IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)

GBADEGBE, JSC

APPAU, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL

NO. J4/18/2020

13TH MAY, 2020

ECOBANK GHANA LIMITED ……

PLAINTIFF/APPELLANT/APPELLANT

VRS

ALUMINIUM ENTERPRISE LIMITED ……..

DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

PROF. KOTEY, JSC:-

1. Introduction

This is an appeal against the judgment of the Court of Appeal substantially affirming the decision of the trial High Court, but reversing it in one small respect.

The background to the controversy is that in the early 1990s, following negotiations between the Plaintiff/Appellant/Appellant (Plaintiff), the Defendant/Respondent/Respondent (Defendant) and the European Investment Bank (EIB), a number of transactions were entered into for the financing of a project to expand the factory and operations of the Defendant.

1. These agreements included a loan agreement between EIB and the Plaintiff, dated 30th January 1992 and 7th February 1992 (Exhibit '1'), by which EIB lent to the Plaintiff, One hundred and sixty-five thousand Ecus (165,00.00 Ecus) which was to be on-lent by the Plaintiff to the Defendant.
2. A second loan agreement was entered into by the Plaintiff and the Defendant, dated 11th March 1992 (Exhibit 'A'), by which the Plaintiff granted the Defendant a loan of One hundred and sixty-five thousand Ecus (165, 000.00 Ecus).
3. Pursuant to Exhibit '1', EIB granted the Plaintiff a loan of Thirty-five thousand Ecus to part finance the subscription by the Plaintiff of shares in the Defendant.
4. The Plaintiff and the Defendant entered into a share purchase agreement dated 7th April 1992 (Exhibit '5') by which the Plaintiff bought 30,000,000 shares, representing 10% shares in the Defendant, subject to terms and conditions.
5. EIB granted the Defendant a loan of Two million, eight hundred thousand Ecus (2,800,000.00 Ecus). The said sum of 2.8 million Ecus was to be disbursed through the Plaintiff.

By Exhibit '5', one (1) representative of the Plaintiff was appointed to serve on the five-member board of directors of the defendant. This representative became the chairman of the Finance Committee of the board.

The contract between the Plaintiff and the Defendant for the loan of 165,000 Ecus (Exhibit '1') provided for a five-year moratorium for the payment of the principal sum after which the loan was to be paid in seven annual installments commencing on 30th September 2003.

Pursuant to Exhibit '1', two European expatriate consultants were engaged by the Defendant from 1991 to 1993. Further, on 29th September 1994, a German expatriate consultant was appointed as the Managing Director of the Defendant.

The loan agreement between the Plaintiff and the Defendant (Exhibit 'A') also provided that in the event of default, the Defendant would be liable to pay a default interest of 7.5% on the outstanding amount. The agreement further provided that should the Defendant default in the payment of one instalment, it would be liable to pay the entire loan together with all outstanding interest.

The Defendant defaulted in making the repayment instalments from 1997 to 2006, during which period no repayment was made by the Defendant. Plaintiff therefore issued a writ of summons on the 18th December 2006 claiming the following reliefs:

> *"i. Recovery of the sum of Two hundred and Forty-eight Thousand, One Hundred and Seven Point Eighty-Three Euros (E 248,107.83) or its cedi equivalent being outstanding balance of the loan granted to the Defendant by the Plaintiff at the request of the Defendant, which said amount Defendant has failed and/or refused to pay to Plaintiff in spite of several and repeated demands made therefor;*
>
> *ii. Interest on the said amount from 1st November 2006 to date of final payment;*
>
> *iii. Costs".*

The Defendant filed an amended Statement of Defence and Counter-claim on 3rd May 2012. The Defendant averred that by the agreements referred to, the Plaintiff became "Fund Manager" of the loan given to it by the Plaintiff, that the Plaintiff assumed control of the Defendant and that the Plaintiff was negligent by "improper supervision" of the Consultant employed as Managing Director of the Defendant. The Defendant further averred that the Plaintiff was negligent in its disbursement, supervision and monitoring of the EIB funds being disbursed to the Defendant through the Plaintiff. Defendant has therefore *"suffered huge financial losses and been plunged into grave indebtedness as a result of the Plaintiff's failure to ensure prudent use of funds disbursed under Defendant's agreement with EIB".*

The Defendant therefore contended that the Plaintiff was not entitled to recover the loan and counterclaimed for the following reliefs:

> *"i. Recovery of Defendant's investment of 1,515,000 Ecus or its equivalent of 2 million US dollars, being the Defendant's equity contribution towards the expansion and modernization of the Defendant Company under the EIB loan agreement;*
>
> *ii. Recovery of the sum of GHC 14,963,505.50, being profit lost by the Defendant from 1991 to 2011 as a result of the Plaintiff's negligence in failing to supervise the use of the Defendant's funds by the Consultants under the EIB Loan Agreement;*
>
> *iii. Cost including legal fees."*

After a somewhat tortuous trial, the High Court, by a judgement dated 3rd November 2015, dismissed the Plaintiff's claim and gave judgment for the Defendant for the recovery of the sum of Fourteen million, nine hundred and sixty-three thousand, five hundred and five Ghana Cedis and fifty pesewas (GH¢14,963,505.50) as profit lost by the

Defendant from 1992 to 2011 and awarded costs of Gh¢20,000 in favour of the Respondent.

Aggrieved by the judgement of the High Court, the Plaintiff appealed to the Court of Appeal. The Court of Appeal by its judgement dated 1st March 2018 affirmed the decision of the trial High Court. It also made a further award of Five hundred thousand Ghana Cedis (Gh¢ 500,000) to the Defendant.

1.1 Grounds of Appeal

It is against the judgement of the Court of Appeal that the Plaintiff has appealed. By its Notice of Appeal filed on 4th April 2018, the Plaintiff stated the following Grounds of Appeal:

a. The Court of Appeal erred when it confirmed the High Court's judgement that the Plaintiff/Appellant was not entitled to recover the sum outstanding on the loan facility having regard to the Bank of Ghana letter.
b. The Court of Appeal erred when it confirmed the judgement of the High Court holding that the Plaintiff/Appellant was negligent in the performance of its duties under the loan contract.
c. The Court of Appeal erred when without giving reasons, it affirmed the High Court's findings that there was a special relationship between the Plaintiff/Appellant and the Defendant/Respondent.
d. The Court of Appeal erred when it affirmed the High Court's judgement that the Defendant/Respondent was entitled to GH¢ 14,963,505.50 as compensation for the Plaintiff/Appellant's breach of duty.

e. The Court of Appeal erred when it held that the Respondent is entitled to additional compensation in general damages of GH¢ 500,000.00 even though the Respondent did not endorse its counterclaim with a claim for general damages.
f. The Quantum of general damages awarded by the Court of Appeal against the Plaintiff/Appellant is excessive and against the weight of evidence.
g. The Court of Appeal did not properly evaluate the evidence on record.

Additional Grounds of Appeal were filed on 31st May 2018 stating the following additional grounds:

1. The Court of Appeal erred when it held in affirmation of the judgement of the High Court that the Appellant owed a duty of care to the Respondent whether arising from contract or trust or in equity.
2. The Court of Appeal erred in holding that any breach of duty by the Appellant was the cause of any loss suffered by the Respondent.
3. The Court of Appeal erred in treating conclusions of law in the judgement of the High Court as though they were findings of fact, thereby disabling itself from sufficiently evaluating and correcting the errors of law that they contained.
4. The Court of Appeal erred in awarding general damages of GH¢ 500,000.00 after having awarded compensation of GH¢ 14,963,505.05.

We have examined the pleadings of the parties, the judgments of the trial High Court and the Court of Appeal and the Grounds of Appeal and Additional Grounds of Appeal of the Plaintiff and have concluded that there are essentially three issues to be resolved in this appeal, though some of these issues involve a number of other legal and factual issues.

These are:

i. Whether or not the Plaintiff is entitled to recover the outstanding sum of 165,000 Ecus from the Defendant.
ii. Whether or not the Defendant is entitled to the award of Fourteen million nine hundred and sixty-three thousand five hundred and five Cedis fifty pesewas (GH¢ 14,963,505.50) as profit lost by the Defendant from 1992 to 2011.
iii. Whether or not the Defendant is entitled to the award of Five hundred thousand Ghana Cedis (GH¢500,000) as general damages.

We now proceed to examine the first issue.

2. Is the Plaintiff entitled to recover the Unpaid Loan from the Defendant?

The trial High court, affirmed by the Court of Appeal, held that the Plaintiff was not entitled to recover the unpaid loan of 165,000 Ecus from the Defendant.

The High Court based its decision on the fact that EIB was not requiring the Plaintiff to repay the 165,000 Ecus it lent to Ecobank. The court relied on three documents in arriving at this conclusion. The first is a letter from EIB to the Defendant, copied to the Plaintiff (Exhibit '52'). In the said letter EIB stated in respect of this loan:

> *"Due to the apparent incapacity of AEL to service the above loan in its present critical financial situation, we herewith inform you that the Bank has decided to allow your company to suspend temporarily the servicing of the loan to the Bank including the unpaid installment of 30th September, 1991. We wish to stress however that AEL will remain liable to reimburse the loan and that repayments shall resume as soon as an improved financial situation of the company permits. A new agreement will then need to be reached with the Bank."*

The second document relied on by the trial High Court is a letter of approval of the EIB loan by the Ministry of Finance, dated 17th April 1991 (Exhibit '27'). In that letter the Ministry of Finance stated that:

> *"A private Ghanaian Company (Aluminium Enterprise Ltd) has informed this Ministry that the European Investment Bank is considering the grant of loan from risk Capital resources under the third ACP-EEC Convention (Lome III) to finance its expansion programme".*

The Court found that "risk capital" meant that the EIB recognised from the inception of the project that the project could result in a profit or loss.

The third document relied on by the Court is a letter of approval of the loan by the Bank of Ghana, dated 3rd March 1992 (Exhibit '2'). In the said letter, the Bank of Ghana stated that;

> *"If AEL becomes bankrupt, goes out of business or cannot repay, EIB will not call its loan to EBG".*

The Court found that the Defendant was not in a position to pay back the loan. It therefore concluded that in the circumstances it would be unjust for the Plaintiff to recover the 165,000 Ecus from the Defendant. This decision of the trial High Court was affirmed by the court of Appeal.

Counsel for the Plaintiff, Mr. Fui Tsikata has vigorously challenged this conclusion. He contends that the statement quoted from Exhibit 2 does not state that the Defendant shall not repay its loan to the Plaintiff and is a reference to the obligations of the Plaintiff to EIB only. He argued that the Defendant is not a party to the loan agreement between the Plaintiff and EIB (Exhibit '1') and has no rights under that agreement.

Mr. Tsikata submits:

> *"There is nothing in this letter which says the Respondent is excused from its obligations to the Appellant on the ground that it cannot repay the loan the former has made. The fact that the Appellant is on-lending money it has borrowed from EIB does not transfer the terms of the agreement between it and EIB into that between these parties. The two agreements are separate and give rise to distinct rights and obligations of their respective parties."*

Mr. Tsikata is technically correct, but we are more persuaded by the reasoning of the trial High Court and the Court of Appeal and the basis of their conclusion. The series of transactions and agreements entered into by the Plaintiff, the Defendant and EIB, including Exhibits '1' and 'A', are parts of a complete whole relating to the expansion and modernization of the factory of the Defendant, and must be construed as such. It is for this purpose that EIB granted the loan of 165,000 Ecus to the Plaintiff for onward lending to the Defendant. EIB cannot recover the 165,000 Ecus from the Plaintiff and there is no evidence that it has attempted to do so. The project failed and the Defendant is not in a position to repay the loan. In the circumstances, it is our considered view that it would be unconscionable for the Defendant to be ordered to repay the amount of 165,000 Ecus to the Plaintiff. We therefore affirm the decision of the trial High Court and the Court of Appeal that the Plaintiff is not entitled to recover the said sum of 165,000 Ecus from the Defendant.

We will now proceed to deal with the second issue, the award of damages of GH¢ 14,963,505.50 to the Defendant, being loss of profit from 1992 to 2011.

3. Recovery of Loss of Profit by the Defendant

As we have noted, the Defendant counterclaimed for the recovery of the said sum of GH¢ 14,963,505.50 from the Plaintiff as loss of profit from 1991 to 2011.

The Defendant stated in its statement of defence that at the time of the execution of the loan agreement between the parties, Mr. B.K. Amandi, the founder and majority shareholder, was the chairman of the board of directors and managing director of the Defendant. The statement of defence also stated that following the execution of the loan agreement, a German consultant, Mr. Trosch was appointed Managing Director in September 1994. The Defendant continued that the Managing Director was appointed to be responsible for project implementation and subsequent operation of the facilities and that any "deviation from this arrangement or interference from the Defendant would cause EIB to withdraw the loan". The Statement of Defence further averred that a representative of the Plaintiff was appointed as a director of the Defendant and became the Chairman of the Finance Committee of the board of directors of the Defendant. The statement of Defence then alleges that this representative of the Plaintiff became the "Fund Manager" of the project and that this "meant that the Plaintiff Company was solely in charge of the supervision of the Consultant, loan disbursement, approval of procurement requests and approval and inspection of materials supplied under the contract on arrival."

The Statement of Defence further alleged that, *"the Defendant started experiencing a downturn in its finances as a result of the lack of proper supervision of the project by the Plaintiff as expected of the Plaintiff based on the Plaintiff's Finance Contract with EIB and the On-Lending Agreement between the Plaintiff and the Defendant"*.

The Defendant then averred that *"the Plaintiff's negligence by improper supervision of the consultant has caused the Defendant to date a loss of 5,000,000 (five million US dollars)"*. The Defendant then provides the following particulars of negligence.

*"**PARTICULARS OF NEGLIGENCE***

i. Failure to implement internal control systems with respect to EIB funds being disbursed to the Defendant.

ii. Poor reporting procedures between the Finance Committee chaired by the Plaintiff and the Consultant for the project.

iii. Breach of stationary requirements in some aspects of acquisition, disbursement and reporting of the said EIB loan."

On the basis of the foregoing the Defendant counterclaimed as follows:

"Recovery of the sum of fourteen million nine hundred and Sixty-three thousand, five hundred and five Ghana cedis (GH¢14,963,505.50) being profit lost by the Defendant from 1992 to 2011 as a result of the Plaintiff's negligence in failing to supervise the use of the Defendant's funds by the Consultants under the EIB loan Agreement."

The trial High Court, affirmed by the Court of Appeal, held that the Defendant was entitled to recover the GH¢14,963,505.50 from the Plaintiff, being loss of profit from 1992-2011.

The High Court based its decision on the following grounds.

First, the High Court held that the Plaintiff as a bank with professional skills and with responsibilities placed on it by the loan contract (Exhibit 'A') had a duty of care towards the Defendant.

Second, the High Court held that from the totality of the evidence the Plaintiff was negligent in the performance of its duties under the loan contract. The Court also held that the Defendant was entitled to recover damages for the Plaintiff's negligence in the performance of its duties under the loan contract.

Third, the High Court held that the Plaintiff was in breach of the loan contract. The court also held that the Defendant was entitled to recover damages in contract for breach of the loan contract.

The Court of Appeal made a concurrent finding that the Plaintiff was negligent and affirmed the award of damages of GH¢14,963,505.50.

Without much examination and analysis of the facts and the law, the Court of Appeal affirmed the trial Court thus:

> *"The Trial Court found from the totality of the evidence placed before it that the Appellant was negligent in the performance of its duties under the contract. From the evidence on record and the evaluation done by the trial judge, we are satisfied that the Appellant was negligent in the performance of its duties under the loan contract. The conclusion reached by the Trial Court in our view is not perverse of the record."*

The Court of Appeal relied on **Koglex Ltd (No2) v. Field [2000] SCGLR 175** and **Re Okwe (Dec'd); Dodoo & Anor v.Okine & Ors [2003-2004] SCGLR 528** and affirmed what it treated as findings of fact by the trial Court.

But a determination that a party has been negligent in the performance of its duties under a contract is not a finding of fact. As counsel for the Plaintiff submitted, it is a conclusion of law arrived at from the application of the law to established facts. **Koglex (No2) v. Field (supra) and Dodoo v. Okine (supra)** are therefore not decisive in this situation.

Even in relation to the treatment of findings of fact by an appellate court, the Court of Appeal's statement of the law is too simplistic and hence misleading. The proper formulation of the principle is that an appellate court can only vary a trial court's findings of fact where on the totality of the evidence, the findings are clearly not supported by the evidence, are unreasonable or perverse, are inconsistent with important documentary

evidence or the trial court has wrongly applied a principle of law. **See Achoro v. Akanfella [1996-97] SCGLR 207**, **Fosua v. Adu Poku v. Dufie & Adu-Poku Mensah [2009] SCGLR 310** and **Gregory v. Tandoh IV & Hanson [2010] SCGLR 975**. Perverseness is therefore not the only basis upon which a trial court's findings of fact may be disturbed.

We are of the view that the grounds on which the Court of Appeal affirmed the decision of the High Court that the Plaintiffs were negligent in the discharge of their obligations towards the Defendant, were insufficient. More fundamentally, the Court of Appeal's treatment of the High Court's conclusion that the Plaintiff was negligent in discharging its obligations towards the Defendant as a finding of fact was misplaced, it being clearly a conclusion of law arrived at upon the application of the law to the facts.

Having disposed of the grounds upon which the Court of Appeal affirmed the decision of the High Court, we now undertake an examination of the decision and reasoning of the High court.

But before that, we consider it important that we spend some time addressing the procedural issues arising from the timing and stage of the proceedings at which leave was granted for the amendment of the Statement of Defence and Counterclaim and the subsequent conduct and course of the trial.

3.1 Order Granting Defendant Leave to Amend Pleadings and Subsequent Course of Proceedings

The application for leave to amend the Statement of Defence and Counterclaim was filed on 23rd April 2012. The application was fiercely resisted by the Plaintiff but was granted by the trial judge on 30th April 2012. The amended Statement of Defence and Counterclaim was filed on 3rd May 2012. At the relevant time, the Plaintiff had closed its case and the defendant's representative (Defendant's first witness as described in the

record of appeal) had concluded his testimony, but a witness for the Defendant was in the box giving evidence.

By the amendment, the Defendant introduced for the first time a counterclaim by which it sought reliefs including that formulated as follows:

> *"Recovery of the sum of fourteen million nine hundred and sixty three thousand five hundred and five Ghana Cedis and fifty pesewas (GH 14, 963, 505.50) being profit lost by the defendant from 1992 to 2011 as a result of the Plaintiff's negligence in failing to supervise the use of the Defendant's funds by the Consortium under the EIB loan agreement."*

Although the amendment introduced materially new facts and issues and was resisted, it was granted by the trial High Court. Having introduced materially new facts that were substantial in nature, the Defendant had altered the character of its case and rendered it an inappropriate application for amendment. See **Allen v Spring**, 52 ER, 1245. Indeed, in **Nkrumah v Serwah** [1984-86] 1 GLR 190, the Court of Appeal upheld the refusal by the High Court to allow an amendment which sought to reconstruct the case of the plaintiff as the defendant before us was enabled to do.

After the amendment, the witness who was then in the box concluded his testimony and the Defendant's representative was subsequently recalled, at the instance of the Defendant, to lead further evidence in the matter following which he was cross-examined by counsel for the Plaintiff. Thereafter, certain interlocutory applications that have no useful bearing on the appeal herein were pursued by the parties and dealt with by the court. Addresses were then filed by the parties and the matter was adjourned for judgment.

It is observed that as the amendments introduced substantially new facts which were not part of the evidence tendered by the parties previous to it and formed the substratum of

the amended reliefs, the trial High Court, as a matter of practice intended to ensure a fair trial, should have applied itself in such a manner that the Plaintiff was given the opportunity to cross-examine the Defendant on its new facts and to rebut the said facts by resort to further evidence. The case of **Bradford Building Society v Borders** [1941] 2 All ER 205, 219 is persuasive authority for the proposition that where an amendment alters the case of a party, his adversary should be given the opportunity to lead evidence directed to the specific charges raised in the new pleading and to have the opportunity in examination and cross-examination of answering the facts raised against him.

The amendment introduced, among others, a counterclaim for loss of profits in a huge sum. The nature of the said claim being in damages is by Order 11 rule 9 of the High Court (Civil Procedure) Rules, CI 47 deemed to be traversed. Due process therefore required that the Plaintiff be given the opportunity to explain by evidence the charges made against it.

Further, although the matter had progressed considerably at the time of the amendment, the Court was not precluded from directing a course of proceedings that is derived from the Rules such as further directions being taken on the substantial amendments. For without directions being taken on the new issues the facts giving rise to them cannot be tried. The point being made here is that there cannot be a trial on contested facts without directions being taken on them. Where, as in this case, directions had been taken long before the amendment was allowed then the trial High Court was required to ensure compliance with Order 32 rule 9(2) of C.I.47 which provides that;

> *"Any application subsequent to the application for directions and before judgment as to any matter capable of being dealt with on an interlocutory application in the action shall be made under the application for directions by two clear days' notice to the other party stating the grounds of the application."*

In our considered view, as the trial had reached an advanced stage before the trial High Court allowed the amendments, it was required to make further orders that will ensure a fair trial including the opportunity to the Plaintiff to lead evidence in rebuttal of the new matters introduced by the amended pleading. It is not enough to have the Defendant merely recalled to testify on the new facts and be cross examined on them particularly when the Defendant changed the nature of its case. The requirements of a fair trial include offering parties the opportunity to be cross-examined by their adversaries on the case which such adversaries have in order to enable the court reach a decision on the contested facts. The process of deciding what the facts in issue are in a case is so critical to the decision-making process that any proven violation results in a miscarriage of justice. The failure of the Defendant to ask the Plaintiff any questions at all about the new facts introduced, in our view had a prejudicial effect on the requirements of a fair trial; a trial in which each party is offered the opportunity to put across his version of the matter to the other side. That failure, in our considered view deprived the new facts on which the Defendant's counterclaim was based of any efficacy such as to form the basis of a decision on the ground that the issues raised by the amendment went through a one-sided deliberation contrary to the settled practice of the court resulting in grave injustice to the Plaintiff. How can our system of trial which is anchored on fairness sanction a trial in which a defendant to a counterclaim was not asked any question by the plaintiff on the materially new facts on which his right to relief on the counterclaim is based? Accordingly, for reasons of rules of procedure and evidence which are intended to ensure a fair trial, the amendment ought not to have been allowed by the trial High Court such as to have been the foundation of a judgment against the Plaintiff on the counterclaim.

Regarding amendments that may be made with leave of the court in the course of a trial, although the Court has a wide discretion, where as in this case the application is made at a very late stage in the proceedings, the court should consider among others whether

such an amendment could have been made at an earlier stage of the proceedings bearing in mind its likely effect on the evidence which had already been tendered by the parties. Also, it is important that our courts uphold the need to avoid delays and achieve speedy disposal of actions as provided for in Order 1 rule 2 of the High Court (Civil Procedure), Rules, CI 47.

It is therefore our considered opinion that to avoid the situation which arose in the course of the trial of the matter herein, the Rules of Court Committee should consider amending the existing provision on amendments with leave in order to limit the very general formulation of the power to amend that is provided in Order 16 rule 5 of CI 47 by introducing a proviso, such as is contained in the Indian Code of Civil Procedure Order 6 rule 7, as follows:

> *"Provided that an application for amendment shall not be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial."*

3.2 Consideration of the Findings of the Trial High Court

We begin our examination of the findings and conclusions of the trial High Court with a summary of the arguments of Counsel.

First, Counsel for the Plaintiff, Mr. Fui Tsikata contended that there was no "special relationship" between the Plaintiff and the Defendant. Counsel argued that Exhibit 'A' is a standard loan agreement and that it did not create a "special relationship" of a fiduciary nature between the parties. Counsel therefore submitted that Plaintiff did not have a fiduciary duty or a tortious duty of care to the Defendant.

Second, Counsel for the Plaintiff contended that the Plaintiff was not negligent in the performance of a contractual duty. Counsel argued that no non-contractual duty of care was assumed or breached by the Plaintiff towards the Defendant. Counsel further

submitted that the verification and monitoring duties assumed by the Plaintiff under Exhibit '1', the contract between the Plaintiff and EIB, did not confer any rights on the Defendant. Counsel further argued that the Defendant, not the Plaintiff, was responsible for ensuring that the project was properly executed and that monies disbursed to it were applied to the project.

Third, Counsel for the Plaintiff submitted that the High Court failed to show that the actions or omissions of the Plaintiff are the proximate or direct cause of the loss of profits of GH¢ 14,963,505.50 by the Defendant. Counsel also argued that the Defendant failed to prove that it has lost GH¢ 14,963,505.50 nor that this loss was entirely caused by the acts and omissions of the Plaintiff alone.

Counsel for the Defendant, Mr. E.K. Vordoagu supported the findings and decisions of the trial High Court and its affirmation by the Court of Appeal.

Counsel for the Defendant argued that the relationship established between the Plaintiff and the Defendant, the Plaintiff's acquisition of 10% shares in the Defendant, the appointment of a representative of the Plaintiff onto the board of directors of the Defendant, the appointment of the said representative as the chairman of the Finance Committee of the board, the appointment of consultants and the Managing Director and the obligations assumed by the Plaintiff under Exhibits '1' and 'A' established a "special relationship" between the parties. Counsel further argued that this "special relationship" imposed a duty of care on the Plaintiff. Counsel relied on **Hedley Byrne & Co Ltd [1964] AC 465** and **Caparo Industries Plc v. Dickman & Ors [1990] 2 AC 605**.

Second, counsel for the Defendant argued that the Plaintiff was negligent in its management of the execution of the project and in breach of its contractual obligations under exhibits '1' and 'A'.

We begin our examination and analysis of the findings and decisions of the trial High Court, affirmed by the Court of Appeal, by reiterating that an appeal is by way of rehearing. See **Republic v. Conduah ex parte Aaba (substituted by Asmah) [2013-2014] 2 SCGLR 1032**; **Tuakwa v. Bosom [2001-2002] SCGLR 61**; and **Oppong v. Anarfi [2011-2012] 2 SCGLR 556.**

It must be pointed out that the Defendant's counterclaim is an action in tort for negligence. It is not an action for breach of contract or for breach of fiduciary duty. In an action based upon negligence, the Plaintiff must plead and establish facts showing:

i. that the Defendant owed a duty of care to the Plaintiff;
ii. that the Defendant breached the duty of care; and
iii. as a result of such breach of duty the plaintiff suffered damage.
iv. that damage was not too remote.

3.2.1 The Duty of Care

A party claiming in negligence must, to succeed, plead and establish facts clearly showing the relationship which existed between himself and the Defendant just prior and during the time of the injury, from which relationship the existence and nature of the duty can be determined. There is no doubt that a relationship existed between the Defendant and the Plaintiff. There was a banker and customer relationship. There was a borrower and lender relationship. There was also a contractual relationship which gave rise to numerous rights and obligations (which we will return to).

It is therefore clear that the Plaintiff owed the Defendant a tortious duty of care as well as contractual obligations. As the trial High Court rightly pointed out, these duties coexist and run parallel to each other. But they are separate and distinct duties.

3.2.2 Breach of the Tortious Duty of Care

The trial High Court, affirmed by the Court of Appeal, held that the Plaintiff was in breach of its duty of care and that the Plaintiff has been negligent in the performance of its duties under the loan contract, in particular, in the performance of its monitoring and supervision of the project.

The particulars of negligence pleaded by the Defendant were:

i. Failure to implement internal control system with respect to EIB funds being disbursed to the Defendant.
ii. Poor reporting procedures between Finance Committee chaired by the Plaintiff and the Consultant for the project.
iii. Breach of stationary requirements in some aspects of acquisition, disbursement and reporting of the said EIB loan."

These are rather nebulous and imprecise.

Article 6.03 of Exhibit 'A' states that:

> ***"MONITORING OF PROJECT EXPENDITURE***
>
> *So long as disbursement of the loan under the contract between EIB and AEL remains unpaid, EBG undertakes to verify and report in writing to EIB as expenditure takes place that each disbursement under this contract and under the contract referred to, has been properly expended on THE PROJECT."*

Article 7 of Exhibit 'A' provides that:

> ***"7.01 Information Concerning the Project***
>
> *EBG shall ensure that AEL*
>
> *(a) Deliver to EIB (i) every 3 (three) months until THE PROJECT is completed a report on the implementation of THE PROJECT;*

(ii) six (6) months after the completion of the PROJECT, a Project Completion Report and (iii) from time to time, any such further document or information concerning the financing, implementation and operation of THE PROJECT as may reasonably require;

(b) Submits for the approval of EIB without delay any material change to the general plans, timetable or expenditure programme for THE PROJECT, by relation to the disclosures made to EIB prior to signing of this contract;"

(d) Maintains accounting records which clearly show the investments relating to the financing of THE PROJECT

(e) Provide to EIB, within ninety (90) days of disbursement evidence acceptance to EIB that the sum disbursed has been utilized exclusively for the financing of THE PROJECT; and

(f) Generally informs EIB of any fact or event known to AEL which might substantially prejudice or affect the conditions of execution or operation of THE PROJECT.

7.03 Visits

So long as the loan is outstanding AEL shall ensure that persons designated by EBG and/or EIB are permitted to inspect the sites, installations and works comprising THE PROJECT and are provided with all necessary assistance to enable them make such examinations as they consider necessary."

The trial High Court held that two British Consultants engaged soon after the commencement of the project to monitor and assist in the implementation of the project failed in the performance of their duties. Similarly, a German consultant who was appointed as Managing Director from September 1994 to 1997 failed in the discharge of

his duties. The trial High Court also held that the Finance Committee of the board of directors of the Defendant which was chaired by a representative of the Plaintiff failed to provide the board with information.

The trial High Court therefore found that from the totality of the evidence the Plaintiff "was negligent in the performance of its duties under the loan contract". This conclusion was affirmed by the Court of Appeal.

The conclusion of the High Court is somewhat perplexing. The court had rightly pointed out that there was a concurrent tortious duty of care and contractual duties assumed by the Plaintiff under Exhibit 'A'. What does *"negligence in the performance of its duties under the loan contract mean*"? Does it mean that the Plaintiff failed to perform its monitoring and supervision obligations under Articles 6 and 7 of Exhibit 'A'. Or does it mean the that the Plaintiff performed its duties, but the standard of its performance did not reach the professional standard required of a bank? Because, if the Court's conclusion is that the Plaintiff failed to perform its duties under the contract, this would amount to breach of contract, not negligence. The proper cause of action would then be a claim for breach of contract at contract law, and not an action in negligence at tort law. As we have stressed, the Defendant's counterclaim is an action in tort for negligence, not an action for breach of contract.

The trial High Court also based its finding of negligence on the part of the Plaintiff in the execution of the project on a number of other factors relating to the operation and management of the project.

As has been noted, one of the reasons given by the High court was that a representative of the Plaintiff was appointed as a member of the Board of Directors of the Defendant. But that a representative of the Plaintiff was appointed as one of five members of the board does not amount to taking control of Defendant. The Plaintiff's representative was

one of five board members including Mr. Amandi, the founder and majority shareholder of the Defendant, who was Chairman of the board of directors throughout the life of the project. It was the entire 5-member board of directors that was collectively responsible for the direction and control of the affairs of the company.

A second reason given by the High Court is that the Plaintiff's representative was appointed Chairman of the Finance Committee of the board and that the Finance Committee was the "Fund Manager" for project. Again, we have difficulty agreeing with the trial High Court. Though the Plaintiff's representative was Chairman of the Finance Committee, the committee had two other members. The other members were not appointed by the Plaintiff. It is therefore difficult to understand why the failings of the Finance Committee, if any, should be attributed solely to the Plaintiff. Furthermore, the Finance Committee, important though it was, was a Committee of the board. It was answerable to and indeed reported to the board. There was no evidence that the Chairman and other members discharged their fiduciary obligations to the company by holding the Finance Committee to account. Board meetings should have been summoned and reports demanded from the Finance Committee. If there was "poor reporting procedures between the Finance Committee chaired by the Plaintiff and the consultant for the project" this cannot be blamed solely on the Finance Committee, which was itself under the supervision of the board of directors of the Defendant. The Defendant was also culpable in failing to ensure, through its board of directors, that proper reporting procedures were adhered to by the Finance Committee and the Managing Director.

We also note that requests for disbursements by the Defendant to the Plaintiff were to be signed by the Managing Director and the Board Chair (Mr. B.K. Amandi) and were so done at all material times. The Board Chairman (DWI), seeks to exonerate himself by alleging that he signed the requests under duress and that he had been told that the loan would be withdrawn if he interfered in the running of the company. It is difficult to

believe this allegation of duress. No sufficient evidence was given to substantiate this claim of duress. In any case, how was the Plaintiff to know of, let alone be responsible for, the actions and circumstances of the Board Chairman and majority shareholder? It is also important to note that the representative of the Plaintiff and Chairman of the Financial Committee was not a signatory to the disbursement requests.

Another way in which the Defendant tries to establish that the Plaintiff was in control of the Defendant is to allege that the two British consultants and the Managing Director were appointed by the Plaintiff. This is not borne out by the evidence. The evidence shows that the two British consultants and the Managing Director were appointed by EIB with the approval of the Defendant. The two British consultants and the German Managing Director were appointed pursuant to Exhibit '1', Article 1.04 (f) of which provides that "AEL shall have entered into a technical assistance and know-how transfer agreement on terms and a party acceptable to the BANK". The BANK in Exhibit '1' is a reference to EIB not the Plaintiff.

The Memorandum of Understanding between the Defendant and Mr. Trosch, prior to his becoming Managing Director of the Defendant and dated 12th July 1994, (Exhibit '61') in paragraph 3 of its recitals stated as follows:

> *"With the consent of EIB, MR WOLFGANG TROSCH, an aluminum resmelting Consultant of Germany, has been engaged by AEL to direct AEL's project as Managing Director for periods ranging from two, three or more years."*

Exhibit '61' was executed by the Defendant, represented by B.K. Amandi (chairman), Mr. Trosch and EIB. The Plaintiff is not a party to Exhibit '61'.

Further, the Contract of Service of Mr. Wolfgang Trosch, dated 29th September 1994 (Exhibit '32') by which Mr. Trosch was engaged as Managing Director was between the Defendant and Mr. Trosch. The contract was signed by Mr. B.K. Amandi, (Chairman) on

behalf of the Defendant. Again, the Plaintiff was not a party to Exhibit '32' and there was no reference to the Plaintiff in the contract. Simply put, Mr. Trosch was an employee of the Defendant. There was no basis for holding the Plaintiff liable for the acts and omissions of, or responsible for the supervision of the Defendant's Managing Director.

The establishment of an "internal control system with respect to the EIB funds being disbursed to the Defendant" was not the responsibility of the Plaintiff. Article 1.04 (g) provides that AEL shall have entered into an agreement on terms and with a party acceptable to the BANK to reorganize its accounting and administrative procedures. It was therefore the Defendant's responsibility to establish the internal control system.

The Defendant had the burden of pleading and proving negligence. The Defendant failed to plead negligence with sufficient particularity. The "Particulars of Negligence" pleaded were nebulous, imprecise or meaningless. It was the responsibility of the Defendant to establish, on a balance of probabilities, how and in what respects the Plaintiff was "*negligent in the performance of its duties under the loan contract*." This it failed to do.

We therefore reverse the conclusion of the trial court that the Plaintiff was negligent.

3.2.3 Breach of Contract

The trial High court also held that the Plaintiff was in breach of contract. This, despite the fact that the defendant had not counterclaimed for breach of contract. In fact, there was no discussion of the issue of breach of contract such as there was for negligence under the subheading, "*Was the Plaintiff Negligent?*". At the end of the consideration of whether or not the Plaintiff had been negligent, the Court concluded at page 51 of the judgement that *"I find from the totality of the evidence placed before the court and following from the discussions above, that the Plaintiff was negligent in the performance of its duties under the loan contract"*.

The court then proceeded to consider the "*Consequences of Breach*" and opens with this startling statement at page 52 of the judgement, *"As I already stated in my opinion there was a breach of the loan contract by the Plaintiff".* But there had been no such previous conclusion. This conflation of breach of contract and negligence is unhelpful and unjustified.

A finding that the Plaintiff has been *"negligent in the performance of its duties under the loan contract"* is not the same as the conclusion that *"there was a breach of the loan contract by the Plaintiff*". The standards required to arrive at those two conclusions and the consequences that flow from them may also be different.

And this is particularly so where, as in this action, the Defendant has not counterclaimed for breach of contract.

3.2.4 Damages

The conflation by the trial High Court of the claim for negligence with one for breach of contract continues with its consideration of the consequences of the conduct of the Plaintiff. Subtitled "Consequences of Breach", it opens with this revealing paragraph on pages 52 of the judgement.

> *"As already stated, in my opinion there was a breach of the loan contract by the Plaintiff. So, what are the consequences of this breach? What remedies are available to the Defendant? Defendant is entitled to recover damages in contract for the breach."*

The High Court then referred to the *locus classicus* on remoteness of damage for breach of contract, **Hadley v Baxendale (1854) 9 Exch.341** in discussing the principles governing the award of damages for breach of contract. But, as we have reiterated, the counterclaim of the Defendant is not for breach of contract but for the tort of negligence.

The trial High Court continued by discussing the principles governing the award of damages in negligence. It then referred to the *locus classicus* on the recovery of damages for negligent misstatement, **Hedley Bryne & Co. v Heller & Partners** [1964] AC 465. It continued by referring to the concept of "economic loss" and concluded that the Defendant is counterclaiming for recovery of the amount of GH¢ 14,963,505.50, being profit lost by the Defendant from 1992 to 2011.

This apparently seamless movement from negligence to breach of contract is unsatisfactory and does not conduce to clarity. At the end of the discussion by the trial High Court of the principles governing the award of damages for negligence and breach of contract, it was still not clear which principles, contract or tort, would be applied in determining what damages, if any, the Defendant is entitled to. For the purpose of clarity and to provide future guidance to courts governing, we restate the principles governing the award of damages for negligence and for breach of contract.

3.2.5 Principles Governing the Award of Damages for Breach of Contract and Negligence

'Damages' is a sum of money claimed as compensation or awarded by a court as compensation to the plaintiff/claimant for harm, loss or injury suffered by the plaintiff/claimant as a result of a tortuous act or breach of contract committed by the defendant or his agent. When a plaintiff makes a claim for damages, the plaintiff or claimant is required under the law to provide evidence in support of the claim and to provide facts that would form the basis of assessment of the damages he will be entitled to.

The general principle underlying the award of damages in both tort and contract is the principle of *restitutio in integrum*. The plaintiff or claimant court considers two main factors: (a) remoteness of damages (i.e. the proximate cause of the breach); and (b) the measure of damages (i.e., the quantum or amount of damages to be awarded). The Supreme Court in the case of **Royal Dutch Airlines & Another v. Farmex Ltd. [1989-90] 2 GLR 623, at page** 625 explained:

> *"On the measure of damages for breach of contract, the principle adopted by the courts was restitutio in integrum, i.e. if plaintiff has suffered damage not too remote – he must, as far as money could do it, be restored to the position he would have been in had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost…"*

This principle was restated by the Supreme Court in the case **of Juxon-Smith v. KLM Dutch Airlines** [2005-2006] SCGLR 438, at page 442 as follows:

> *"Where a party has sustained a loss by reason of a breach of contract, he was, so far as money could do it, to be placed in the same situation with respect to damages, as if the contract had been performed. In carriage of persons contracts, as in the instant case, the normal measure of damages for failure to carry, was the cost of obtaining substitute transport less the contract price and consequential losses such as hotel expenses and the like and non-pecuniary loss such as physical inconvenience and discomfort".*

Remoteness of Damages for Breach of Contract

As stated, recovery of damages is limited by the rules of "Remoteness of damages", which require that the damages to be awarded must not be too remote, but must be proximate to the tortious act or the breach of contract. Generally, a victim of a breach of contract is entitled to compensation for any loss which results from the breach as long as the loss is not too remote or one which the plaintiff could have avoided by taking reasonable steps in mitigation.

Remoteness of damages in contract is governed by the principles enunciated in **Hadley v Baxendale (1854) 9 Ex 341**, which held that damages for losses incurred would only be recoverable if such losses were "within the contemplation of the parties" at the time the contract was made. Alderson B. stated in **Hadley v. Baxendale**:

> *"where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it".*

Hadley v. Baxendale stated two tests for determining when damages are proximate and recoverable and when they are too remote and therefore unrecoverable. These are: (i) do the damages arise naturally from the breach? and (ii) were the damages reasonably contemplated by both parties at the time they made the contract as a probable result of the breach? If the answer to any of these two questions is yes, then damages are proximate, not too remote and therefore recoverable. In **Victoria Laundry (Windsor) Limited v. Newman Industries Limited** [1949] 2KB, 528, Asquith L.J. reformulated the rule in **Hadley v. Baxendale** and stated that the single test for determining the remoteness of damages is whether the loss was 'reasonably foreseeable as liable to result from the

breach' and what was reasonably foreseeable by the defendant depends on the state of the defendant's knowledge.

Assessment of Damages

In torts, the purpose of the award of damages is to put the plaintiff in the position he would have been in if the tort had not been committed. [restitutio in integrum]. Damages are therefore awarded to compensate the plaintiff for the losses he has actually suffered as a result of the tort.

The primary test for determining whether a harm is too remote as a consequence of the defendant's negligence is set out in **Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co. (The Wagon Mound)** (No 1) [1961] AC 388, which held that remoteness was satisfied if the loss is "reasonably foreseeable". The case held that to establish whether the claimant's harm is too remote, the question to be asked is: *"Was the kind of damage suffered by the claimant reasonably foreseeable at the time the tort occurred?"* According to the formulation of this remoteness test, it is only the type of damage that must have been foreseeable, not the extent. As stated in Salmon on Torts (14th edition at page 719), "*It is sufficient if the type, kind, degree or order of harm could have been foreseen in a general way.*" Thus, the defendant will be liable, provided the type of harm and its manner was reasonably foreseeable, even if the extent of the harm was not foreseeable. **Vacwell Engineering v BDH Chemicals** [1970] 3 All ER 553.

The contractual test for remoteness is therefore significantly narrower than its tortious counterpart.

Recovery of Economic Loss

A significant distinction between tort and contract claims is the possibility of claiming for pure economic loss. Claims for purely economic losses have been traditionally available

in contract but not in tort. However, in cases involving negligent misstatement, the decision in **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465, carved out a category of cases where pure economic loss is recoverable. In Hedley Byrne, the court recognized that a duty of care can be established even if there was no contractual or fiduciary relationship between the parties. Such a duty of care could be deemed to exist if there was a "special relationship" between the parties which demanded that care should be taken that the statement or representation being made is accurate. Such a special relationship will be deemed to exist in cases involving professional or business relationships, where, even in the absence of contract, it can be established that the representor knew or ought reasonably to have known that the person to whom the representation was made was likely to act or rely on the representation to his detriment. In **Hedley Byrne**, Lord Reid stated that a special relationship would arise where it was clear that:

The party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew that the inquirer was relying on him. Thus, in the case of advice given by a negligent professional, the law on negligent misstatement is likely to apply and subsequently a claim in pure economic loss will be available.

3.2.6 Measure of Damages

The trial High Court awarded damages of Fourteen Million Nine hundred and Sixty-three Thousand Five hundred and five Cedis Fifty pesewas (Gh¢14,965,505.50) being loss of profit from 1992 to 2011 to the Defendant.

We have already reversed the conclusion of the trial High Court that the Plaintiff was negligent in the performance of its duties towards the Defendant. But we consider it important to examine the amount of damages awarded to the Defendant.

The trial High Court essentially relied on two documents in determining the amount of loss suffered by the Defendant. The first is a report prepared by Deloitte & Touche, dated 9th April 2012 (Exhibit '71'). The second is a letter from Bank of Ghana approving the project, dated 3rd March 1992 (Exhibit '2'). This letter, stated that upon successful completion of the project *"AEL would be in a position to earn as much as $ 5 million per annum from the export of its products".*

The Deloitte report, commissioned by the Defendant during the pendency of this action, projected that the total profit that the Defendant would have made from 1991 to 2011 if the project had been successfully completed and gone into operation would have been over Gh¢14,963,505.50.

But what is the probative value of these two reports in establishing the amount of economic loss suffered by the Defendant.

Counsel for the Plaintiff, Mr. Fui Tsikata has vigorously challenged the probative value of these reports. He points out that the report contains expressions? of qualifications and disclaimers by its authors. For example, Deloitte states in paragraph 2 that it accepts *"no responsibility, liability or representation to any person whatsoever in respect of the contents"* of the report. Counsel also points out that the report is addressed to the Defendant and expressly states that it is not making "any form of representation regarding the sufficiency of the procedures…. [it] performed for your information need." The report further states that it does not make any "*representation or warranty….as to the accuracy or completeness"* of the report. Deloitte further described the report as "highly speculative". Counsel for the Plaintiff further points out the report was not tendered by Deloitte. The

Plaintiff was therefore not afforded an opportunity to cross-examine the authors of the report.

Counsel for the Defendant on the other hand, submitted that Exhibit '71' is not speculative. He contends that, in the nature of things, the Defendant could not have provided the actual loss of profit suffered by the Defendant. In the circumstances counsel argued, a projection of the loss of profits, such as Exhibit '71' should suffice.

We have carefully considered the judgement of the trial High Court and the Court of Appeal and the submissions of counsels for the Plaintiff and the Defendant and are of the considered view that the damages of GH¢14,963,505.50 awarded to the Defendant cannot be supported. There is no adequate basis for the amount awarded. Both Exhibits '2' and '71' are projections, not actual losses. As has been pointed out above, damages for negligence are awarded to compensate the claimant for the losses he has actually suffered as a result of the tort. It must be pointed out that **Hedley Byrne** (supra) did not alter the mode for the assessment of damages in negligence; it only established that in certain circumstances economic loss was recoverable for negligent misstatements. In any event, the instant claim is not one for negligent misstatement.

The Court of Appeal affirmed the damages of GH¢14,963,505.50 awarded by the trial High Court to the Defendant. The Court of Appeal relied on **Sarpong & Co v. Silver Star Auto Ltd 2 [2013-2014]** 1313 as authority for not varying the amount of damages awarded by the trial High Court. In **Sarpong & Co, (supra)** the Supreme Court stated at page 1348; *"Where they have not found any legal basis for altering the damages awarded by the Court of first instance, it was not open for the Court of Appeal to vary the damages awarded".*

But we are not seeking to vary the amount of damages awarded by the trial High Court. We are saying that after careful examination of the law and the facts, there is no basis for

the amount of damages awarded to the Defendant. The Defendant had responsibility for proving that it had actually suffered the loss it was claiming. It failed to do so.

We therefore reverse the decision of the trial High Court, affirmed by the Court of Appeal, awarding specific damages of GH¢14,963,505.50 to the Defendant.

4. General Damages

The Court of Appeal, like the trial High Court below it, dismissed the Defendant's counterclaim for restitution. However, the Court of Appeal *suo motu* awarded the Defendant general damages of Five Hundred Thousand Cedis (GH¢500,000.00). The Defendant did not counterclaim for damages. The Court of Appeal justified this extraordinary step on the basis of the principle of "doing substantial justice". The court relied of **Muller v. Home Finance [2012] 2 SCGLR 1234**, where this court stated on page 1238 that:

> *"It is not the duty of the Court in civil cases to make the case for the parties. The duty of the trial High Court was to enter judgement for the party on what he asked for and not to give him what him what the court thought he needed. However, it is fairly now established that on the principle of doing substantial justice, the court might in some circumstances grant a party, reliefs not asked for provided the grant of that (those) relief will help achieve substantial justice to the case and bring litigation to an end between the parties".*

The Court of Appeal also referred to **Hydrafoam Estates Ltd v. Owusu & Ors [2013-2014] 2 SCGLR.**

We find this application and extension of **Muller** (supra) troubling and unwarranted. **Muller** (supra) specifically refers to the trial court. The trial High Court did not make an award for general damages. The Court of Appeal was exercising an appellate jurisdiction. The Defendant had not counterclaimed for general damages and the trial High Court did

not award any. The Court of Appeal made this award *suo motu* for the first time without offering the parties an opportunity to be heard on the issue.

This goes contrary to the spirit of the Court of Appeal Rules, 1997 (C.I.19) and the rules of natural justice. Rule 8(8) of C.I.19 provides that;

> *"...the Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting that case on the ground."*

Rule 8(8) of C.I. 19 is not as explicit on the issue as Rule 6(8) of the Supreme Court Rules, 1990 (C.I. 16), but it is our considered view that it is animated by the same spirit and has the same effect. Rule 6(8) of C.I. 16 provides that:

"Where the Court intends to rest a decision on a ground not set forth by the appellant in his notice of appeal or any matter not argued before it, the Court shall afford the parties' reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal".

As we have noted, the Defendant did not claim for general damages and the trial High Court did not award general damages. The Defendant claimed for restitution. This claim was dismissed by the trial High Court; and this dismissal was affirmed by the Court of Appeal. It is not right for the Court of Appeal, having affirmed the dismissal of the claim for restitution, to proceed to award general damages to the Defendant, without affording the parties an opportunity to be heard on the matter.

It is not even clear why the Court of Appeal considered the issue of the restitution. The Court of Appeal was not seised with that matter. It was the Defendant who counterclaimed for restitution. This was dismissed by the trial High Court. The Defendant did not appeal against the dismissal of the High Court of the claim for

restitution. It is our considered opinion that the Court of Appeal erred in dealing with the claim for restitution and awarding general damages in lieu thereof. The Court had no jurisdiction to deal with that matter.

5. Conclusion

In consequence of the foregoing, we allow the appeal in part.

We allow the appeal in respect of the award of damages of ¢14,963,505.50 being loss of profit from 1991 to 2011 to the Defendant and accordingly reverse the said award. We also allow the appeal in respect of the award of general damages of ¢500,000 to the Defendant by the Court of Appeal and accordingly reverse that award.

We, however, dismiss the appeal and affirm the decision of the trial High Court, affirmed by the Court of Appeal, dismissing the Plaintiff's claim against the Defendant for the repayment of the loan of 165,000 Ecus.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

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