 44 allows for regulations to exempt certain contracts of insurance, or certain classes of descriptions of contracts. This subsection could also extend to motor vehicle insurance contracts.

The preamble of the Act also demonstrates that the purpose behind the Act was to revise much of the insurance industry. The Memorandum that accompanied the Act further exemplifies this purpose for revision and greater clarity, as well as getting

motor vehicle insurance more in line with the rest of the insurance industry. The relevant part of the Memorandum provides that:

> "*Amendments proposed by the consultants to be made to the current law were so numerous and cumbersome that it was thought expedient by the government on the recommendation of the National Insurance Commission to repeal both the Insurance Law, 1989 (P.N.D.C.L. 227) and the Ghana Reinsurance Organization Law, 1984 and replace them with a new Insurance Act.*
>
> The recommendations of the consultants were subjected to thorough consultation with stakeholders such as the Ghana Insurers Association, the Ghana insurance Brokers Association, the Insurance Institute of Ghana and the National Insurance Commission, and form the basis of this Bill.
>
> *The Bill will ensure the effective administration, supervision, regulation, monitoring and control of the business of insurance to protect the insurance policy holder and the insurance industry apart from health insurance which is provided for under the National Health Insurance Act 2003 (Act 650)"*

Continuing after clause 41 the said Memorandum states at p. viii thus:

> "*The next group of clauses deals with insurance business*. Clause 42 requires an insurer to carry on insurance business and other business specified in Regulations to be made under the Act as business considered to be carried on in connection with or for the purposes of the insurance business of an insurer.
>
> Clause 43 requires an insurer to carry on its business substantially in accordance with its recent business plan approved and lodged with the Commission.
>
> *Clause 44 requires insurers to avoid entering into contracts of insurance of unlimited amounts after the commencement date of the Act,* except those exempted by Regulations made under the Act. The Commission in consultation with the insurance industry will come out with a formula in the regulations for

> computing standard compensation in respect of injury and deceased claims arising out of motor accidents."

This reading of the Insurance Act, and the memorandum that accompanies it, seeks to create certainty concerning the prerequisites required in contracts of insurance, as well as to protect insurance policy holders. Without this certainty, insurers could be held responsible and bound to contracts of dubious validity and uncertain value. Insurers need a guaranteed protection under the law that contracts will not have an unfixed sum read into them, potentially opening them up to endless liability. The Act seeks to create clearer guidelines for insurance contracts, and such a purpose must be imposed into the understanding of the statute.

The analysis above merely provides clarity as to the rules and requirements that contracts of insurance must abide by if they hope to be valid under the law. This clarity does not, however, resolve the current ambiguity concerning the status of the financing obligations offered by the Defendant. The 2nd Defendant extended guarantee bonds as repayment security for the credit facilities obtained by 1st Defendant.

If these bonds are found to be contracts of insurance, then they are required to abide by the requirements of Act 724 and be issued for a certain amount or a certain maximum amount, otherwise they will be invalidated. However, no such requirement exists for mere contracts of guarantee, which have also been known as performance bonds. Thus, if in the current case these bonds are found to be contacts of guarantee, then they will be binding even without fixed amounts, or maximum amounts, of liability for the insurer.

Under the common law, these two types of contracts have been noted for their shared similarities, while also remaining separate before the law. In *Edward Owen Engineering Ltd. V. Barclays Bank International Ltd.* (1978) 1 Q.B. 159 at 169-70, the court held that:

> "A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar…. All this leads to the conclusion that *the performance guarantee*

> *stands on a similar footing to a letter of credit*. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer… The bank must pay according to its guarantee, on demand, if so stipulated, without proof of conditions."

While the obligation of banks to pay the amount guaranteed is clear, under the common law, the courts have noted the two contracts share very many similarities. In *Seaton v Health; Seaton v Burnard* (1899) I Q.B. 782, the court per Romer L.J. expounded this point thus:

> "*The difference between these classes of contract does not depend upon any essential difference between the word "insurance" and the word "guarantee". There is no magic in the use of those words*. The words, to a great extent, have the same meaning and effect; and *many contracts*, like the one in the case now before us, *may with equal propriety be contracts of insurance or contracts of guarantee."*

The dividing line between these two contracts appears blurred, but the differences in the treatment and expectations of them before the law are very apparent. Presently Act 724 places upon contracts of insurance the requirement of containing specific amounts to insurer liability.

These differences in treatment and requirement make the task of differentiating between two very similar types of contracts all the more important, with the courts utilizing a number of different methods to do so. At common law the use of extrinsic evidence has been advocated to help this exercise. Courts have noted and focused on how the parties themselves treat the contract, what the contract actually protects against, and the mutual balance of information that exists between the parties. This consideration of extrinsic evidence is exemplified by Lord Atkin's opinion in Trade *Indemnity Co. v Workington Harbour and Dock Board* (1937)A.C 1 at 17, H.L as follows:

> "The first question that arises in regard to the plea of non-disclosure is *whether the contract is one of insurance or of guarantee*. The form of the contract is a

money bond for 50,000 (pounds) conditioned for the performance by the contractors of the contract in all things whatsoever. *The defendants are described in the bond as the "surety*": but they say that *they are an insurance company;* they were *approached through insurance agents*: this is well known form of insurance business; and they have reinsured their risks with other persons carrying on business in the insurance world, notably at Lloyd's. On the other *hand the contract demanded by the Dock Board was a guarantee*; the defendants in the contract style themselves sureties; the contract appears in substance to be a contract to answer for the debt, default or miscarriage of another; and the express provisions negativing release of the "surety" upon a variation of the contract or forbearance as to time indicate that the parties were thinking of the law as to guarantees. I entertain no doubt that this was a guarantee, and the rights of the party should be regulated on that footing."

See also *Lep Air Services v. Rolloswin Ltd.* (1973) A.C 331 H.L at 344-45.

Upon consideration of the principles prescribed by the common law as recounted supra, the answer as to whether the contract at present is a contract of insurance or a guarantee could have been very thorny. But Act 724 seems to have settled the matter by defining insurance business in such a way, that it is our thinking that the same definition should apply to insurance contracts. This fact, reinforced again by the preamble and purpose of the Act, seems to indicate that insurance business also comprehends insurance contracts. Consequently, the question of whether the contract in this case is one of insurance or a guarantee is governed by the definition of "insurance business" in section 211 as follows:-

> "The business of undertaking liability to *indemnify* a person in respect of *loss or damage*, and the liability to pay damages *or compensation contingent upon the happening of a specified event* and any business incidental to insurance business and reinsurance business."(e.s)

Applying this definition to the contract in this case, it is quite clear that these bonds fall within the terms of certain 211, as the contract relates to the liability of Glico to indemnify the plaintiff in respect to loss or damage upon default of the companies to

whom the facilities were granted. As such, they are to be considered contracts of insurance, which must adhere to the requirements of Act 724.

Act 724 requires Glico to have undertaken a liability the amount, or maximum amount, of which was certain. Based upon the evidence submitted, the contract does in fact comply with this requirement, making the contract binding and enforceable.

Uncertainty as to either the maximum amount of insurer's liability, or uncertainty of the amount of liability is enough to invalidate a contract under Act 724. This does not mean that the insurer must know, upon signing the contract, what his or her exact liability is at any specific future moment. Such a reading would lead to the invalidation of almost every insurance contract; as such knowledge is inherently impossible to have.

In truth, this requirement merely asks that the insurer know the structured amount of the liability. This requirement can *inter alia*, be met from having both a set cap to insurer liability along with a timetable of due payments. Having these two sets of information allows an insurer to know both the maximum extent to his or her liability, as well as an approximate understanding of when the payments would become due. At hand in the present case, we have both of these pieces of information.

The guarantee bond may seem to offer neither a maximum amount to liability nor any liability amount at all. This seems especially if the bond is read very narrowly, as advocated by the defendant, who focuses solely on, "*Glico… will upon demand of the Bank pay to the Bank any sum that is due and owing to the facility. This guarantee shall remain in force so long as there is any sum due and owing from the Customer to the Bank on the facility.*" However, such a narrow reading does not paint the true and whole picture.

It is first necessary to read each and every guarantee bond in full. Doing so will reveal that each individual bond lists the amount guaranteed on behalf of the companies, which indicates the maximum amount of liability for the Defendant. It is incorrect to say that the defendant is open to "any liability" as a plain reading of the whole bond clearly indicates the maximum amount of liability the Defendant takes upon himself.

Further, the guarantee bond must be read in conjunction with the credit facilities, as the two contracts are inextricably linked to one another. The guarantee bonds were issued so as to guarantee the repayment of these facilities. The amount that the insurer would be liable for was scheduled to change as these facilities were paid off, as a repayment schedule was included in each of these credit facilities contracts. The insurer, upon issuance of these bonds, had a very good idea how much could be owed upon the occurrence of each of the specified dates of repayment.

This clear repayment schedule along with the maximum caps to the defendant's liability mean that each of the guarantee bonds meet the requirement of contracts of insurance as stipulated by Act 724. The maxim *certum est quid certum reddi potest* has not fallen into disuse. The certainty of the amount and the maximum amount in the Glico bonds in this case makes the question whether they are contracts of insurance or guarantee rather academic.

The Amici Curiae Briefs

We are grateful to the National Insurance Commission and the State Insurance Company Limited for their amici curiae briefs submitted in response to our invitation.

We note that both briefs agree with the opinion herein that the provisions of s.44(1) of the Insurance Act, 2006 (Act 724) are not limited to Motor Vehicles Insurance.

However while the National Insurance Commission is certain that the Glico bonds herein are contracts of Insurance, the State Insurance Company Limited takes the contrary view but alternatively submits that even if they are contracts of Insurance they are not invalid for uncertainty of liability under s.44(1) of Act 724. Contrariwise the National Insurance Commission is of the clear view that "The guarantee bonds issued by GLICO Insurance Company Ltd are of uncertain liability and therefore void"

It will however be seen that the position taken by us in this judgment, supra is in accord wit the views expressed by the State Insurance Company Limited under the hand of S. Kwami Tetteh, Tetteh & Co in paragraphs 21 to 23 thereof as follows:

> "21. Glico argues that those bonds qualify as contracts of insurance but invalid under section 44(1). The appellant, the creditor, argues to the contrary,

Even if Glico were right, those bonds would be in full compliance with section 44 because *the quantum of debt is stated in full*. The requirement for full *disclosure of the insured amount* under section 44 is intended to introduce transparency into the business. Regrettably, the requirement has become a difficult issue because, in the nature of things, the insurer can neither foresee the future nor make a reliable pre-estimate of future loss. The insurer thus takes a gamble.

22. In each bond, Glico undertook to pay the debt in the event of default by the debtor. *The mention of the quantum of debt satisfied section 44(1). The parties envisaged that the debtor would service the debt. Accordingly, Glico undertook to pay the amount outstanding if the debtor partially serviced the debt. Neither Glico nor the creditor could have predicted default, the outstanding or timing, and section 44(1) could not have demanded disclosure of reducing balances of a debt*. Business persons enter into debt transactions with pious hope of fulfillment but unexpected developments dash their hop. At page 8 of the record, the plaintiff's witness expressed such hope, insisting under cross-examination that the plaintiff did not expect any default. Surely, if Glico suspected possible default, it would not have issued the bond.

23. Therefore *in deciding whether there is default of a particular statutory provision, the courts of law would take into cognition life's realities and presume that the legislator legislates in full awareness of the practicalities of the situation*. Francis Bennion states in his *Statutory Interpretation*, 3rd ed. section 313, that courts of law interpret statutes in a workable manner:

> *"Illegality The unworkable consequences of a particular construction may be relevant* indirectly for example *in measuring how far the effects of statutory illegality are to be taken in their application to contractual obligations*. *Parliament* will not be assumed to *intend to carry them so far to make trading impracticable over a wide area*."(e.s)

For the foregoing reasons the appeal is allowed to the extent indicated in this judgment.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

MINORITY OPINION

BAFFOE BONNIE, JSC:

The judgment against which this appeal emanates is from three consolidated suits namely;

1. NDK Financial Limited Vrs. Harold Ntorinkansah & 2 others; suit Nº BFS 227/09

2. NDK Financial Services Limited Vrs. Addicent Foods & Another; suit NºBRS 228/09; and

3. NDK Financial Services Limited Vrs. Hansas Complex & 3 Others; suit Nº BFS 344/09

The facts and the issues in the suits are generally common except the details. The common facts are that the plaintiff (NDK), a financial institution granted credit facilities to the 1st defendant in each of the suits. In the three suits, that is suit number BFS/227/09; suit number BFS/228/09 and BFS/344/09, the plaintiff is seeking for an order for recovery of the sum of GH¢417,842.39; GH¢1,095,730.76 and GH¢192,539.71 respectively, being balances due and owing on the credit facilities extended by the plaintiff to the defendants together with interest at the agreed interest rate.

Glico in all the suits provided what is called a "Credit guarantee bond" as a condition precedent to the approval and disbursement of each of the loan facilities to the 1st defendant. The 1st defendant in each of the suits defaulted in servicing the loan facility by way of repayment of the credit facilities granted it by NDK. It is this default on the part of the 1st defendant that necessitated NDK to initiate the suits in the High Court (Commercial Division) against the defendants in each of the suit. In suit number BFS 227/09, NDK advanced a credit facility in the sum of GH¢300,000.00 to the 1st defendant. Glico issued three credit guarantee bonds in the total sum of GH¢550,000.00 to secure payment of the credit facility advanced to the 1st defendant by NDK. In suit number 228/09, NDK advanced a total sum of GH¢698,000.00 to the 1st defendant. In this instance Glico issued three credit guarantee bonds in the sum of GH¢224,220.00, GH¢370,000.00 and GH¢740,000.00 respectively to secure the credit facility. The 1st defendant unable to pay for the credit facility within the stipulated period sought for an extension of the period from NDK to enable 1st defendant make payment. The extension was granted by NDK on condition that the 1st defendant procured a credit guarantee bond for the extension requested. The 1st defendant turned to Glico for assistance in terms of providing the credit guarantee bond. Glico obliged and issued a credit guarantee bond in the sum of GH¢1,220,000.00.

In suit number BFS 344/09, NDK granted a credit facility in the sum of GH¢ 134,000.00 to the 1st defendant. Glico again issued a credit guarantee bond in the sum of GH¢730,000.00 to secure the repayment of the credit facility advanced to the 1st defendant by NDK.

NDK claims against Glico simply were for the recovery of the various sums due and owing on the credit facilities extended to the 1st defendant by the plaintiff repayment of which were secured by the defendants but which credit facilities the defendants had failed to pay despite several demand notices.

Glico, in defence, denied any knowledge of the credit guarantee bonds issued by its General Manager, Mr. Derek Amoah, alleging fraud and collusion between NDK, the said defendants and Glico's General Manager, Mr. Derek Amoah. Glico therefore counterclaimed as follows:

a. Suit Number BFS/227/09;

   A declaration that the credit guarantee bond number GG/BON/08-00237 dated 22nd October 2008 issued by Derek F. Amoah in the name of the 2nd defendant is legally unenforceable and void on the grounds of fraud and collusion among the plaintiff, 1st defendant and Derek F. Amoah.

b. Suit Number BFS/228/09;

   A declaration that the credit guarantee bond number GG/BON/08-00236 dated 22nd October 2008 issued by Derek F. Amoah in the name of the 2nd defendant is legally unenforceable and void on grounds of fraud and

collusion among the plaintiff Harold Ntorinkansah hiding behind the 1st defendant and Derek Amoah.

c. Suit Number BFS/344/09;

A declaration that the credit guarantee bond dated 2nd October 2008 issued by Derek F. Amoah in the name of the 2nd defendant is legally unenforceable and void on the grounds of fraud and collusion among the plaintiff, 3rd defendant and Derek F. Amoah.

Glico further counterclaimed for the following common reliefs in all three suits

"1. Punitive damages against plaintiff for fraud and /or collusion.

2. An order directed at Bank of Ghana to sanction the plaintiff for statutory infraction

3. Costs, including lawyers fees".

Harold Notrinkansah, Addicent Foods Limited, Hansas Complex and Millicent Ntorinkansah failed to file a defence and consequently, NDK filed an application for default judgment and the court entered final judgment against the said defendants for the reliefs endorsed on the Writs of Summons. The case therefore proceeded between NDK and Glico.

From the pleadings, the fact that the facilities were granted by NDK to the 1st defendants in the three cases did not appear to be in dispute nor the fact that the facilities granted by NDK had not been paid back by the 1st defendants.

However, it appeared from the pleadings, that the main issues for determination by the trial court were;

1. Whether Glico knew of the bonds issued by its General Manager Derek Amoah and if it did not know, whether Glico should be bound by the act of Derek Amoah in issuing the bonds in the name of Glico and

2. Whether the transaction concerning the issuance of the credit guarantee bonds by Glico's General Manager, smack of collusion and fraud between him (Derek Amoah), NDK and the other defendants.

After the trial, the court below held that NDK Financial Services is entitled to all the reliefs sought in the writ and therefore dismissed Glico's counterclaim with costs of GH¢3,000.00 against it.

Aggrieved by the said judgment, Glico filed four main grounds of appeal. There is no evidence on the record that additional grounds of appeal were filed by Glico upon receipt of the record of appeal as was indicated in the Notice of Appeal.

At the Court of Appeal counsel argued his grounds as follows;

Ground (a) reads as follows:

> "In the face of the conclusive documentary evidence demonstrating that all the credit guarantee bonds the plaintiff is seeking to enforce were unlimited and the amounts uncertain in quantum in contravention of

section 44 (1) of the Insurance Act, Act 724 which renders such insurance instruments void, the trial judge misinterpreted the law that the section applied only to motor insurance"

Counsel for Glico set the tone for his argument on this ground by quoting section 44 (1) of Act 724 and questioned what the true and proper meaning of the section should be.

At the High Court the trial judge when referred to section 44, of the act had opined as follows,

> *"In my opinion, a further reading of section 44, particularly 44 (3) indicates to me that the provision is referring to motor insurance. It is to ensure that the law is not used to limit liability payable as a result of death or permanent disability".*

At the Court of Appeal, counsel's comment on the opinion of the court supra was that the court put a restrictive interpretation on the statutory provision under consideration in that the trial court did not indicate which rule of construction permitted the conclusion the court reached. Counsel contended that the interpretation that should be placed on the statutory provision under construction is that section 44 (1) of the statute invalidates every contract on insurance entered into by every insurer in all cases in which the insurer undertakes a liability the amount or the maximum amount of which is uncertain at the time when the contract is entered into. Counsel contended further that the statute does not limit its effect to any type of insurance contract and as such does not affect motor insurance only as held by the court

below. Counsel was of the strong view that sub-section (2) of section 44 of the Act confirms without allowing any room for doubt that it does not in any way diminish the effect of subsection (1).

Counsel added that, a cursory look at the credit guarantee bonds purportedly issued by Glico to secure payment of the credit facilities advanced to 1st defendant in each of the three suits reveals that they are indeed void on grounds of lack of certainty as to the eventual amount for which Glico purportedly exposed itself to liability in Exhibits T, 1,8,20 and 32. Counsel continued that what is obvious from each of the credit guarantee bonds is that although it recites clearly the specific sum for which the credit guarantee bond is required, it does not say the specific sum of money for which Glico would eventually be liable to pay upon default of the 1st defendant in respect of whom the credit guarantee bond is issued. Counsel emphasized on the portion of the credit guarantee bond which reads that "any sum that is due and owning on the facility" and submitted that it is clear that the liability of Glico is open as it lacks certainty and section 44(1) of Act 724 invalidates such contract. Counsel, finally on this ground, cited the Supreme court case of the Republic vrs .High Court (Fast Track Division); Ex Parte National Lottery Authority (Ghana National Lotto Operators Association & others-interested parties) [2007] SCGKR 390 and submitted that by the said decision, the court below is clearly wrong in refusing to uphold Glico's submissions on the illegality of the credit guarantee bonds the subject matter of the suit in terms of section 44 (1) of Act 724.

On this ground of the appeal, Counsel for NDK in answer, submitted that section 44 (1) of Act 724 is not applicable to the facts of this case and therefore its interpretation is totally unnecessary, the reason being that at law there is a clear difference in the nature and legal effect of a contract of insurance and a gurantee bond. Counsel for NDK referred to **"Chitty on contrancts" (Common Law Library Series) 28th Edition Volume 2** on "specific contracts" at paragraph 41-014 which described a contract of insurance as follows:

> "A contract of insurance is one whereby one party (the insurer) undertakes for consideration to pay money or provide a corresponding benefit of the other party (the assured) upon the happening of an event which is uncertain either as to whether it has, or will occur at all or as to the time of its occurrence, where the object of the assured is to provide against a cost or to compensate for prejudice caused by the event or for his old age [where the event is the reaching of a certain age by the assured] or where the event is the death of the assured] for the benefit of others upon his death. It is these objectives which distinguish insurance from gaining or wagering. When embodied in a document the contract is usually called a policy, but save in the case of marine issuance an oral contract of insurance though rare, is perfectly valid and may be indeed also be described as a policy.

Counsel further referred to paragraph 44-014 of the same source supra where Performance Guarantee also called Performance Bond or Guarantee Bond is described as;

"Exceptionally stringent contracts of indemnity. They are contracted undertakings normally granted by banks to repay specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor. Such guarantees are sometimes called "first guarantees".

"The bank or other financial institution which grants a performance guarantee will of course demand a counter guarantee or indemnity from the customer whose requests the guarantee is granted. As the customer will be liable to reimburse the bank on their payment under the guarantee and as he will be unable to prevent the bank from paying (except in cases of fraud) when demand is made on the bank, his position is clearly perilous"

Counsel for NDK again referred to the case of **Edward Owen Engineering Limited Vrs. Barclays Bank International Limited [1978] QB 159** where it was held that;

"These performance guarantees are virtually promissory notes payable on demand while such a counter indemnity by a customer in favour of a guaranteeing bank takes effect according to its terms. There is clearly no concept of counter indemnity or repayment of liability paid by the bank or insurance company as in this case in a contract of insurance solely undertaken by insurance companies".

Counsel argued further that in the instance case, evidence was led by NDK to show that Glico took a counter indemnity in the form of landed properties from the 1st defendant on whose behalf the guarantee bonds in issue were not contract of insurance.

In respect of the complaint against the interpretation that the trial court put on section 44 of Act 724, Counsel for NDK, submitted that to interpret it to cover credit guarantee bonds would be totally unacceptable and cannot be supported in law. Counsel submitted that under the circumstances, this ground of appeal ought to fail.

In their judgment The Court of Appeal said among other things,

"In 2006 when Act 724 was passed, the Motor Vehicles (Third party Insurance) Act was already in existence. A careful reading of the earlier Act discloses that it does not contain any provision similar to sub-section (1) of section 44. In our view since under the Motor Vehicles (Third Party Insurance) Act contracts of insurance are created, be it in the form of Insurance Policy etc, the drafters of Act 724 did not want to give room for doubts to be created as to whether contracts of insurance made under Motor Vehicles (Third Party Insurance) Acre were exempted. Thus sub-section (1). In our further view sub-section (1) of section 44 of Act 724 is not limited to contracts of insurance created under the Motor Vehicles (Third Party Insurance) Act but every contract of insurance entered into by an insurer after the commencement date of Act 724. We therefore agree with Counsel for Glico that the trial court

ought not to have limited section 44 of Act 724 to insurance contracts under the (Motor Vehicles Third Party Insurance) Act.

"Another issue that was raised by counsel for Glico is that the credit guarantee bonds that were issued by Glico did not specify the sum of money which Glico was eventually to be liable upon default on the part of each of the 1st defendants contrary to the provision under section 44 (i) of Act 724.

As Counsel for Glico rightly pointed out, each of the credit guarantee bonds recited the specific sums advanced to each of the 1st defendants mentioned in the credit guarantee bonds. Counsel for Glico pointed out further that the operative part however, does not state the specific sum of money that Glico would eventually be liable to pay upon default of each of the 1st defendants. The operative parts of the credit guarantee bonds state that;

> "Now therefore the condition of obligation is that if the customer shall fail to repay the Bank the said facility then we Glico General Insurance Company of P. O. Box 4251, Accra will upon demand of the bank pay to the bank any sum that is due and owing on the facility. This guarantee shall remain in force for so long as there is any sum due and owing from the customer to the bank on the facility."

Counsel for Glico contended that it is clear from the operative part quoted supra that Glico's liability is open to "any sum that is due and owing to the facility" which section 44 (1) of Act 724 clearly invalidates as a contract. It is clear from the operative part of the credit guarantee bonds i.e. Exhibits T,

1,8,20 and 32 that there is no indication of the specific amount that Glico is expected to pay in case of default on the part of the 1st defendants to pay the credit facilities to NDK extended to the said defendants.

Section 44 (1) of Act 724 makes it clear that any contract of insurance entered into after the commencement date is void if the insurer undertakes a liability the amount or maximum amount of quantum of the liability of the insurer to be stated on the face of the contract and not to be left wide open.

In fact from the definition of Performance Guarantee also called Performance Bond or Guarantee Bond stated in paragraph 44-014 of Chitty on Contracts supra which was quoted by Counsel of NDK, the fact that they are contracts of indemnity normally granted to "repay specific sum in the event of any default in the performance by the principal debtor" is made clear [Emphasis mine]. The credit guarantee bonds issued by Glico in favour or 1st defendant guaranteeing to repay NDK in case of default on the parts of the 1st defendants are contracts of insurance and therefore the law requires that the amount that Glico undertook to indemnify NDK should have been specified. It is clear from the face of the Credit Guarantee Bonds issued by Glico to the 1st defendants that it was silent on the specific sum that Glico would pay should the 1st defendants default in paying the credit facilities granted them by NDK and therefore lacked certainty contrary to the provision under S.44 (1) of Act 724.

Under the circumstances, we will allow ground (a) of the appeal."

With this conclusion on ground (a) of the notice of appeal, the findings of the Court of Appeal on the other grounds were rendered irrelevant as the whole contracts that gave rise to the transactions had been nullified.
Being aggrieved by this holding by the Court of Appeal, the plaintiff has appealed to this court on the following grounds.

(a) the learned justices of the Court of Appeal, erred in law when they held that Sub section (1) of section 44 of the insurance Act, act 724 is not limited to contracts of insurance under the Motor Vehicle (third party insurance)Act but every contractor(sic) of insurance entered into by the insurer after the commencement of Insurance Act, Act 724

(b)The learned Justices of the Court of Appeal erred in law when they held that the credit guarantee bonds issued in favour of the plaintiff/respondent by 2nd Defendant/Appellant were contracts of insurance

© The learned justices of the Court of Appeal erred in law when they held that the credit guarantee bonds issued by Glico to the !st defendant was silent on the specific sum that Glico would pay should the !st defendant default in paying the credit facilities granted it by NDK and therefore lacked certainty contrary to the provision under section 44(1) of the Insurance Act, Act 724.

(d)The learned Justices of Court of Appeal erred in law when they failed to consider the fact that the guarantee bonds were issued by the "2ndDefendant/Appellant…".

It can be seen that the grounds of appeal have been formulated solely based on the provisions of section 44 of the Insurance Act, Act 742.

As can be seen from the recount of the facts earlier in this judgment the main issue to be resolved is the scope and meaning of section 44 of The Insurance Act, Act 742 in the light of the wording in the guarantee bonds at issue in this case.

Section 44 of the Insurance Act, Act 742 reads as follows;

"44 (1). Subject to subsection (2) a contract of insurance entered into by an insurer after the commencement date is void if it is a contract under which the insurer undertakes a liability the amount or maximum amount of which is uncertain at the time when the contract is entered.

(2). Regulations may prescribe contracts of insurance or classes or descriptions of contracts of insurance that are exempt from subsection (1).

(3). This section applies to motor insurance contracts despite anything to the contrary in the Motor Vehicles (Third Party Insurance) Act, 1958 (Nº. 24).

(4). The Commission in consultation with the insurance industry shall by regulations prescribe a formula to compute the compensation in

respect of injury and deceased claims arising out of a motor accident"

We have read the majority opinion on the first two grounds of appeal and we agree with the analysis and conclusions in part. In other words we agree with the lead opinion and the learned justices of the court of appeal that Sub section (1) of section 44 of the insurance Act, act 724 is not limited to contracts of insurance under the Motor Vehicle (third party insurance)Act but every contract of insurance entered into by the insurer after the commencement of Insurance Act, Act 724

We also agree with the Majority opinion and the learned justices of the court of appeal when they held that the credit guarantee bonds issued in favour of the plaintiff/respondent by 2nd Defendant/Appellant were contracts of insurance. We believe that the majority opinion has dealt extensively with this ground of appeal and there is no need to belabor it.

We are however unable, with respect, to agree with the conclusions arrived at by the opinion of our learned brother with regard to grounds 3 and 4 of the appeal.

Ground C and D of the appeal read as follows;

© The learned justices of the Court of Appeal erred in law when they held that the credit guarantee bonds issued by Glico to the !st defendant was silent on the specific sum that Glico would pay should the !st defendant default in paying credit to facilities granted it by NDK and therefore lacked certainty contrary to the provision under section 44(1) of the Insurance Act, Act 724.

(d) The learned Justices of Court of Appeal erred in law when they failed to consider the fact that the guarantee bonds were issued by the "2ndDefendant/Appellant…".

The respondent argued before the Court of Appeal and repeated before us that in the light of the provisions of section 44(1) of the act, the guarantee bonds issued by the Respondent Glico were all null and void because they lack certainty with regard to the liability of Glico.

The appellant on the other hand argues that a careful examination of the credit guarantee bond shows that a specific sum for a specific period is stated in the bond and that the so called operative part of the bonds only state that in the event that the customer shall fail to pay the facility on the due date, Glico shall upon demand made by the Bank pay to the Bank any sum that is due and owing on the facility. Any additional sum payable under the bond shall arise only upon default of the customer and the amount shall be calculated in accordance with the interest on the facility. Therefore it was wrong for the Court of Appeal to have concluded that there was uncertainty as far as the amount payable was concerned. Counsel concluded this by tying it with the ground 4 of the appeal to the effect that the credit guarantee bonds in issue were issued by the respondent herein who collected premiums before they issued same. So they ought not to be allowed to take advantage of its own wrong, granting that its own documents/guarantee bonds were illegal.

Section 44(1) reads as follows;

"44 (1). **Subject to subsection (2) a contract of insurance entered into by an insurer after the commencement date is void if it is a contract under which the insurer undertakes a liability the amount or maximum amount of which is uncertain at the time when the contract is entered."**

The relevant part of the guarantee bonds at issue reads as follows

"If the customer shall fail to repay to the bank the said facility then we Glico... will upon demand of the Bank pay to the Bank *any sum due and owing* **to the facility. This guarantee shall remain in force so long as there is *any sum due and owing* from the Customer to the Bank on the facility"(e.s)**

Reading these two formulations, that is, the law and wording in the guarantee bonds, we find it difficult to arrive at any other conclusion other than the fact that that the bonds are void for uncertainty. We believe there cannot be any other conclusion.

A careful reading of the bonds indicate that a credit facility for a specific sum was advanced to each of the defendants. Each credit guarantee bond also recites the specific sum of money advanced by way of credit facility. What is obvious however from each credit bond is that although it recites the specific sum for which the credit guarantee bond is required, it does not say the specific sum of money for which the respondent would be eventually **liable upon default** of each of the 1st defendants in respect of whose eventual liability the credit bond is issued. It is this this lack of uncertainty which is frowned upon by the law. No derogation is possible from the effect of section

44(1) of the Act. The section states in unequivocal terms that a contract of insurance is void if there is no certainty of liability assumed by the insurer. That is the law and it does not make for any exceptions, at least not in terms as being advocated by the appellants. As was stated by the Supreme court in the case of **Boyefio v NTHC Properties Ltd [1997-98]1 GLR768,**

"*The law was clear that where an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed"*

The position of the law is that every court is bound to apply and ensure the compliance with, statutes of the land and so courts must give effect to such statutes and avoid anything that would amount to condoning an illegality. Two quotes from the case of **Republic V High Court (Fast Track Division)Ex Parte National Lottery Authority…..[2009]SCGLR 390,** will be apposite here.

"No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament….The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament…" Date-Bah JSC (pg. 402)

"It is communis opinion among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute…is, unless expressly or impliedly provided, a nullity." Atuguba JSC (pg. 397)

Insurance is a global concern. It is inconceivable for insurance business to be entered into where the limit of the liability is not determined. That will be against public policy because it would subject some insurance companies to endless liabilities which may be far beyond the capital means of the companies. Every Insurance company does business in the light of the knowledge of its own assets or funds. For example if the company is worth fifty thousand, It will be perfectly legitimate for it to accept business worth, say twenty thousand cedis. Because it knows that its funds and assets meet the liabilities. If one insurance client is allowed to claim any amount which is not specified and therefore cannot be envisaged by the insurance company, the insurance company would not have been given the opportunity to enter into the business in the light of its own knowledge of its assets or funds. That will be necessary consequences of validating unlimited claims against insurance companies. Upholding the case of NGK will validate a situation where an insurance company will be subject to claims to which it had not had the chance to commit itself because the claim will be undetermined and therefore unknown. That will make the position of all insurance companies most precarious. That will be the argument that will go against the operations of insurance companies. Quite clearly, that will be grossly against public policy.

To avoid such potential dangers that may confront insurance companies as well as the customers of insurance company, the only safe way is to uphold the law that the limit of every insurance business should be predetermined and known in order to make the business valid. Any insurance contract which allows unlimited claims should be declared invalid and void.

I believe the decision, as put forth by the majority will be a landmark one which may set the dangerous precedent of subjecting insurance companies to liabilities which they cannot envisage and therefore cannot commit themselves to meet. For this principle alone, the case of Glyco should be upheld so that the appropriate precedent will be set. To hold otherwise will virtually spell the collapse of some insurance companies by subjecting them to claims they have not envisaged and therefore have not prepared themselves to meet. That will be dangerous. Public policy alone should forbid open-ended insurance contracts. That is why the law is as it states in section 44

Finally we believe that the law that limits should be set should be given a purposive interpretation. The purpose of that law is to ensure that the insurance company is subjected to claims it can envisage and has consciously undertaken to commit itself to meet, not claims it has not had the chance to consider whether its assets are in a position to meet because the upper limit remains undetermined. Society does not expect the law be interpreted in such a way as to pave the way for the collapse of companies by legalizing unconscious commitments.

GROUND 4

Tied to the third ground of appeal is the 4th which seeks to say that granting that the interpretation being put on the section 44 by the respondent is correct, since the bonds which are being sought to be nullified were issued by the respondents herein, their nullification will tantamount to the respondents

being allowed to take advantage of their own wrong doing. In other words, the respondents are estopped from denying the validity of the bonds they issued. To this argument, the respondent has provided an incisive response. He said

'The law is that estoppel cannot be used as an excuse to validate an illegal contract. The law is that where as in this case 2nd Defendant's case is that a transaction is illegal not just on grounds of fraud and collusion (which was not accepted) but also that it breached statutory provisions regulating it, estoppel cannot be invoked to validate the transaction"

Counsel then cited the cases of **Republic v. High Court, Accra; Ex Parte Attorney General(Delta FoodsLtd-Interested Party)[1999-2000]1GLR255** where Acquah JSC(as he then was),said,

"For it is trite knowledge that the doctrine of estoppel cannot be invoked to render valid an act or transaction which a statute forbids"

Then the case of ***In re Kwabeng Stool; Karikari v. Ababio II*** Justice Ampiah also said;

"…Estoppels of all kinds are subject to one rule: they cannot override statutory provisions. Thus where a particular formality is required by statute no estoppel will cure the defect"

We couldn't agree more.

If we may draw an analogy from Article 118(1),(2)and (3) which read;

181(1) "Parliament may, by a resolution supported by the votes of a majority of all members of parliament, authorize the government to enter into an agreement for the granting of a loan out of any public fund or public account."

(2) "An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament

(3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an act of Parliament."

In the various actions that have arisen in our courts for non-compliance with the provisions of these articles of the constitution like*, Martin Alamisi Amidu* vrs. The Attorney General and Two Others (The Woyome Case)(unreported)Writ No J1/15/2012 dated 14th June 2013, and

2). Martin Alamisi Amidu vrs. The Attorney General and 2 others(the Isofoton Case)(unreported) writ No J1/23/2012 dated 21st June, 2012,

the Court's interpretation of these provisions of the constitution have been very strict. The fact that certain acts had been performed under the contracts and certain rights had accrued, never influenced the courts in declaring the contracts null and void for failure to seek parliamentary approval.

When this issue of part performance, accrued rights and unjust enrichment in respect of illegal contracts was raised in the Woyome case (supra) this is what the Supreme Court said;

" *A contract which* breaches article 181(5) of the Constitution is null and void and therefore creates no rights. (See The Attorney-General v Faroe Atlantic Co. Ltd. [2005-2006] SCGLR 271 and The Attorney-General v Balkan Energy Ghana Ltd. 2 ors. Unreported, 16th May, 2012.) It should not be legitimate to evade this nullity by the grant of a restitutionary remedy. Although one

accepts the cogency of the argument that there is need to avoid unjust enrichment to the State through its receipt of benefits it has not paid for, there is the higher other countervailing argument that the enforcement of the Constitution should not be undermined by allowing the State and its partners an avenue or opportunity for doing indirectly what it is constitutionally prohibited from doing directly. The supremacy of the Constitution in the hierarchy of legal norms in the legal system has to be preserved and jealously guarded. Thus the flexibility that the Supreme Court introduces in the CCWL case is to be exercised sparingly in the case of breaches of the Constitution. The requirement that international business contracts to which the Government is a party should be approved by Parliament has a purpose and it should be made clear to Government and its partners that non-compliance with the requirement, directly or indirectly, will have consequences. We are accordingly inclined to the view that, where article 181(5) has been breached, a restitutionary remedy would be in conflict with the Constitution and therefore not available".

We believe that the guarantee bonds issued by the respondents lacked certainty with respect to the amount of money for which the respondent became liable on breach. This was a breach of section 44 of the Insurance Act, Act 742, and therefore invalid. We so hold.

CONCLUSION

As was mentioned in the majority opinion this case has not been easy to deal with. It can be seen from its history that the plaintiff won at the High Court but

was reversed by 3 Justices at the Court of Appeal. When this matter came before us the court was divided. We therefore referred same for Amicus Curia brief. Of the two amici that responded, The National Insurance Commission, the umbrella commission for insurance companies, came to a conclusion that supported the minority opinion, whilst the other written by S. Kwame Tetteh and co., external solicitors for State Insurance Company, supported the majority view.

For a closure to be brought to this we hope that an expanded coram of this court would have the chance to look at the law again.

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

(SGD) J. ANSAH
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