IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL ACCRA

AD 2021

CORAM DENNIS ADJEI JA (PRESIDING)

AMA GAISIE JA

NOVISI ARYENE JA

SUIT NO. H3/351/2021

DATE: 17TH MARCH 2022

CHEMITECH LTD ..... PLAINTIFF/APPELLANT

VRS

STANBIC BANK GHANA LTD..... DEFENDANT/RESPONDENT

J U D G M E N T

DENNIS ADJEI, J.A

The High Court on 28th February, 2017 delivered its judgment by non-suiting the 2nd Plaintiff as not a necessary party to the action, granted part of the reliefs sought by the Plaintiff and dismissed the others.

The 1st Plaintiff, a limited liability company incorporated under the laws of Ghana and its Executive Director brought an action against the Defendant, a well-known banking

institution for: *inter alia*, negligence; general damages emanating from the negligence; payment of compensatory damages for loss of business, loss of anticipated income and profit, loss of customers, and loss of corporate reputation; special damage in the sum of GB£ 12.00 being an amount short-changed by the defendant and the interest thereon ; an order for the payment of damages for fraudulent concealment and; exemplary damages in the sum of 30 million pounds sterling or its Cedi equivalent for the loss of the 60 - day credit arrangement built with Comma Oil for over twenty years business relationship and loss of reputation of Plaintiffs before Comma.

The 2nd Plaintiff at the Court below and the Plaintiff jointly claimed against the Defendant for payment of compensatory damages for causing an embarrassment to both particularly the 2nd Plaintiff.

The brief facts of the case which culminated in this appeal were that the 1st Plaintiff who has a long standing 60 - day credit trading arrangement with Comma Oil for the supply and shipment of Comma lubricants was prematurely abrogated as a result of the negligence of the Defendant who failed to transfer an outstanding amount of GB£ 5,017.00 on lubricants previously supplied to the 1st Plaintiff by Comma Oil to honour its credit relationship with Comma Oil. Comma Oil was to supply lubricant oil on credit in the sum of GB£ 48,818.86 provided by the 1st Plaintiff discharged its indebtedness in the sum of GB£ 5,017.00 to Comma Oil. The Plaintiff instructed the Defendant to debit its trading account with the sum of GB£5,017.00 to offset the Plaintiff's indebtedness to Comma Oil for the oil worth GB£ 5,017.00to be shipped to the Plaintiff in Ghana.

The Defendant who was to pay the sum of GB£ 5,017.00 to Comma Oil through its bankers HSBC Bank Plc (HSBC), an international bank in the United Kingdom did not take prudent steps to ensure that payment was effected on behalf of the Plaintiff. The Defendant attributed the non- cashing of the cheque by the HSBC bank to the fact that the cheque had been discoursed on three occasions and that it had played its role as the

banker for the Plaintiff. However, it was established that the Comma Oil presented the bankers draft for clearing but was not cleared and re-presented two more times and was still not cleared as the Defendant who was required to give authorization for payment to be made did not give, and the failure to cash same was attributable to the negligence of the Defendant.

The long standing credit facility agreement between the Plaintiff and Comma Oil allowed the Plaintiff to buy from Comma Oil on credit and paid same within six months. Under the credit agreement, the Plaintiff had to make a request order to Comma Oil for the latter to send a *pro forma* invoice and supplies the oil at the cost price including shipment to Ghana. Upon the arrival of the goods the Plaintiff would clear, sell and remit Comma Oil within sixty days.

The Defendant finally admitted that it could not locate the account into which it lodged the bank draft issued for the benefit of Comma Oil. The Plaintiff directed the Defendant to issue a new bank draft to save it from losing its credit facility with Comma Oil but the Defendant proposed for SWIFT Transfer as the quickest mode of payment and made it. Unknown to the Plaintiff, the Defendant had

unilaterally cancelled the SWIFT Transfer on the grounds that it had located the account into which the draft which could not be honoured on three times had been found.

The High Court on its judgment delivered on 28th February, 2017, determined the capacity of the 2nd Plaintiff and non-suited it as not being a necessary party to the action. The judgment after non-suiting the 2nd Plaintiff as a necessary party to the action automatically terminated the claim made by the 2nd Plaintiff against the Defendant. The 2nd Plaintiff did not appeal against the order which non-suited him and ceased to be a party to the suit. However, the appeal before this Court was jointly filed by the Plaintiffs when the 2nd Plaintiff did not appeal against the decision which non- suited him. I find

that the appeal was filed by the 1st Plaintiff only who subsequently became the Plaintiff after the 2nd Plaintiff had been non-suited.

The grounds of appeal filed by the Plaintiff are as follows:

"a. ***The learned High Court (Commercial Division) Judge erred in law when he failed to commercially evaluate the adverse effect of the enormity and gravity of the Respondent's various acts and omissions on the international corporate image or the reputational capital of the Appellants.***

b. The Learned High Court (Commercial Division) Judge erred in law when he failed to exercise proper discretion in the grant and ward of damages to the Appellants thereby occasioning a substantial miscarriage of justice.

c. The learned High court (Commercial Division) Judge misdirected himself on the law and the facts when he failed to avert his mind on a question he posed to himself at page 18 of the judgment, namely; Applying the first element of negligence, being duty of care to this case, can one say that the Defendant owes Plaintiff a duty of care to ensure that the principals of Plaintiff received the amount written on the face value of the bank draft upon presentation? And ended up discussing a question on the time and issue of authorization and thereby arrived in a totally different conclusion.

d. The learned High Court (Commercial Division) Judge failed to exercise proper discretion in the determination of the cause or reason and the veracity of the payment, reduction or deduction of £12.00 from the face value of the cheque when he relied on the evidence of the Defendant's witness; a witness whom he had found to be a palpable liar and whose

evidence he had found to be 'very troubling', 'exposed lack of candidness' 'startling' and 'mind boggling' and therefore erred in law.

e. *The learned High Court (Commercial Division) Judge erred in law when he failed to uphold that after the payment of processing fees or charges by the Appellant, the reduction or deduction of the sum of £12.00 from the face value of the cheque in the name of clearing bank charges or correspondent bank charges or foreign bank charges or hidden bank charges by the defendant or any of its agents was unlawful and improper and that there was no evidence before the learned judge in support of that conclusion.*

f. *The Learned High Court (Commercial Division) Judge by holding that the £12.00 reduction or deduction from the face value of the cheque was proper meant to say that a cheque, a bankers draft or a banker's cheque can be reduced in value (while in transit) before it reaches the recipient's account.*

g. *The Learned High Court (Commercial Division) Judge was wrong in law when he failed to uphold that the reduction or deduction of the £12.00 was concealed from the knowledge of the 1st Appellant and its principals until it was discovered in court documents and that the concealment was fraudulent and call for damages.*

h. *The learned High Court (Commercial Division) Judge erred in law when he failed to carefully appreciate or avert his mind on the nature of the reliefs or claims set before it and the principles of law involved in the determination of each but woefully combined most of the reliefs or claims thereby arriving at wrong conclusions and occasioning a substantial miscarriage of justice.*

i. The Learned High Court Judge erred in law when he held that the appellants had specifically proved and quantified their loss in the nature of the loss of the 60 day credit and the privileges enjoyed yet refused to grant the £30 million claim for exemplary damages.

j. The learned High Court Judge erred in law when he refused to consider the list of additional documents of Plaintiff filed on 16th November, 2016 on notice before the Defendant opened its case upon grounds of undue enrichment to the Plaintiff yet refused, failed or neglected to record same.

k. The Judgment is against the weight of evidence that was before the court.

l. Additional grounds of appeal may be filed with leave of the Court upon receipt of the record of proceedings".

I address grounds (h), (i) and (j) of the appeal together and their combined effect is that the trial High Court Judge failed to grant the different types of damages sought by it under various headings. The types of damages sought by the Plaintiff on its writ are: General damages for negligence and general inconvenience to the Plaintiff; compensatory damages for causing embarrassment to the Plaintiff under the same transaction; and exemplary damages for thirty million Pounds Sterling or its cedi equivalent for the loss of the sixty day credit facility it enjoyed from Comma Oil which he lost as a result of the negligence of the Defendant.

There are different types of damages and awards are made under them on stated grounds. General damages are normally not particularized unlike special damages which must be particularized and proved. General damages are awarded based on the type of wrong complained of to compensate the Plaintiff for the harm caused to it as a result of the negligence of the Defendant. Compensatory damages on the other hand, is damages which is sufficient enough to indemnify the Plaintiff for the loss suffered arising out of

contract or tort. Punitive damages is awarded by the courts as an additional amount to actual damages where it has been proved that the conduct of the Defendant amounts to reckless, malice or deceit and are not generally recoverable under contract.

The American Federal Supreme Court case of *BMW of North America , Inc v Gore, 517 US 559, 116 S. Ct 1589 (1996) quoted by Black's Law Dictionary, Tenth Edition by Bryan A. Garner, at page 474* discussed the difference between compensatory damages and punitive damages thus:

> ***"Although compensatory damages and punitive damages are typically awarded at the same time by the same decision maker, they serve distinct purposes. The former are intended to redress the concrete loss that the Plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi - criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrong doing."***

The Black's Law Dictionary, *supra,* states unambiguously that punitive damages is the same as exemplary damages and the latter is awarded in quasi criminal cases. The matter before this court is not a quasi-criminal matter and the award of exemplary or punitive damages is out of place.

The basis for the award of compensation is to compensate the Plaintiff for the injury caused to it and not as a windfall. *Halsbury Laws of England, Fourth Edition, reissue Vol. 12(1) paragraph 91* explains the normal functions of damages thus;

> ***"The normal function of damages for breach of contract is compensatory. Damages are award to punish the party in breach or to confer a windfall on the innocent party, but to compensate the innocent party and repair his actual loss."***

The plaintiff is only entitled to damages to compensate it for the loss of business, credit facility, loss of customers and loss of anticipated income and profit. The Plaintiff who was

buying on credit, sell and pay within sixty days has been awarded adequate compensation by the High Court to enable it to buy oil from its creditors to the tune GB£ 48, 818.86 which represented the total worth of oil that it was to buy on credit and sell.

From the evidence adduced, I am not satisfied that the negligence act of the Defendant caused the Plaintiff to suffer loss of reputation as the trial High Court found the Defendant negligent and condemned it in damages and the judgment speaks for itself. Furthermore, the communication between the Defendant and Comma Oil revealed that it was the Defendant who failed to honour its obligation under the contract to locate the actual account the draft was to be cashed and give authorization to that effect.

From the totality of the evidence on record, the general damages awarded by the trial High Court adequately compensated the Plaintiff to make it credit worthy which is quite close to conferring a windfall on the Plaintiff. The trite position of law is that general damages are assessed and awarded taking into account the nature of the injury caused and the appropriate amount to award to compensate for the injury unlike special damages which is specifically particularized and proved.

The claim that the trial High Court erred by not granting the sum of thirty million damages as exemplary damages is untenable as it is the duty of the court to determine as to whether that type of damages could be awarded and the appropriate amount to award taking into account the nature of injury complained of and not to give the Plaintiff a windfall. There is no justification for claiming for exemplary damages, and furthermore, the amount claimed by the Plaintiff is unreasonable taking into consideration the type of injury it sustained. I dismiss the above grounds of appeal together with grounds (a), (b) and (c) which touch and concern the same questions of facts and law as unmeritorious.

I now discuss the purpose for which the sum of GB£ 12.00 was deducted from the sum of GB£ 5,017.00. I discuss grounds (d), (f), (g) and (h) of the appeal which could have been

combined as one ground of appeal by being economical with words. The Plaintiff's position was that the Defendant fraudulently deducted and concealed the sum of GB£ 12.00 from the sum of GB£ 5,017.00 and should be condemned in damages. I have examined the entire evidence on record and I am satisfied that the evidence by the Defendant that it deducted it as foreign bank charges or correspondence bank charges is more probable than the Plaintiff's position that it was fraudulent deductions.

The Plaintiff has a burden of persuasion to prove that the sum of GB£ 12.00 was not a legitimate fee but was a fraudulent transaction but failed to prove same. The Defendant rather satisfied section 10(2) of the Evidence Act, 1975 (NRCD 323) by raising doubt to the claim made by the Plaintiff that the sum of GH£ 12.00 was a fraudulent deduction and further proved that it was a legitimate fee which is associated with banking transactions.

In the case of ***Bakers-Wood v Nana Fitz [2007-2008] 2 SCGLR 879,*** the Supreme Court applied section 10(2) of the Evidence Act, 1975 (Act 232) held that a person who makes an allegation has the burden to persuade the Court by establishing degree of belief concerning that fact in mind of the Court. DW1 vividly explained the deduction made by HSBC as clearing charge and whenever a cheque goes through series of banks, they take their charges from the fund.

The Comma Oil who was to receive an amount of GBE 5,017.00 from the Plaintiff did not receive the amount and did not know that a deduction of GB£ 12.00 was deducted and what should have been the basis for damages? The claim for damages is without any legal basis as the amount was not received by Comma Oil and did not know of any deductions. The deductions made did not cause any injury to the Plaintiff and Comma Oil and damages shall not lie against the Defendant. The Plaintiff's position is defeated by the presumption against *de minimis* by the fact that the complaint is on trivialities which did not occasion any injury.

In the case of ***Constantine v Imperial Hotels [1944] KB 693*** where the plaintiff who was a guest in a hotel had his room changed with another with equal facilities but declined and sued. The English Court held that even though the plaintiff proved that there was a breach of the hotel's common law duty to him, he did not suffer any injury and the triviality of the contract required an award of five British Pounds as nominal or contemptuous damages.

I affirm the findings made by the trial High Court that the deduction made is legitimate fee for the foreign transfer and damages cannot be awarded.

Assuming that there was a breach, the court would have described it as *de minimis non curat lex* and award contemptuous damages which is normally the smallest of the coins. In the case of ***Newstead v London Express Newspapers [1940] 1KB 377,*** the Court held that there was no need for the action as the breach was insignificant to attract injury and was awarded a farthing; one quarter of a penny as contemptuous damages. I dismiss grounds (d), (f), (g) and (h) as unmeritorious.

The Plaintiff also failed to prove that the trial High Court Judge committed factual errors or both factual and legal errors which could help to advance the determination of the factual matters raised in the appeal and on the strength of the case of ***Owusu- Domena v Amoah [2015-2016] 1 SCGLR 790***, I dismiss the omnibus ground of appeal contained in ground (k) of the notice of appeal as unmeritorious.

The trial High Court Judge erred in law when he considered relief (ii) and granted GH¢10,000.00 as general damages for negligence and general inconvenience caused to the Plaintiff under contract separately from general damages for breach of contract. I set aside the award of GH¢ 10,000 .00 as superfluous of what the Plaintiff is entitled. Subject to the above, I affirm the decision by the trial High Court and dismiss the entire appeal as unmeritorious.

SGD

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JUSTICE DENNIS ADJEI

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE .....

JUSTICE AMMA GAISIE

(JUSTICE OF THE COURT OF APPEAL)

NOVISI ARYENE JA (MRS).

Plaintiffs sued defendant for reliefs endorsed on the writ of summons. After hearing the parties, the learned trial judge non-suited the 2nd plaintiff and entered part judgment for plaintiff. Dissatisfied with the judgment of the court, plaintiff is before us seeking a reversal or variation of the judgment

APPELLANT'S CASE

Per its statement of claim which was subsequently amended with leave of court, plaintiff, (hereinafter referred to as appellant) averred that since 1994, it has been trading with Comma Oil and Chemicals Limited, (a company based in the United Kingdom). Because of the good and long standing relationship with Comma Oil, the latter extended an interest free collateral-free 60 day credit trading facility to appellant. This arrangement enabled appellant buy products from Comma Oil on credit basis and repay after 60 days.

When business is good, appellant could buy on the average, five different consignments of 20/40 footer containers a year, valued at a minimum of £150,000, it was averred.

In October 2014, appellant ordered £48,818.86 worth of products from Comma Oil on credit. Appellant however had to clear an outstanding amount of £5,017 in respect of a previous consignment first. Consequently, on 18th November 2014, appellant instructed defendant, (hereinafter referred to as respondent) to issue a banker's draft with the face value of £5,017 to Comma Oil. It was a HSBC UK bank draft to be drawn on respondent's account with HSBC Bank PLC UK.

Appellant contended that it was a requirement that such transfers are accompanied by authorization by the issuing bank before the cheque would be honoured. Defendant failed, neglected or refused to send the authorization, as a result when Comma Oil presented the bank draft to HSBC for payment on the 25th of November 2014, it was returned unpaid. On receipt of the information from Comma Oil, appellant immediately informed respondent and was assured that the due authorization would be sent. Based on these assurances, appellant duly informed Comma Oil and they re-presented the cheque for payment on 1st of December 2014. The cheque was however returned unpaid a second time. Altogether the cheque was returned three times and was finally paid on the 5th of January 2015.

Appellant averred that it was later informed by respondent that HSBC had paid the amount onto a wrong account. And that it could not identify the account into which it lodged the amount paid by appellant. As a result of the delay in honouring the bank draft, appellant pleaded with respondent to prepare a SWIFT transfer for the benefit of Comma and the latter was duly informed that the bank draft had been replaced with a SWIFT transfer. Appellant contends when respondent finally located the account into which the funds were paid, it unilaterally cancelled the SWIFT. The amount was finally

returned to HSBC on 15th December 2014 but respondent did not honour the cheque until 5th of January 2015.

Appellant averred that due to respondent's negligence, Comma Oil cancelled the 60 days credit arrangement. It also lost business, expected income and profits, loyalty and trusts of its customers as well as the hard earned reputation and the good relationship it had built with Comma Oil over twenty years. Appellant also did not receive the lubricants ordered for the Christmas season. And that respondent's conduct has put appellant through much anxiety, anguish and embarrassments, loss of business and all the related privileges.

By a letter dated 19th December 2014, signed by its CEO, respondent apologized for the delay in sending the authorization. Appellant also took issue with respondent's contact with Comma Oil during the period of the delay, and described it as unethical as it was without its consent. Appellant further alleged that she later found out that instead of £5,017, respondent shortchanged appellant by fraudulently deducting an amount of £12.00 from the money intended for Comma Oil. And that the respondent fraudulently concealed the deductions from appellant.

Per its amended writ of summons and statement of claim, appellant sought the following reliefs against respondent:

I. *Declaration that the defendant was consistently and repeatedly negligent for failing to send the authorization for payment of the bank draft within the stipulated time and in the general handling of 1st plaintiff's banker's draft to Comma Oil.*
II. *An order for the payment of general damages for negligence and general inconvenience caused to the plaintiffs.*
III. *An order for the payment of compensatory damages for loss of business; loss of anticipated income and profits; loss of customers; loss of corporate reputation.*

IV. *An order for payment of compensatory damages for causing embarrassment, anxiety and anguish to the plaintiffs, particularly, 2nd plaintiff.*

V. *An order for the payment of special damages in the sum of GBP 12.00 only or its Ghana Cedi equivalent being the sum short-changed by the defendant or its agents to Comma Oil, plaintiff's principal and interest accrued thereon at the commercial bank's lending rate from January 6, 2015 to date of final payment.*

VI. *An order for the payment of damages for fraudulent concealment.*

VII. *An order for the payment of exemplary damages in the sum of 30 Million GBP or its Cedi equivalent, for the loss of the 60 day credit arrangement built with Comma Oil over twenty years of doing business as well as the loss of reputation of plaintiffs before Comma Oil.*

RESPONDENT'S DEFENCE

The claim was vehemently denied. Respondent averred that on the instructions of appellant, a bank draft was issued in favour of Comma Oil. It admitted that it did not immediately send the authorization to HSBC. However, immediately its attention was drawn to the omission, an authorization was sent on 26th of November 2014. And that Comma Oil re-presented the bank draft on the 8th of December 2014 through its bankers, Bank of America, UK. The latter then submitted the draft for clearing through their corresponding bank, NatWest Bank, UK. On the 10th of December 2014, HSBC released the funds to NatWest Bank UK. And that between Bank of America and its UK agent NatWest, the account into which the cleared funds had to be lodged could not be traced. As a result, NatWest returned the funds to HSBC on the 15th of December 2014. Subsequently, NatWest bank provided the account details and the money was duly paid on the 5th of January 2015. Respondent denied the claim of negligence and averred that events that occurred after the 26th of November 2014 when the authorization was sent to HSBC, were neither its fault or within its control.

Respondent denied that the bank draft was dishonoured on three occasions. It averred that upon Comma Oil confirming receipt of the draft, the SWIFT transfer was cancelled and appellant was duly informed of these developments. Respondent averred that it did everything within its control and power to trace the funds, and even offered to execute a SWIFT Transfer to ensure payment on time. And that it has no control over the date on which Comma Oil chose to re-present the bank draft for payment.

Respondent also denied the alleged unethical conduct and averred that contact with Comma Oil was made in an effort to trace the accounts into which the funds were lodged. And that appellant was involved with all exchanges between respondent and Comma Oil. And that when respondent became aware that Comma Oil had withdrawn its credit arrangements with appellant, respondent offered to establish letters of credit free of charge to appellant, to facilitate its business.

Respondent averred that the letter of apology of its Managing Director dated 19th December 2014, supports the bank's assertion that the apology was in respect of the failure to issue authorization prior to the first presentation by Comma Oil and not for the entire events that followed.

The alleged fraudulent concealment was also denied and respondent averred that the bank draft was issued to cover the total amount of £5,017 and the draft was delivered personally to appellant's Managing Director who forwarded same via courier service, to its Principal. And that respondent is not responsible for any offshore charges or deductions made by other international intermediaries as the cheque went through the UK banking clearance system.

In further denial of the action, respondent contended that prior to the request for the issuance of the bank draft, appellant's relationship with Comma Oil was already in jeopardy due to substantial breaches of its payment obligations to Comma Oil. And that

appellant's relationship with its principal was terminated because of its failure to settle its trade invoices with its principal on time and that the amount of £5,017, payment of which has led to the instant action, was six months overdue.

At the end of the trial, the court found respondent liable in negligence. Applying the law of Agency, the trial judge also found that HSBC was the agent of respondent and held respondent liable for the acts and omissions of HSBC. Appellant's reliefs, v and vi were dismissed. The trial court also ruled that relief iii being compensatory damages, and relief vii being exemplary damages are materially the same and awarded compensatory damages in the sum of 48,818.89 GBP in favour of appellant. The trial court ruled that the said amount or its cedi equivalent was enough to cover reliefs iii, iv and vi. General damages in the sum Ghc10,000.00 was awarded.

THE APPEAL

It is these conclusions which form the basis of the instant appeal. The judgment is impugned under the following grounds of appeal as amended with leave of court:

a. *The learned High Court judge erred when he held that the respondent had proffered similar consistent explanation on the deduction of GBP 12.00 from the face value of the Banker's Draft issued on behalf of the 1st plaintiff/appellant.*
b. *The learned High Court judge erred when he failed to award the 1st plaintiff/appellant special damages of GBP 12.00.*
c. *The learned High Court judge erred when he failed to award the 1st plaintiff/appellant damages for the fraudulent concealment of the deduction of GBP 12.00 from the face value of the Banker's Draft issued on behalf of the 1st plaintiff/appellant.*
d. *The learned High Court judge erred in law when he failed to commercially evaluate the adverse effect of the enormity and gravity of the respondent's various acts and omissions on the international corporate image or the reputational capital of the 1st plaintiff/appellant.*

e. *The learned High Court judge erred in law when he failed to exercise proper discretion by his failure to grant and award the various heads of damages sought by the 1st plaintiff/appellant thereby occasioning a substantial miscarriage of justice.*
f. *The learned High Court judge failed to exercise his discretion properly in the quantum of award of damages granted the 1st plaintiff/appellant.*
g. *The judgment is against the weight of the evidence before the court.*
h. *Additional grounds of appeal may be filed with leave of the court upon receipt of the Record of Appeal.*

SUBMISSIONS ON GROUNDS A, B & C.

Grounds a, b and c of the appeal which refer to the issue of fraudulent concealment, were argued together.

Counsel for appellant submitted that Comma Oil was paid 5,005 GBP instead of 5,017 GBP on the bank draft. And that respondent concealed this information from appellant and it was only during the trial that appellant found out that Comma Oil was paid less 12.00 GBP. Accordingly, the trial judge erred when he refused to grant the relief of special damages of 12.00 GBP with interest thereon, endorsed on the amended writ of summons.

Referring to case law and the Evidence Act 1975, (NRCD 323) on the burden of proof, it was submitted that having paid all the charges related to the transaction to respondent in Accra, the burden of persuasion as to whether or not the deductions made were bank charges, rested solely on respondent who alleged same. And that having failed to furnish the court with evidence of the alleged deductions by a bank other than itself, or its agent HSBC, the trial court ought to have ruled against the respondent on that issue.

Responding to these submissions, counsel for respondent also referred to the Evidence Act and case law and submitted that appellant failed to discharge the burden of proof. It failed to produce cogent evidence in support of the alleged fraudulent concealment.

The portion of the judgment under attack is at pages 464 to 465 of the ROA where on the issue of the alleged unlawful deductions and fraudulent concealment, the trial judge delivered himself thus:

> *"I now turn my attention to deal with the claim of the controversy surrounding an allegation of fraudulent concealment made by plaintiff first in respect of £12.00 that it claims had been unlawfully deducted. The face value of the draft was £5,017 but plaintiff claims that £12.00 was taken out of the total amount given to plaintiff and that this ought not to be so as he paid all the charges in Ghana. This Linda Tetteh explained well when she came under cross examination in the following that*:
>
> *'My lord, HSBC paid 5,017 GBP, but there are hidden charges called overseas bank charges and once there are several banks involved in the UK clearing process, the corresponding bank charges or foreign bank charges will apply. The beneficiary bank i.e Comma Oil banks which is Bank of America UK is the clearing agent which is NatWest for Bank of America will all take charges which Stanbic Bank has no control over.'*
>
> *Similar consistent explanation was provided on the 17th of January, 2017 by the witness. I think the wild allegation of fraudulent concealment which is criminal in nature and require the criminal burden was not made out and accordingly dismiss reliefs v and vi in the endorsement of the writ of plaintiff."*

The trial court found that the deductions were bank charges and dismissed the allegation of fraudulent concealment. This court has been invited to set aside the findings on

grounds that the evidence does not support the conclusion. In addressing the issue, we are guided by the well- established principle that findings of fact made by trial courts should not easily be interfered with by an appellate court unless the said finding has no support of the evidence on record.

It is not in dispute that the bank draft with a face value of 5,017 GBP was received by appellant's Managing Director and forwarded to Comma Oil. It is also not in dispute that HSBC paid the sum of 5,005 GBP to Comma Oil through NatWest, see Exhibit 4N, (a message from HSBC to respondent).

Respondent's representative told the court in cross examination that respondent did not inform appellant that bank charges would be deducted from the banker's draft. She explained that the amount paid by appellant in Ghana, was commission for the issuance of the draft. And that bank charges were deducted by the foreign banks as the cheque went through the UK clearance system.

It is pertinent to note that the exactitude of the amount due Comma Oil, (according to appellant) was 5,017 GBP. Yet contrary to appellant's assertions, there is no evidence before the court that Comma Oil complained about being short paid. In the circumstances, we hold that Comma Oil accepted the sum of 5,005 GBP in full payment. Indeed as appellant indicated to the court, it only became aware that Comma Oil was paid 5,005 GBP when the matter came to court. A logical conclusion is that Comma Oil acknowledged that the amount of 5,017.00 GBP was inclusive of bank charges.

The following evidence elicited from 2nd plaintiff who testified on behalf of the 1st plaintiff at the trial, supports this conclusion:

> Q *Have you actually seen bank statement of Comma Oil which shows what they received at the face value of your banker's draft.*

A My lord I have not seen bank statement of Comma Oil but they always tell me they have received payment for the consignment they have already sent to me.

From this testimony it can be inferred that Comma Oil would have informed appellant if they had not received the full amount due them. On the totality of evidence before us, we are of the view that the trial court's findings that the deduction was bank charges, is highly probable and is supported by the evidence. The finding shall not be disturbed.

This conclusion ought to have put to rest the allegation of fraudulent concealment, however having set same up as a ground of appeal, it is our duty to interrogate the issue. We uphold the submission by counsel for respondent that an allegation of fraudulent concealment connotes criminality and requires proof beyond reasonable doubt. Our decision is buttressed by the case of **Fenuku & Anor v John-Teye & Anor [2001-2002] SCGLR 985.** At page 1003, the court observed thus,

> *"Generally in a civil trial, the burden of persuasion is on the preponderance of probabilities. Where, however, a criminal act is the issue in a civil trial, the burden of persuasion requires proof beyond reasonable doubt, though the sufficiency of the evidence required to attain that standard would depend to a large extent, on the gravity of that particular offence."*

What evidence did appellant proffer in proof on the alleged fraudulent concealment? None whatsoever. Quite obviously, appellant's invitation to this court to rule in his favour, is grounded on a misconception that it was respondent who bore the burden of proof on the issue.

Fraud is a criminal offence and **Section 13 (1) of the Evidence Act 1975 (NRCD 323)** provides, "In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue, requires proof beyond a reasonable

doubt." A case in point is **Cocoa Marketing Co ltd v Ansah [1997-98] 2 GLR 514** (cited by both counsel) in their written submissions. In that case, the respondent accused his former employers of fraudulently concealing his exact salaries and allowances. This court speaking through Wood JA (as she then was) stated the position of the law as follows;

> *"What the law looks out for in a plea of fraudulent concealment is not merely negligence or recklessness on the part of the person against whom the charge is laid, but some wilful concealment of the facts and which is designed to defraud the innocent party. In the instant case, the respondent did not lead any evidence in proof of either his allegation that he was deliberately underpaid or the deliberate concealment of what his just earnings were in particular, and which coupled therefore with the payment of wrong salaries to him, was designed to cheat him. The furthest the respondent's evidence went, was merely to allege that he was not notified of the new salary ranges. In the circumstances the respondent failed to establish either fraud or fraudulent concealment."*

We have given careful thought to submissions by both counsel and read the cases cited and the ROA and rule that having alleged criminality on the part of the respondent, the onus of proof was squarely on appellant and never shifted. To succeed, appellant must produce evidence of wilful concealment by respondent of the facts alleged, which is intended to defraud appellant. We have thoroughly examined the record and find not even a scintilla of evidence in support of the alleged fraudulent concealment**.** No evidence of willfulness on the part of the respondent was presented to the court.

Applying the reasoning of the court in the **Cocoa Marketing case (supra)**, we rule that appellant failed to prove the alleged fraudulent concealment beyond reasonable doubt, and grounds a, b and c, being unmeritorious, fails.

GROUNDS D, E & F

Grounds d, e and f of the appeal were also argued together. For a better appreciation of the issue this court is called upon to address, we reproduce the said grounds below.

a) *The learned High Court judge erred in law when he failed to commercially evaluate the adverse effect of the enormity and gravity of the respondent's various acts and omissions on the international corporate image or the reputational capital of the 1st plaintiff/appellant.*
b) *The learned High Court judge erred in law when he failed to exercise proper discretion by his failure to grant and award the various heads of damages sought by the 1st plaintiff/appellant thereby occasioning a substantial miscarriage of justice.*
c) *The learned High Court judge failed to exercise his discretion properly in the quantum of award of damages granted the 1st plaintiff/appellant.*

The thrust of Appellant's grievance is the quantum of compensatory damages awarded by the trial judge. It was contended that 48,818.89 GBP was inadequate and did not restore appellant to the status quo ante. More so, since two years had lapsed since the breach by respondent, and the amount awarded could not purchase the same quantity of products from Comma Oil.

The portion of the judgment being impugned in this court is at page 483 of the ROA where the learned trial judge delivered himself thus:

> *"Plaintiff must be restored as far as money can do, in his relations with his business partners first with the 60 day credit arrangement- as plaintiff was enjoying receipt of goods without cash, selling them and paying within 60 days, I think a figure of £48,818.89 or its cedi equivalent would be fair. Why? That was the total price of the last container that plaintiff was*

supposed to pay but enjoyed the liberty of having the goods shipped and later pay for it."

The import of grounds (d), (e) and (f) of the appeal, is an invitation to this court to interfere with the exercise of the trial court's discretion in the award of damages. It is trite knowledge that the award of damages involves the exercise of discretionary power. The court is required to exercise this power judicially based on the evidence before it. In addressing these grounds, we are guided by the principle that an appellate court will not interfere with the exercise of discretion by the trial court unless it is satisfied that the trial judge applied wrong principles or can be said to have reached a wrong conclusion which would work a manifest injustice between the parties. Or that it took into consideration matters which it should not have taken into consideration. See **Nartey Tokoli v Valco (No 3) [1989-90] 530.**

Did the trial court apply wrong principles in the assessment of damages? Has appellant sufficiently demonstrated why this court should interfere with the quantum of damages awarded? The burden is on the appellant.

In ascertaining whether or not to interfere with the award granted, we shall consider whether the trial court was guided by the principle of restitution intergrum in making the award. Arguing the appeal, counsel submitted that although in his judgment, the trial judge referred to the guiding principles on award of damages, he failed to appreciate the gravity of the respondent's negligence and the severity of damage caused to the appellant. That the trial judge failed to advert his mind to the change in market price of goods from the time of the breach to the date of judgment. The court also failed to take into consideration the fact that by reason of respondent's negligence, appellant no longer enjoyed concessions by way of price discounts from Comma oil, and the loss of business and its damaged reputation.

Responding, counsel for respondent submitted that award of damages involves the exercise of discretion by the court, and that it is not the case of appellant that the trial judge failed to exercise his discretion properly. And that counsel for appellant acknowledged in his written submissions that the learned trial judge properly applied the principles governing the award of damages when in his judgment he supported his conclusions with the locus classicus on award of damages; **Hadley v Baxendale [111854] EWHC J70** and also cited the local case of **Royal Dutch Airlines v Farmex ltd [1989-90] 2 GLR 623.** Counsel further argued that having applied the right principles and given reasons for the award, this ground of the appeal ought to fail.

The general objective of awarding damages is to place the injured party as far as money can do it, in the position he would have been in if the breach had not occurred. See **Hadley v Baxendale [1854] 9 Ex. 341.** The general principle is that a claimant is entitled to full compensation for the loss suffered. To succeed, claimant must produce evidence to warrant the award. He must furnish the court with facts upon which the assessment can be made.

The records show that the trial court was guided by the principle of restitution in intergrum. The principle is that where an injury is to be compensated by damages, the claimant should as nearly as possible be compensated with an amount of money which will put him in the same position (or near thereto) as he would have been in if he had not sustained the injury.

It is in evidence that in assessing damages, the learned trial judge considered the various heads of damage as endorsed on the writ. Applying the principle of restitution in intergrum, he delivered himself thus;

> *"Plaintiff must be restored as far as money can do it in his relations with his business partners first with the 60 day credit arrangement*

– as plaintiff was enjoying receipt of goods without cash, selling them and paying within 60 days, I think a figure of 48,818.89 or its cedi equivalent would be fair."

The learned trial judge ruled that damages in the sum of 48,818.89 GBP, being the cost of products appellant had ordered, should be sufficient compensatory damages. He explained that relief iii is not materially different from relief vii. Relief iii is a prayer for "An order for the payment of compensatory damages for loss of business; loss of anticipated income and profits; loss of customers; loss of corporate reputation." And relief vii, is a prayer for "An order for the payment of exemplary damages in the sum of 30 million GBP or its cedi equivalent, for the loss of the 60 day credit arrangement built with Comma Oil over twenty years of doing business as well as the loss of reputation of plaintiffs before Comma Oil."

Evaluating evidence adduced at the trial, and applying the principles on award of damages, we affirm the trial court's conclusion. We agree entirely with the trial court that reliefs, iii and vii are basically the same, and that the amount of 48,818.89 was enough to cover reliefs, iii, iv and vi which has to do with injuries suffered by reason of respondent's negligence. It is our view that the mere fragmentation of the injuries suffered under reliefs iii, iv, and vii, does not entitle the claimant to separate heads of damages because the essence of damages is to restore the plaintiff as far as money can do so, to the position he was before the injury.

The said claims, being injuries arising from the breach of duty by respondent, were considered by the trial judge in making the award. In our view, for a company which prior to events leading to this suit, was dealing with its principal on credit basis, the award of GBP 48,818.89 puts appellant in a position to order goods and pay upfront. In

other words, for the first time since 1994, appellant has been placed in a position where it could pay for supplies from Comma Oil. Clearly, no injustice was occasioned by the grant. Indeed, we agree with counsel for respondent that in the circumstances, anything more, would amount to unjust enrichment. It is for these reasons that we rule that the quantum of compensatory damages awarded is adequate and the reason assigned by the learned trial judge, sound and justifiable. Same shall not be disturbed.

Appellant also challenged the Ghc10,000 awarded as general damages on grounds that it was inadequate. It was submitted that the trial court did not advert itself to the gravity of the respondent's negligence. And that as a Bank, respondent knew or ought to have known that failure to authorize payment of the bank draft would affect appellant's business, and that the trial court failed to factor these reasons into the award of general damages.

As earlier discussed in this judgment, compensatory damages is a form of general damages awarded with the object of compensating the claimant for injuries caused. I have had the opportunity of reading the erudite judgment of my esteemed brother Sir Dennis Adjei on the award of general damages and I entirely agree with his conclusions that general damages are assessed and awarded taking into account the nature of the injury suffered and that in the instant case, the general damages awarded adequately compensated for the damage, in that it made appellant credit worthy. The award of Ghc10,000.00 as general damages is therefore superfluous and is accordingly set aside.

The final ground of appeal argued by counsel for appellant is that the judgment is against the weight of evidence adduced at the trial. The position of the law is as stated in the oft cited case of **Tuakwa v Bosom [2001-2002] SCGLR 61** is that;

> *"An appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is*

against the weight of evidence. in such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case to analyze the entire records of appeal take into account the testimonies and all documentary evidence adduced at the trial before arriving at the decision, so as to satisfy itself that, on a preponderance of probabilities, the conclusions of the trial court are reasonably or amply supported by the evidence……"

The duty imposed on an appellant who alleges that the judgment was against the weight of evidence, is that such an appellant carries the burden of bringing to the fore for the consideration of the appellate court, the pieces of evidence on record which if the trial judge had applied in his favor, would have resulted in a favourable ruling. **Djin v Musa Brako [2007-2008] SCGLR 686** refers.

What evidence was presented to the court to merit a favourable ruling? None whatsoever. The evidence adduced at the trial is that appellant used to deal with Comma Oil on credit basis. The compensatory damages awarded, in our respectful view, placed appellant in a position to import goods and pay up-front. Appellant who alleged that the compensatory award was inadequate to purchase the same quantity of goods it could have imported in 2014 failed to produce evidence in support of the assertion.

It was further submitted on behalf of appellant that given the aggravated nature of respondent's negligence, the trial court ought to have awarded exemplary damages of thirty million GBP in favour of appellant. In support of this submission, counsel cited the case of **Messrs Askus Company v Boakye & Ors J4/14/2015 [2016] GHASC 11** and urged this court to rule that appellant was entitled to exemplary damages. It bears mention that no evidence was presented to the court in support of the exactitude of 30 million GBP exemplary damages pleaded. **In Messrs Askus Company v Boakye & Ors (supra),** the

Supreme Court quoted with approval the following ruling by Lutterodt J (as she then was) in **Nicol v Customs Excise and Preventive Service [1992] 1 GLR 135,** "Exemplary damages are awarded when the tortfeasor's conduct was reprehensible and so outrageous that it deserved condemnation, as for example where he was actuated by malice, fraud, cruelty, insolence, brutal show of force or the like……"

Applying above reasoning of the Supreme Court as a guide, we hold that the evidence before the court does not support the imposition of punitive or exemplary damages accordingly, the trial judge shall not be faulted for rejecting the invitation to award same. In coming to this conclusion, we take into consideration the apology rendered by respondent's CEO. We also take into consideration respondent's offer to assist appellant with Letters of Credit, when it was informed about the withdrawal of the credit facility. It would also be noted that respondent issued the authorization immediately its attention was drawn to the omission.

Respondent was negligent but certainly not willful or fraudulent. There being no evidence before us in support of a finding that respondent's conduct was actuated by malice, sheer recklessness or was outrageous and reprehensible, we rule that appellant failed to make a case for the imposition of punitive/exemplary damages.

We find the conclusions of the trial court sound in law. Save the award of general damages in the sum of GHc10,000.00, which we hereby set aside, we shall not disturb the judgment. The appeal lacks merit and is accordingly dismissed.

SGD

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JUSTICE NOVISI ARYENE (MRS)

(JUSTICE OF THE COURT OF APPEAL)

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