IN THE SUPERIOR COURT OF JUDICATURE IN THE COMMERCIAL DIVISION (COURT 1) OF THE HIGH COURT OF JUSTICE ACCRA, HELD ON TUESDAY THE 28TH DAY OF NOVEMBER, 2023

BEFORE HER LADYSHIP JUSTICE SHEILA MINTA

SUIT NO.: CM/RPC/0451/2020

THE SEED FUNDS SAVINGS & LOANS - PLAINTIFF

VRS.

1. EAGLE STAR ENTERPRISE - DEFENDANTS

2. THEOPHILUS BINEY

3. PETER OBENG-NIMAKO

4. CHRISTOPHER ADAMS

JUDGMENT

INTRODUCTION

The Plaintiff by its Writ of Summons and Statement of Claim filed on 3rd February 2020 claimed jointly and severally the followings reliefs against the Defendants:-

a. Recovery of an amount of Four Million Five Hundred and Fifty-Three Thousand One Hundred and Fifty-Six Ghana Cedis and Ninety-Two (GH¢4,553,156.92) as at 24th September 2019.

b. Recovery of interest on the principal sum of GH¢4,553,156.92 from 25th September 2019 at the rate of 24% per annum till the date of final payment.
c. Costs.
d. Further/or in the alternative an Order for Judicial Sale of 7 – bedroom property located at Asene Akim in the Eastern Region being the property of the 3rd Defendant.

The Defendants entered Appearance and filed their Statement of Defence on 23rd June 2020 and averred that the sum claimed by the Plaintiff was mostly made up of penal interest compounded and denies owing the Plaintiff the amount endorsed on the Writ. According to the Defendants the Plaintiff placed itself between the dealings of Ghana Cocoa Board (Cocobod) and 1st Defendant and having handed over all the certificates of completion of the projects executed to the Plaintiff who failed to quickly pursue payments from Cocobod, disentitled it to its claim.

PLAINTIFF'S CASE

The Plaintiff, a Savings & Loans Company incorporated under the laws of the Republic of Ghana extended credit facilities to the 1st Defendant also a Ghanaian registered entity in the business of general construction, carrying on civil works and acting as building contractors in the sums as follows:-

1. Five Hundred Thousand Ghana Cedis (GH¢500,000.00) facility dated 8th April, 2016 at an interest rate of 5% per month payable within 6 months, and tendered Exhibits "A" Series.
2. Twenty Thousand Ghana Cedis (GH¢20,000.00) facility dated 29th April, 2016 at an interest rate of 5% payable within 3 months and tendered Exhibits "B" Series in support of its claim.

3. Three Hundred and Fifty Thousand Ghana Cedis (350,000.00) dated 13th June, 2016 at an interest rate of 5% per month payable within 4 months (Exhibit "C" Series).
4. One Million Five Hundred Thousand Ghana Cedis (GH¢1,500,000.00) dated 3rd November, 2016 at an interest rate of 4.5% payable within 5 months (Exhibit "D" Series).
5. Three Hundred and Sixty Thousand Four Hundred (GH¢360,400.00) dated 11th July, 2017 payable within 4 months (Exhibit "E" Series).

From the above facilities, it appears between 8th April, 2016, and 11th July, 2017, the Plaintiff had advanced to the 1st Defendant the sum of GH¢2,730,400.00 at varying interest rates. The purpose of these credit facilities was to enable the 1st Defendant complete a contract awarded it by the Cocobod for Bitumem surfacing of the Bisease-Anyinasu Feeder Road for a contract sum of GH¢8,062,880.04. According to the Plaintiff these facilities were secured by Personal Guarantees of the 2nd, 3rd and 4th Defendants and a Mortgage created by the 3rd Defendant of his property located at Asene-Akim. The Plaintiff averred that the parties executed an agreement for proceeds in respect of the Cocoa Board contract due the 1st Defendant to be paid in the joint names of the 1st Defendant and the Plaintiff. The Plaintiff tendered **Exhibit "F" Series** being Personal Guarantees of 2nd, 3rd and 4th Defendants. The Plaintiff further posits that upon the Defendants' failure to honour their obligations as agreed upon by the parties the 1st Defendant requested that the facilities together with the interest be restructured and tendered **Exhibit "G"** which said request was rejected by the Plaintiff**.** Having stated that the request made by the 1st Defendant to restructure the facilities was turned down, the Plaintiff by itself then purportedly restructured and consolidated the various facilities after 28th December, 2018 at an interest of 24% per annum. The Plaintiff again attached **Exhibits "H" Series** being demand letters and **Exhibits "J" Series** being 1st Defendant's Statement of Account with the Plaintiff.

The Plaintiff in response to the Defendants' claim that the Defendants having submitted copies of the certificates for payment from Cocoa Board and the payments being made in their joint names does not eradicate the Defendants liability towards the Plaintiff. According to the Plaintiff that kind of arrangement is a normal banking practice the allows it to monitor payments.

DEFENDANTS' CASE

The Defendants' case is that the 1st Defendant having secured a contract with the Department of Feeder Roads to bitumen surface a six-kilometer road at Bisease-Anyinasu sometime in 2016, it subsequently entered into various agreements for the Plaintiff to finance the various phases of its road construction contract with Ghana Cocoa Board. Payments for the said contract were to be made by the Cocobod upon the submission of certificates by the 1st Defendant. According to the Defendants the parties agreed that payments for each completed phase would be directly paid into Plaintiff's Account by Cocoa Board. The Defendants posits that the loans from the Plaintiff were taken in tranches at an agreed interest rate of 5% per mensem for each loan and the total loan granted was in the sum of GH¢2,730,400.00 and tendered **Exhibit "1" Series**.

It is the Defendants case further that from the said **Exhibits "1" Series** it shows 5% interest and 2.5% interest as processing fees and 1% as monitoring fee were added to the principal sum of GH¢2,730,400.00 bringing the figure to GH¢3,441,790.00 and tendered **Exhibit "2"** (Statement of all payments from Cocobod on certificates raised on work financed by the Plaintiff) which shows that GH¢3,600,086.69 had been paid directly to Plaintiff by Cocoa Board which ought to discharge 1st Defendant of its obligations towards the Plaintiff.

The Defendants story is that 1st Defendant initially initiated payments from Cocoa Board and ensured that payments on certificates raised were paid promptly but after two (2) payments were made the Plaintiff insisted that the subsequent certificates be handed over to it to pursue payment by itself from Cocoa Board which the 1st Defendant did. The 1st Defendant then submitted all the certificates raised to the Plaintiff to pursue payment as agreed. Indeed, it is the Defendants' case that the project was completed in 2018 and raised its last certificate dated 19th January 2018 which was also duly handed over to the Plaintiff. That upon the completion of the whole project a final certificate of completion was also given to the Plaintiff which entitled it to some retention money in the sum of GH¢201,572.00. The 1st Defendant again averred that it was not aware that the Plaintiff had not been promptly paid and through no fault of the Defendants it will be unjust and unequitable to be called upon in 2020 for the payment of the Plaintiff's claim of GH¢4,553,186.92 described as principal and interest on outstanding debt due and owed the Plaintiff by the Defendants.

ISSUES FOR TRIAL

This suit being one of a commercial nature, at the close of pleadings and in accordance with the Commercial Court Rules, attempts at settlement having failed at pre-trial, the following issues were set down as issues for trial:-

1. Whether or not the Defendants are jointly and severally liable to repay the debts owed by the 1st Defendant to the Plaintiff under the contractual terms amongst the parties?
2. Whether or not the alleged delay in payment by Ghana Cocoa Board (Cocobod) absolves the Defendants from their contractual obligations to the Plaintiff?
3. Whether or not by virtue of the said arrangements between the Plaintiff and the 1st Defendant the Plaintiff was in a fiduciary relationship with the Defendant?
4. Whether the Plaintiff is entitled to its claim?

The Court ordered parties to file their Witness Statements and both parties gave their evidence before this Court through their representatives. Trial in this matter started on 7th February, 2023 and on 22nd February, 2023 after Plaintiff had closed its case and in the light of the evidence before the Court, Counsel for the Plaintiff made a request to the Court for an appointment of an expert witness to reconcile the accounts between the parties. This request was acceded to and Cliftaas Chartered Accountants appointed, who eventually presented its report to the Court and the parties. The Court Appointed witness, presented its report and on 12th July, 2023 its representative Mr. Solberg Horverg Mishiwo was cross-examined by both Counsel. Parties were ordered to file their respective Written Addresses and Counsel for the Defendant filed his on 18th September, 2023 and Counsel for the Plaintiff rather filed his belatedly on 31st October, 2023.

ANALYSIS

I will begin my analysis with the discussions on issue 1, followed by Issues 2 and 3 which will be merged and conclude with issue 4.

ISSUE 1 - Whether or not the Defendants are jointly and severally liable to repay the debts owed by the 1st Defendant to the Plaintiff under the contractual terms amongst the parties?

In respect of Issue 1, from the evidence before the Court it is not in doubt that the 2nd, 3rd and 4th Defendants executed personal guarantees and a mortgage by the 3rd Defendant to be personally responsible for the debts owed by the 1st Defendant to the Plaintiff in the transaction in issue. It stands to reason that no useful purpose would be served to set same down for argument since it is a non-issue as same has been admitted by both parties. Indeed, in the submissions of Counsel for the Defendant he stated thus:-*"My Lady*

Defendants do not deny they are jointly and severally liable to repay the debts owed by the 1st Defendant to the Plaintiff."

In the case of ***Kusi & Kusi vrs. Bonsu [2010] SCGLR 60***, the Supreme Court held that; *"when a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment."*

ISSUE 2 - Whether or not the alleged delay in payment by Ghana Cocoa Board (Cocobod) absolves the Defendants from their contractual obligations to the Plaintiff?

ISSUE 3 - Whether or not by virtue of the said arrangements between the Plaintiff and the 1st Defendant the Plaintiff was in a fiduciary relationship with the Defendant?

The Plaintiff in five separated loan agreements advanced the total sum of GH¢2,730,400.00 to the 1st Defendant. It is not as if the 1st Defendant took money from the Plaintiff for a business transaction which did not work out. The principle relating to loan contract is as postulated in the case of ***Barclays Bank (Ghana) Ltd v Sakari [1997-98] 1 GLR 746 – 767;*** where the court stated:-

> *"Now, what is the obligation created under this loan contract, a breach of which would entitle the other to sue? The obligation of the bank was to advance the money, which it did, and that of the defendant was to repay the loan together with interest, if any. This is the obligation of the parties under this loan contract, and indeed, almost all loan contracts. When a bank lends money to its customer, the obligation of the customer is to repay the loan. If the loan is sought for, let's say, a business venture, and the business flops resulting in massive financial loss to the customer, this misfortune, though may be due to no fault of*

this customer, does not change the nature of the obligation of the customer to repay the loan he had contracted for. He will still be obliged to fulfil his obligation. Thus, the obligation of a borrower in a loan contract as opposed to other types of contracts, is to repay the loan and not the performance of the purpose for which the loan was sought."

The Plaintiff is inviting the Court to apply the principle stated in the above case. One is tempted to look at the instant case in a bit of different light having regard to the evidence before the Court. The loans were for contracts that were to be performed by the 1st Defendant for payments to be made in the joint names of the Plaintiff and the 1st Defendant. The Plaintiff knew that the primary source of repayment of the loan was to come from the Government of Ghana through Cocobod against certificates raised by 1st Defendant for completed works. According to the Defendants the understanding between the parties was that as soon as the certificates was issued, the Plaintiff would follow up with the payments from Cocobod, but this was denied by the Plaintiff. It is this that the Defendants have construed as the Plaintiff having put itself in an intermediary position between 1st Defendant and Cocobod for the purpose of directly receiving cheques for payments from Cocobod.

The Defendants' testimony is that after the payments on the 1st and 2nd certificates the Plaintiff by itself requested that subsequent certificates on works for payments from Cocobod be given to Plaintiff for it to pursue same by itself. In the Defendants testimony they averred in paragraphs 14, 17-22 and 24 of their witness statement as follows:-

14. *However, after the 1st two payments from Ghana Cocoa Board into the Plaintiffs account Plaintiff insisted that once the certificates for payment had been raised by the 1st Defendant the Certificates should be handed over to Plaintiff for the Plaintiff to pursue payment directly with Ghana Cocoa Board to which the 1st Defendant obliged.*

17. *At the time certificates Nos. 3 and 4 on Exhibit 2 had been ready and were duly surrendered to the Plaintiff to follow up payment with Ghana Cocoa Board.*

18. *When certificates Nos, 4 and 6 were subsequently raised, they were also surrendered to the Plaintiff to follow up payment with Ghana Cocoa Board.*

19. *The 1st Defendant completed the project in 2018 and raised its last certificate No. 6 dated 19/01/2018 and handed the certificate over to Plaintiff to pursue payment with Ghana Cocoa Board as aforesaid.*

20. *Then on the completion of the project to the satisfaction of Ghana Cocoa Board it issued the 1st Defendant with a Final Completion Certificate which entitled the 1st Defendant to all outstanding payments including 50% of the retention money in the sum of GH¢201,572.00 from Ghana Cocoa Board.*

21. *The 1st Defendant again duly surrendered the Final Completion Certificate to the Plaintiff to pursue the outstanding payments and the 50% retention money.*

22. *The 1st Defendant subsequently became aware that the Plaintiff had not been promptly paid but Plaintiff did not bring the delayed payment to the 1st Defendant's attention until the writ was served on the Defendants claiming GH¢4,553,186.92 which the Plaintiff described as the principal sum outstanding and on which the Plaintiff claims interest to date.*

24. *The Plaintiff having assumed responsibility for payments directly from Ghana Cocoa Board and the Plaintiff having encountered delayed payments without communication same to the 1st Defendant peradventure the 1st Defendant could have hastened payment the Plaintiff the Defendants to account for the delayed payments in the form of penal interest.*

The Plaintiff in paragraph 15 of its Witness Statement also stated thus:-

15. *In response to the Defendants' Defence in this case, the Plaintiff says that the fact that they agreed with the Defendants for Ghana Cocoa Board (Cocobod) to make*

payments into the joint names of the Plaintiff and the 1st Defendant does not in any way take away the liability of the 1st Defendant and its Directors to pay their just debts to the Plaintiff.

The Plaintiff admits that the parties agreed that payments from Cocobod should be paid directly to the Plaintiff. In the proceedings of 8th February, 2023, the following was recorded when the Plaintiff's witness was being cross-examined by Counsel for the Defendant.

Q: The loan Defendants from you in the sum of GH¢2,730,400.00 were to be repaid from payments from Ghana Cocoa Board, not so?

A: That is so, my Lady.

Q: The agreement you had with the Defendants was that the cheques would be paid directly into your account. It that correct?

A: That is so, my Lady.

Q: Did you receive any payments from the Ghana Cocoa Board?

A: Yes, my Lady, but the payments were not received on time as per the facility agreement.

Q: You received the payments is six tranches, not so?

A: I cannot confirm that.

…

Q: Since you are unable to tell the Court all the story, I am putting to you that you received from Cocoa Board GH¢3,600,086.69 against certificates raised by the Defendants for payment.

A: I know the amount received is in excess of GH¢3,600,000.00 but I cannot confirm the exact figure.

It is not as if the business of the 1st Defendant flopped, it performed the contract between itself and Highways with short-term loans from the Plaintiff at monthly interest rate. It turned out that the 1st Defendant and the Plaintiff's projection for the repayment from Cocobod was okay until the last tranche. The Plaintiff knew that certificates were issued for payment by Cocobod but both parties did not anticipate that Cocobod would delay in its payments. The Defendants' argument is based on the purported understanding between the parties and the fact that the final Certificates were handed over to the Plaintiff with the intention that the Plaintiff's will deal directedly with Cocobod for those cheques. The 1st Defendant contended that it had satisfied its part of the bargain by completing the works satisfactorily and procuring the certificates for payment as if the interest payment was the obligation of another person. All the payments from Cocobod went directly to the Plaintiff but there was still a gap because payments from the Government Institution delayed and the Plaintiff continued to charge interest and penal interest on the 1st Defendant's account with it.

The Plaintiff on the other hand contended that it had no business transaction with Cocobod hence it is entitled to the payments of all outstanding including principal, interest at 5% per month and 7% penal interest chargeable on overdrawn amounts that is overdue and without authorization. The Plaintiff denied placing itself in an intermediary position between the 1st Defendant and Cocobod for the purpose of directly receiving cheques for payment from Cobobod and therefore no fiduciary relationship existed between the parties. Plaintiff therefore insisted that it is entitled to its pound of flesh as contained in the agreement between the parties and as endorsed on its Writ. There is also evidence that the 1st Defendant had written a letter to the Plaintiff in "**Exhibit H 1**" expressing surprise at the demand notice sent to it by the Plaintiff which still showed that the interest calculation had not stopped and also bemoaned the penal interest charges and asked for same to be waived.

The Plaintiff did not deny the fact that the 1st Defendant handed over the copies of the Certificates Nos. 3, 4, 5 and 6 for the works done to the Plaintiff with the last certificate raised on 19th January, 2018. What the Plaintiff said was that, it was industry practice to enable them monitor payment. In monitoring the said payment, it is obvious that the Defendants have not diverted the money but have had challenges not anticipated by the parties and yet the Plaintiff is not willing to help the Defendant keep their business afloat by continuously charging interest together with penal interest as provided by the loan contract.

In ***Volta Aluminium Co. Ltd. vrs. Tetteh Akuffo & Others [2003-2004] SCGLR 1158***, the Supreme Court in its holding 2 on page 1160 per Dr. Date-Bah JSC stated as follows:-

> *"Generally, the fairness of a contract is not a matter for the courts unless a statute so prescribes. The refusal of common law courts to intervene to set aside contracts on the grounds of their assessment of the contract's fairness is meant to avoid the re-opening of bargains. In the interest of freedom of contracts, the courts do not wish to interfere to determine for the parties what their bargain ought to be".*

I believe in sanctity of contracts but if there was a peculiar circumstance of a transaction that was not anticipated by the contract, parties must be able to properly plead it for the contract to be examined if there was any leeway that the contract terms could address or accommodate it. It is desirable that financial institutions pay attention to changing circumstances of projects they sponsor or facilitate to make it possible for their customers to liquidate their debts. They should not just be interested in collecting from them exactly what they may have signed for in difficult moments but must help keep those businesses afloat in re-adjusting the contract for future business between the parties. It sad to say that contractors obtain financial assistance from the financial institutions at very high interest rates to execute government contracts only for payments to be delayed

unnecessarily by the public institutions in some cases for several years. Meanwhile the financial institutions who also need to collect their depositors' funds would not be obliged by the regulator to factor the problem of non-payment by government bodies into the contractual relationships between the financial institutions and its borrowers.

This Court from the evidence before it is unable to hold that the Plaintiff put themselves in a fiduciary relation with the Plaintiff. I also hold that the delayed payment by Cocobod would not absolve the Defendants completely from their contractual obligations to the Plaintiff. However, the Defendants must not be made to pay more than what is reasonably due the Plaintiff by looking closely at application of penalty clauses and penal interest.

My brother Aseidu J (as he then was) in the case of ***Boateng vrs. Melbound Microfinance Company Limited [2018-19]1 GLR 791 @ 813*** where he stated thus:-

> *"Penalty interest is penal in nature and by its terminology meant to serve as punishment against the borrower. A court of law should not lend support to punishment of borrowers by their lenders in an otherwise civil commercial transaction. Interest may be exigible as return on investment for the use of one's money but to exact penal interest is akin to imposing punishment on borrowers in an otherwise commercial activity."*

I agree with the above decision of my brother and the Court was interested in knowing how much of the Plaintiff's claim constituted penal interest.

ISSUE 4 - Whether the Plaintiff is entitled to its claim?

Per the **Exhibits C1, D1 and E1** it is a term of the agreement between the parties that a penal rate of 7%, 10% and 5% respectively (in addition to the normal facility interest) will be charged per month on account which is overdrawn or overdue without authorization. The difficulty in determining what is due the Plaintiff by the Defendant is what triggered an application by the Plaintiff to appoint an Expert to go into the accounts of the parties. The scope of the Court Expert's work included the reconciliation of accounts between the parties and establish whether penal interest have been applied in the calculation of the total amount outstanding as well as an assessment of Defendants' indebtedness to the Plaintiff. Agreed interest rates must be paid however looking at the peculiar circumstances of this case it will be unequitable to allow the Defendants pay for penal interests on expired facilities which is as result of default of Government to the knowledge of the Plaintiff.

AUDITORS REPORT

The Auditor conducted an Account Reconciliation exercise and submitted a report which was tendered in evidence as **Exhibit "CW 1"**. In the Auditor's conclusions the following among others were stated:-

68. *The Audit concludes that the Plaintiff's claim was based on the Consolidated Restructured Loan Statement with opening balances as of 28th December 2018 made up of Cocoa Project Loan* ***GH¢360,400*** *(with a past due interest of* ***GH¢99,115.25****) and balance of Unfunded Repayments of* ***GH¢2,850,613.70*** *(with a past due interest of* ***GH¢608,884.57*** *totalling* ***GH¢3,919,013.50****). (See Exhibit D)*

69. *The Audit Concludes that the balance on the Loan Statement as claimed by the Plaintiff on the 24th September 2019 was* ***GH¢3,509,186.94*** *and not* ***GH¢4,553,156.92****. The claimed indebtedness (if any) was in excess of* ***GH¢1,043,969.98*** *credited as repayment on the Defendants' account on 31st May*

2019. Our Reconciliation per the Loan Statement presented to the Court as Exhibit showed that the Plaintiff's claim was inaccurate and misleading. (See Exhibit D)

70. *We conclude that the claim of **GH¢4,553,156.92** was made up of Cocoa Project Loan of **GH¢360,400** (with a capitalized past due interest of **GH¢150,124.17**) and Unfunded Repayments of GH¢2,850,613.66 (with a consolidated past due interest of **GH¢1,192,019.09** as of 24th September 2019. (See Appendix A and D)*

74. *The Audit Concludes that the indebtedness due on the outstanding Cocoa Project Loan as at 3rd February 2020 (Court Filing Date) was **GH¢360,400** (Principal), **GH¢435,004** (Interest) **and GH¢549,354** (penal interest) respectively. (See Appendix E)*

75. *The Audit Concludes that the Cocoa Project indebtedness exclusive of penal interest of **GH¢549,354** as at 3rd February 2020 was **GH¢611,725.00.** (See Appendix E)*

78. *The Audit Concludes that in the absence of Credit Facility agreements to support "Unfunded Repayments (Overdrafts)" and "Consolidated Restructured Loan" the Firm could not vouch for the Appropriateness, Accuracy, and Correctness of the following Transactions, Charges, Repayments and Outstanding Claims;*

A. *A total of **GH¢6,488,311.97** described as Unfunded Repayments (Overdrafts) with no Credit Facility Agreements and made available as additional facilities to the Defendants between 3rd August 2016 and 21st May 2018. (Appendix F)*
B. *A total of **GH¢3,637,698.27** of Unfunded Repayments with no Credit Facility Agreement were reversed on the Account statement (as credit repayments). These Unfunded Repayments attracted charges of **GH¢43,231.32** (processing fees), **GH¢470,689.23** (Interest) and **GH¢18,659.9** (penal interest). (Appendix F)*
C. *Outstanding balances of **GH¢2,850,613.70** Unfunded Repayment as at 31st December 2018 were part of Consolidated Loan claimed by Plaintiff. The Consolidated Credit Facility Agreement was signed by Plaintiff only and presented to Court as Exhibit (See Exhibit A and B)).*

D. *Interest on Unfunded Repayment of GH¢2,850,613.70 was GH¢840.13 as well as penal interest of GH¢1,159,803.24 were paid by the Defendant. (Appendix F)*

E. *Consolidated outstanding past due interest and accrued capitalized on* ***GH¢2,850,613.70*** *balance of Unfunded Repayments in the Loan Statement presented to the Court was* ***GH¢1,192,019.09****. There was no Credit Facility Agreement to justify this interest charged on the Loan Account. (See Exhibit D)*

F. *A total of* ***GH¢396,297.51*** *interest paid on 31st May 2019 on the Account Statement could not be allocated to specific Credit Facility. (Appendix B)*

G. *A total of* ***GH¢1,043,969.98*** *principal paid on 31st May 2019 on the Account Statement could not be allocated to specific Credit Facility. However, we noted this payment should have reduced the outstanding claims made by the Plaintiff on 24th September 2019 as this amount was credited on the Loan Statement on 31st May 2019. (Appendix B and Exhibit D)*

From the Audit report, a total credit repayment found on the Account Statement from 6th July, 2016 to 31st May, 2019 was GH¢9,843,561.47. The repayments credited the Defendants Loan Account included transactions related to Unfunded Repayments (Overdrafts). The Audit also at page 17 of the Report stated that it received the following answer in response to its draft report to the Plaintiff:-

> *"We hereby refer to our excel analysis above, to the effect that those repayments had been reversed into our loan book to regularize the Account from the overdrawn position created on the current account, since the account was not funded by the Customer. (Refer to Customer account statement given to your outfit).*
>
> *In effect, a total of GH¢6,457,903.64 representing payments per your report were not payments made to Eagle Star. Hence the amount of GH¢6,457,903.64 should be taken out of the total payment GH¢9,843,561.47 indicated in your report. This will then bring the total payment to an amount of GH¢3,385,657.83. as depicted in our analysis."*

On 28th July 2023 when the Auditor was being cross-examined the following were recorded:-

Q: By your report, what is the amount found due to the Plaintiff from the Defendant?

A: A total amount found to be indebted within the scope of work given to us is GH¢611,724.00 as of 3rd February 2020.

…

Q: Finally, on the totality of the evidence placed before you in the proceedings, would you say that the Plaintiff's claim that the Defendant was indebted to the Plaintiff in the sum of GH¢4553,156.92 from the records placed before you, did you find that the Defendant owed that amount?

A: No, my Lady, per the records made available to us and per the Court's instructions we indicated that the total indebtedness excluding penal interest of GH¢549,354 as at 3rd February 2020 (the Court's filing date) was GH¢611,724.00 and not GH¢4,553,156.92 at page 6(j). In addition, any other facilities claimed by the Plaintiff should be decided by the Court.

From my understanding of the Auditor's report, per its findings on the Defendants' indebtedness to the Plaintiff the sum of GH¢611,724 is what the Plaintiff is entitled to having regard to the interest element exigible to the said loan without penal interest. The report further stated that any other facilities claimed by the Plaintiff should be determined by the court by the application of the law on *"the Appropriateness, Fairness and Validity"* of the purported unfunded repayments.

It is generally understood that a court is not bound by the evidence of an Expert. See ***Fenuku vrs. John-Teye [2001-2002] SCGLR 985.*** In this case, the Supreme Court in discussing the legal effect of Court Experts evidence under Section 114 of the Evidence

Act, NRCD 323 held that expert evidence like any other evidence does not bind courts and ought to be evaluated like any other evidence. But the law is that a trial judge must give good reasons why an expert evidence is to be rejected as stated in the case of ***Hayford vrs. Tetteh (Substituted by) Larbi & Decke [2012]1 SCGLR 417.*** In the Defendants' submissions they stated that notwithstanding the Auditor's Report that their indebtedness to the Plaintiff exclusive of final interest stood at **GH¢611,724**, the Court lacks jurisdiction to grant same to Plaintiff since same is inconsistent to Plaintiff's claim. The Plaintiff on the other hand submitted that the Auditor's report established that the Plaintiff is entitled to the sum of GH¢1,161,079 being the repayments due under the facility agreement dated 11th July, 2017 for the sum of GH¢360,400.00 which repayments consist of accrued interest of GH¢435,004.00 and penal interest of GH¢549,354.00.

Again, the Plaintiff's submitted that the report established the outstanding balance of GH¢2,850,613.00 (without the accrued interest and penal interest components) and being the sum outstanding on the unfunded repayments (Overdraft Facilities). That by adopting the 2 figures stated above entitled the Plaintiff to the aggregated sum of **GH¢4,011,692.00** to be paid by the Defendants. The Plaintiff finally submitted that whiles the Court has the power to accept that part of the Auditor's Report, it urged the Court not to admit of the speculative comments contained in the report which were outside the domain of the Auditor intended to create prejudice in the determination of the Defendants' indebtedness to the Plaintiff.

CONCLUSION

I can cannot be guided by the evidence of the Auditor that the indebtedness of the Defendants to the Plaintiff on the Cocoa Project Loan exclusive of penal interest as at 3rd February, 2020 is **GH¢611,724.00.** I hold the view that the Defendant in their pleadings do not doubt the overdraft sum of **GH¢2,850,613.00**. On this, the Auditor in its evidence

of 28th July, 2023 in answer to Counsel for the Plaintiff stated:-*"The Audit concludes the Plaintiff's claim of GH¢4,553,156.92 as of 24th September, 2019 on the loan account's statement was made up of a delayed cocoa project loan of GH¢360,400.00 with a capitalized past due interest of GH¢150,124.70 and unfunded repayments of GH¢2,850,613.66 with a consolidated past due interest of GH¢1,192,019.09. The claim indebtedness by the Plaintiff included transactions that were not brought before the Court for determination. Therefore, the Plaintiff's claim was misleading."*

Overdrafts can be enjoyed without necessarily having an official agreement. In such cases, the rate of interest charged is what becomes an issue. The Defendants' contention was not about the normal interest as per their custom but their contention was related to the penal interest, which had resulted from Cocobod's delay in paying for the Certificates. The Auditor's task therefore was to determine how much had accrued as penalty since 2018 when the last certificate had been submitted by the 1st Defendant till date of filing the Writ. Once that figure has been ascertained, it becomes a simple matter of deducting it from the outstanding Overdraft sum with the exigible interest for the court to know what is due the Plaintiff. The Defendants may want to take advantage of the Auditor's report, which is not binding on me but serves only as a guide. Also, in this particular arrangement between the parties and as indicated above, to allow the Plaintiff calculate accruing penal interest on this delayed loan together with the agreed interest rate would be unconscionable and would not be countenanced by this Court. Had the Plaintiff adhered to the format of pleadings in moneylending and mortgage transactions required by **Order 59 of the High Court (Civil Procedure) Rules, 2004 (C. 47)**, this singular element of quantum of penal interest from 2018 to date of filing of this Writ would have stood glaringly for all to see. I will therefore enter judgment in favour of the Plaintiff against the Defendants jointly and severally for the sum of **GH¢2,850,613.00** with interest thereon at the prevailing commercial bank rate from February 2020 till date of judgment. Due to the peculiar nature of this case, the penal interest is disallowed.

Alternatively, I further order the judicial sale of all the 7-bedroom property located at Asene-Akim in the Eastern Region being the property of the 3rd Defendant.

I award cost of Five Thousand Ghana Cedis (GH¢5,000.00) in favour of the Plaintiff against the Defendants.

(SGD.)

SHEILA MINTA, J.

JUSTICE OF THE HIGH COURT

REPRESENTATIONS:

PARTIES

PLAINTIFF – ABSENT

4TH DEFENDANT PRESENT AND REPRESENTS 1ST, 2ND AND 3RD DEFENDANTS

COUNSEL

STEPHANS AHENE-TRULY, ESQ., HOLDING BRIEF FOR KWESI AUSTIN, ESQ., FOR THE PLAINTIFF – PRESENT

J. A. LARKAI, ESQ., WITH PERNELL BOAKYE, ESQ., FOR THE DEFENDANTS – PRESENT

AUTHORITIES:

1. ***KUSI & KUSI VRS. BONSU [2010] SCGLR 60***
2. ***BARCLAYS BANK (GHANA) LTD V SAKARI [1997-98] 1 GLR 746 – 767***
3. ***VOLTA ALUMINIUM CO. LTD. VRS. TETTEH AKUFFO & OTHERS [2003-2004] SCGLR 1158***
4. ***BOATENG VRS. MELBOUND MICROFINANCE COMPANY LIMITED [2018-19]1 GLR 791 @ 813***
5. ***FENUKU VRS. JOHN-TEYE [2001-2002] SCGLR 985***
6. ***HAYFORD VRS. TETTEH (SUBSTITUTED BY) LARBI & DECKE [2012]1 SCGLR 417***
7. **ORDER 59 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (C. 47)**