IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

MARFUL-SAU, JSC

AMEGATCHER, JSC

OWUSU (MS.), JSC

TORKORNOO (MRS.), JSC

CIVIL APPEAL

NO. J4/07/2021

29TH APRIL, 2021

IN-PETROL GHANA LIMITED ……. PLAINTIFF/RESPONDENT/ RESPONDENT

VRS

GHANA OIL COMPANTY LIMITED

(GOIL) …….. DEFENDANT/APPELLANT/ APPELLANT

JUDGMENT

TORKORNOO JSC:-

This is an appeal from the judgment of the court of appeal affirming the decision of the commercial division of the high court. The parties are companies dealing in petroleum products. The plaintiff/respondent/respondent (plaintiff) described itself as an oil trading company and the defendant/appellant/appellant (defendant) as an oil marketing company.

THE CASE OF PLAINTIFF

The case of the plaintiff is that it sold 5500 metric tonnes of gasoil to defendant on credit. The defendant gave the plaintiff a Corporate Irrevocable Payment Undertaking (hereinafter referred to as CIPU or the Undertaking) with a schedule of payments for the gasoil. The CIPU was addressed to the plaintiff and it's bankers, UT Bank Ltd.

Under the payment schedule, defendant was required to pay plaintiff **GhC10,727,808.00** in five equal installments of **GhC2,145,561.60** between 30 to 40 days after commencement of loading of the gasoil from Tema Oil Refinery (TOR).

According to plaintiff in its statement of claim, the sum of **GH10,727,808.00** stated on the CIPU was an estimated ex-refinery price because the final purchase price is determined after the complete discharge of the product. Plaintiff further averred that loading commenced on 2nd January 2015 and so payment should have started by the 30th day after 2nd January and ended by 12th February 2015. Plaintiff alleged that defendant failed and or refused to pay plaintiff in accordance with the agreed payment schedule and this led to losses and the claims of the plaintiff.

According to Plaintiff in its amended statement of claim, the payment schedules were agreed as '*a pre-condition for plaintiff obtaining Letters of Credit from the bank to pay plaintiff's suppliers, and due to nature and mode of pricing in the oil industry'*. This was to ensure that *'fluctuating (sic) in pricing and changes in exchange rate as determined by the National Petroleum Authority does not result in losses to plaintiff*

Regarding the fluctuations referred to, Plaintiff made the case in its statement of claim that *'in fulfillment of the functions and objectives of the National Petroleum Authority, bulk distribution companies which by virtue of price and/or foreign exchange fluctuations make profits over and above the pricing set by the Authority pay the resulting profits referred to as 'over recoveries' to the National Petroleum Authority and where losses are made due to price fluctuations referred to as 'under recoveries the oil companies are reimbursed for the losses*.'

Again, plaintiff alleged that, '*to the knowledge of the defendant'*, UT Bank limited had issued a 90 day letters of credit to plaintiff's supplier on 19th December 2014 for the gasoil that was sold to the defendant. And, to the knowledge of defendant, the payment in Ghana cedis was scheduled over the 30 to 40 day credit period so that plaintiff would effectively recover with profit, the sum of **$3,759,811** that plaintiff had spent as purchase price for the 5500 metric tonnes of gas oil sold by BP Oil International limited.

Plaintiff went on to allege that because of losses it incurred due to defendant's breach of the payment schedule, the plaintiff was compelled to contract a loan of **GhC3,783,866.88** from UT bank to generate enough foreign exchange to pay plaintiff's suppliers for the cost of the gasoil.

HEADS OF LOSSES

From the statement of claim and indorsement on the writ, two heads of losses are discernible. The first set of losses allegedly arise from price changes to the unit price of petroleum products oil determined by the National Petroleum Authority in accordance with world market prices, along with applicable exchange rates of United States dollar to the Ghana cedi, from the time the transaction sum was due, to the time the defendant completed payments for the gasoil. This time period ran from 12th February 2015 to 21st April 2015, and is hereafter referred to as the default period.

Plaintiff claimed that it was entitled to recover the price differentials between the sum stated on the CIPU and the prices of gasoil during the default period because '*the failure of defendant to pay in accordance with the schedule agreed upon culminated in plaintiff losing a total amount of GH2,426,972.53 in the transaction which is the subject matter of this dispute*'.

This **Gh2,426,972.53** was the aggregate of price changes to gasoil as well as exchange rate differentials as determined by the National Petroleum Authority (NPA) during the default period

On the second head of claim, the pleadings state that the plaintiff was entitled to reimbursement of a loan of **GHS3,783,866.88** it took to pay off its suppliers because first, the letters of credit for the supply of the gasoil were obtained in reliance on the CIPU given by defendant, and second, the defendant knew that plaintiff had relied on the loan to pay for losses arising from this particular transaction. This loan of **GHS3,783,866.88** from UT Bank came with an annual interest rate of 37.65%. It is this loan that ostensibly allowed plaintiff to raise and pay for the full purchase price of the gasoil being **$3,759,811**

The plaintiff's reliefs were set out as follows:

a. A declaration that plaintiff is entitled to recover from defendant the amount of Gh2,426,972.53 being the losses incurred by plaintiff due to defendant's breach of the agreement.

b. An order directed at defendant to pay plaintiff the amount of Gh2,426,972.53

c. A declaration that defendant is liable to pay plaintiff any money that may be due UT bank Ltd from plaintiff, as a result of the loan granted plaintiff

d. An order that defendant pays any such amount resulting from the loan from UT Bank Limited to plaintiff

e. Cost

THE DEFENCE

The defendant denied prior knowledge of the reasons for the payment schedule that had been attributed to it in the plaintiff's statement of claim - namely the issue of the letters of credit for purchasing the gasoil by plaintiff's bankers, and plaintiff's obtaining of a loan facility to cover deficits in payments for the gasoil. Defendant also denied being privy to any transactions between the plaintiff and third parties, including its bankers.

Defendant denied that plaintiff had incurred any losses from the pricing windows set by NPA or foreign exchange fluctuations and admitted that there was an industry arrangement for companies to recover losses or to hand over profits to the National Petroleum Authority as described by the plaintiff in the statement of claim. Defendant acknowledged the systems operated by the NPA to ensure that '**over recoveries**' by oil trading and marketing companies are handed over to the national regulator, and '**under recoveries**' are absorbed by the national regulator. Defendant therefore denied liability

for the alleged losses from exchange rate differentials or price differentials set by NPA, if such losses had occurred.

Defendant asserted that it had paid the plaintiff in full for the 5500 metric tonnes of gas oil supplied and plaintiff had accepted the payments without any complaint. It therefore denied liability for the loan of **GHC3,783,866.88** that the plaintiff claimed that it had taken to cover for losses from the pricing windows and foreign exchange differentials.

THE HIGH COURT'S DECISION

At the end of the trial, the high court accepted the plaintiff's version of facts regarding defendant's prior knowledge of the conditions for plaintiff obtaining letters of credit to purchase the gasoil it sold to defendant. The court also held that he was satisfied that the CIPU was issued to satisfy the requirements for grant of the letters of credit on behalf of the plaintiff for the purchase of gasoil from its suppliers, because the CIPU was addressed to plaintiff's bankers.

The court also accepted plaintiff's case on its alleged loss of NPA price and foreign exchange differentials during the time of delayed payments by defendant.

Regarding the loan facility that plaintiff wanted reimbursement for, it was the evaluation of the trial judge that in April 2015, the plaintiff utilized a loan facility offered by its bankers in January 2014, to pay off the losses occasioned by defendant's breach of the payment schedule and therefore defendant should be liable to pay for that loan. On the basis of these findings the trial judge held that defendant was liable for all the claims of the plaintiff.

The final orders of the trial court were stated in these unqualified general words as to the actual liability he was entering judgment on: *'It is my considered opinion that defendant is liable to the claim of the plaintiff. Accordingly, I enter judgment on its reliefs. Plaintiff shall have its costs assessed at Ghc20,000.00'*

APPEALS

The defendant appealed to the court of appeal on six grounds including the omnibus ground that *'the judgment is against the weight of evidence*'. The court of appeal dismissed the appeal and affirmed the findings of fact and holdings of law of the trial court. Plaintiff has further appealed to this court on the following grounds:

GROUNDS OF APPEAL

i. The judgment is against the weight of evidence
ii. The Justice of the Court of Appeal erred in the application of the principle of promissory estoppel when they confirmed the finding of the trial court that the defendant applied for a loan in the year 2014 relying on a promise made in 2015 by the defendant.
iii. The Justice of the Court of Appeal erred by confirming the finding of the trial court that the defendant is liable for all the plaintiff's indebtedness to UT Bank Limited instead of what was specifically occasioned by the admitted delayed payments by the defendant.
iv. The Justices of the Court of Appeal erred by confirming the finding of the trial court that the defendant is liable for the forex and pricing differentials despite evidence from both parties that the National Petroleum Authority is statutorily liable for such payments.

SUBMISSIONS TO THE SUPREME COURT

Counsel for defendant argued all the grounds of appeal under the omnibus clause of the judgment being against the weight of evidence. He submitted that both the high court and court of appeal had their findings and evaluation of the facts wrong, that they both misapplied the law in relation to the wrong findings of fact, and as a result, arrived at a wrong conclusion.

Counsel for defendant submitted that in holding that the plaintiff relied on the payment undertakings given by defendant in the CIPU to obtain the letters of credit to import the gasoil in issue, the trial court had misapplied the equitable doctrine of promissory estoppels, because the letters of credit pre-dated the CIPU. Since the defendant had not given the undertakings in the CIPU at the time of the issue of the letters of credit, it was chronologically impossible for the plaintiff and its bankers to have relied on the CIPU payment schedule to undertake the obligations in the letters of credit. He pointed to the holding of this court on the necessary factors for a finding of promissory estoppels in **IBM World Trade Corporation v Hasnem Enterprise Ltd (2001 - 2002) SCGLR 393**. The court had held per Adzoe JSC that *'It is clear from the authorities that a party relying on the principle of promissory estoppels must make out a case that such a promise was made, intended to be binding, intended to induce him to act on it and that he in fact acted on it'.*

Counsel for defendant also urged that in holding that the plaintiff had relied on the loan facility offer issued in January 2014 and which was scheduled to expire in January 2015 to obtain a loan facility in April 2015, the trial court had set up a case inconsistent with that of the plaintiff itself. This is because the plaintiff's witness had testified that the loan facility he used to pay off the alleged deficit in the purchase price of the gasoil was one given in April 2015, and not January 2014. This was contrary to the rule in **Dam v Addo 1962 2 GLR 200**.

Counsel for defendant further submitted that though there were delays in paying according to schedule, the defendant had fully paid for the gasoil it purchased and this was admitted by plaintiff's representative, and sole witness. There was therefore no issue of breach of the undertaking to pay for the gasoil and plaintiff's claims of losses ought to have been dismissed by the trial court.

He urged that for the court to hold that the plaintiff was entitled to losses arising from the alleged breach of the payment schedule, the plaintiff ought to have proved the dates on which payments were made, the number of days of delay and the monetary cost of such delays that were in contemplation of the parties in the transaction. Having failed to provide and prove these particulars, the plaintiff's claims ought to have been dismissed. He pointed out that the record referred to by the trial judge and relied on to make the finding that the loading of the gasoil in issue commenced on 2nd January 2015 did not constitute an exhibit before the court and the finding of the date of commencement was therefore perverse.

It was the submission of defendant counsel that to the extent that these holdings of the trial court were affirmed by the court of appeal, the judgments of both courts are at variance with the documentary evidence that was put before the court by the parties. Counsel for defendant therefore invited this court to reverse the decisions based on the documentary evidence tendered as exhibits A, B, C, D, E, F, G, H, and exhibits 1, 2 and 3.

Exhibit A is described as the 'product price build up' of oil products issued by NPA over the period of January to March 2015. **Exhibit B** was the invoice

issued by BP Oil International when it sold the 5500 metric tonnes of gasoil to plaintiff.

Exhibit C was a pro-forma invoice dated 13th January 2015, in the sum GHC11,755,342.48 issued by plaintiff to defendant. This pro-forma invoice covered 6,574,694 liters of gasoil, and not 5500 metric tonnes of gas oil. According to paragraph 14 of plaintiff's witness statement, the price of the gasoil on this pro-forma invoice was fixed at GHC1.78 per liter because this was the unit price given by NPA as ex-refinery core price for the pricing window of 1st to 15th January 2015. **Exhibit D** is the letters of credit issued by UT Bank in favor of plaintiff to cover the 5500 metric tonnes of gasoil it imported from BP Oil. **Exhibit E** is the CIPU issued by defendant to UT Bank in favor of plaintiff. **Exhibit F** is plaintiff's bank statement reflecting payments by defendant and plaintiff's drawdown of the loan it wanted to be reimbursed for. **Exhibit G** is plaintiff's calculation of price and foreign exchange differentials in the cost of gasoil at the various times that defendant took delivery of the gasoil from plaintiff. **Exhibit 3** is documentation on a loan facility obtained by plaintiff from UT Bank Ltd in January 2014. It was to expire after 12 months.

Counsel for plaintiff resisted the submissions of defendant counsel. He first admitted that plaintiff's cause of action against the defendant arose from the breach of the CIPU tendered as exhibit E and exhibit I and continued with this position throughout his submissions. He urged that it is defendant counsel who imported a discussion of the doctrine of promissory estoppel into the proceedings and all submissions thereon by defendant counsel had no basis. This is because both decisions of the two lower courts were premised on the principles applicable when there is breach of contract. It was his submission that the two heads of claims were rightly granted by the trial court and affirmed by the court of appeal

CONSIDERATION

My lords, I have no difficulty in upholding all the grounds of appeal as subsumed under the omnibus ground that the judgment of the court of appeal is against the weight of evidence in the case. And I say this in full appreciation of the position of the law that a second appellate court should be hesitant in upending findings of fact by a trial court that have been concurred in by a first appellate court. In such a situation, as determined in **Gregory v Tandoh 1V & Hanson 2010 SCGLR 971 at 985 to 987,** the second appellate court may only overturn the decision of the two lower courts where there were strong pieces of evidence on record which made it manifestly clear that the findings of the trial court and the first appellate court were perverse or inconsistent with important documentary evidence or the totality of the evidence on record and the surrounding circumstances of the entire evidence on record. Such a decision would constitute a miscarriage of justice, and the second appellate court reverses the decisions to ensure that absolute justice is done. When it is also clear that the reasons in support of the findings had so wrongly applied principles of law such that if the error was corrected, the decision cannot stand, the second appellate court ought to overturn the decision. See **Koglex Ltd (No 2) v Field 2000 SC GLR 175.** If there is a neglect of some principle of law or procedure which if corrected, the decisions cannot stand, there is a duty to ensure the reversals of the decision, as determined in **Adu v Ahamah 2007-2008 1 SCGLR 143** cited by plaintiff counsel. I find all these factors present in the decisions presented to us in the instant appeal.

THE NATURE OF THE PLAINTIFF'S CASE

The plaintiff's counsel has stated assertively in his submissions to us that the plaintiff's cause of action in law resides in a claim for recovery of losses pursuant to breach of contract. And yet, in the pleadings in this record, the

plaintiff failed or declined to articulate a claim for 'damages' as a result of the breach alleged. It is trite knowledge that when a party alleges breach of contract or a duty in law, and losses arising from that breach, the applicable arena of law within which to resolve reliefs claimed is that of the law on damages, whether general or special damages. And I see that it is this failure to properly situate this case in applicable law that led to the distortions surrounding plaintiff's alleged entitlements to the reliefs it claimed in its case, and the judgment awarded which was affirmed by the court of appeal

Law on Damages

Damages are monetary awards by a court given in compensation for breach of contract. **Black's Law Dictionary, 11th Edition (Thomson Reuters 2019)** defines it as *'Money claimed by, or ordered to be paid to another person as compensation for a loss or injury*'

As settled from the seminal case of **Hadley v Baxendale 1854 9 Ex 341**, damages are losses that should have been *'fairly and reasonably considered as either arising naturally, i.e. in the ordinary course of things, from such breach of the contract, 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*'.

In **Chitty On Contracts Volume 1, Sweet & Maxwell 33rd Ed, 2018**, the learned authors describe general and special damages in these words on pages 1798 and 1799:

'General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right or duty. The main meaning of ***special damages is that precise amount of pecuniary loss which the claimant can***

prove to have followed from the particular facts set out in his pleadings'
(emphasis mine)

In the entire record of the case in the high court, it is defendant counsel who referred to the decision of this court in **Royal Dutch Airlines (KLM) & Another v Farmex 1989-90 2 SCGLR 623 at 633** in his addresses, which directed that *'Special damages must be specifically pleaded and specifically proved. But the rule does not imply that if one claims general damages only, one cannot lead evidence of specific damages as a foundation for an award of general damages.* '

The loud silence of plaintiff in presenting its case in proper legal context should have invited the direction of the court in its case management role very early in the trial. Unfortunately, this was not the case

In **Asare-Baah 111 v Attorney General & Electoral Commission 2010 SCGLR 463**, this court per Wood CJ had stated firmly at page 470 that *'A court's duty is to determine the real matters in controversy between the parties effectually. It is therefore imperative in actions of this kind, as indeed, in civil causes or matters, that all alleged acts of statutory and constitutional invalidity, breaches or violations, inconsistencies or non-compliance be identified with sufficient particularity, with nothing being left to chance or conjecture....This just requirement of the law, which is based on plain good sense, serves the interest of justice well in all civil actions. It enables issues in controversy between parties to be clearly identified, so each side can adequately prepare to meet the case alleged against him or her, thereby enabling the court to firmly and effectually determine all disputed issues*'

My view is that in the face of the failure of the plaintiff to identify with sufficient particularity the alleged elements of losses it suffered as a result of the breach of contract this suit is premised on, the trial court could have called

to its own aid **Order 11 Rule 12 of the High Court Civil Procedure Rules 2004 CI 47** in order to ensure that there is a fair and effective trial. It provides:

Particulars of pleading

12(1) *Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, but without prejudice to the generality of the foregoing words,*

a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies

(2) *Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed three pages, they may be set out in a separate document...*

(3) *The court may order a party to file particulars of any claim, defence or other matter stated in the party's pleading, or in any affidavit, or a statement of the nature of the case on which the party relies, and the order may be made on such terms as the court considers fit* (emphasis mine)

Order 11 rule 12(3) allows a court to order a party to file particulars of a claim, or even a statement of the nature of the case that the party is relying on, if the pleadings do not provide such particulars as will adequately assist with a fair or effective trial. In the instant suit, on account of the fact that the plaintiff's stated cause of action lay in an alleged breach of contract, and yet its counsel failed to identify the particulars of the losses it claimed to have arisen from that breach, my view is that this is one case that should have invited an invocation of Order 11 rule 12(3) for plaintiff counsel to provide particulars of the alleged losses, so that the matters in issue could be settled more effectively, as directed by Order 1 (2) of CI 47. Order 1(2) provides:

'These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all

matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided.'

Such a direction would not have compromised the independence of the judge. It would rather have satisfied the duty of the judge to ensure that matters in issue are resolved effectively.

LEGAL EVALUATIONS BY THE HIGH COURT AND COURT OF APPEAL

In the face of the failure to articulate a case for damages despite allegations of breach of contract, and contrary to the protestations of plaintiff counsel in his submissions before this court, the trial judge commenced his legal evaluation of the rights of the parties by relying on the doctrine of promissory estoppel. From that premise, the trial judge upheld the defendant's contractual obligation to plaintiff on the undertakings in the CIPU, and expanded that obligation to include an obligation to ensure that the plaintiff could honor its obligations on the letters of credit.

The trial court then moved on in his evaluation into the arena of the law on damages when no case on damages had been presented in the Writ, pleadings, and evidence of the plaintiff. The court utilized the principles on the law of damages to find and hold that the defendant should have foreseen the losses allegedly incurred by the plaintiff in the default period because defendant was also a player in the petroleum industry, and the prices of petroleum products and foreign exchange rates changed during the default period.

He went on further to hold that the defendant should be liable for plaintiff's alleged losses in paying off the cost of the gasoil, and letters of credit in raised to purchase the gasoil, because the evidence established that defendant knew

of plaintiff's liabilities to its supplier on exhibit B and the liability to its bankers on exhibit D. Again, the defendant should be liable for the plaintiff's utilization of the loan to pay off the losses claimed because the loan facility had been obtained to cover exigencies such as the defendant's breach of the payment undertakings. The court recognized that the letters of credit had been issued in December 2014, that the loan facility was dated January 2014 and was scheduled to expire in January 2015, while the defendant's undertakings in the CIPU were given on 7th January 2015.

It is these follow up evaluations and holdings discussed with a background reference to the law of damages, and starting from a statement of the law on promissory estoppel, that the court of appeal affirmed. It is these evaluations and holdings therefrom that the defendant invites this court to reverse as erroneous because the judgment is against the weight of evidence and the legal premises invoked to justify it are wrong. I agree with counsel for defendant because from my review of the records, the findings, evaluations and holdings are inconsistent with the case of plaintiff, the clear words of the documentary evidence, the testimonies of the parties, and the law on damages.

The trial judge said on page 4 of his judgment:
'In the case of **Central London Property Trust Ltd v High Trees House Ltd 1947 KB 130, it was held that:**
'Where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will take the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by considerations in the strict sense...'

'It is my opinion that exhibit E, which was addressed to plaintiff's bankers and executed by both parties, was a promise made by the defendant both to the plaintiff and plaintiff's bankers that defendants would pay according to the schedule therein. It was this guarantee that UT Bank acted upon to grant plaintiff the necessary letters of credit to be able to complete the transaction. In my view, exhibit E evince the intentions of the parties' (emphasis mine)

To explain the reasons behind the acceptance of the plaintiff's claim of losses, the trial court stated on pages 6 and 7 of the judgment

'Consequently, in accordance with the terms of Exhibit E, all payments were due to be made by the 12th of February 2015. From the undisputed facts before me, during this window, the defendants only made one payment on 9th February 2015 instead of 2nd of February 2015. The delay herein is negligible as it still fell within the existing pricing window set by the NPA at the time. However, after this payment, all other payments were made between 2nd March 2015 and 21st April 2015. Plaintiff has led evidence in Exhibit A series to establish the fact that at the time of the payment of 2nd March, the NPA had revised its pricing window and had pegged the ex-refinery core price of gasoil of GH₵195.51 from a previous price of GH₵184.7353 as at 16th February 2015. The exchange rates were also revised from GH₵3.5 to the dollar as at February 16th 2015 to as much as GH₵3.95 by April 2015.

In the light of the revisions by the NPA, it is manifestly clear that plaintiff who was expecting payments within a period of time where the pricing and forex rates ranged between GH₵167.8897 and GH₵3.25 respectively as at 16th January 2015, and GH₵184.7353 and GH₵3.5 respectively as at 16th February 2015, would make losses when payments are made in March at a time where the rates have been revised to

GH₵195.5129. Even worse in contemplation are the payments made in April when the rates had risen to as much as GH₵204.2663 for pricing and GH₵3.9 for forex.

In the case of ***THE ACHILLEAS [2009] AC 61****, it was determined that a contract-breaker is only liable for damage resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind. The need to prove foreseeability is further illustrated in* OZALID GROUP (EXPORT) LTD v AFRICAN CONTINENTAL BANK [1972] 2 LLOYDS REP. 231*, where a bank which delayed payment was held liable when the delay caused its clients losses arising from changes in the dollar-sterling rate.*

From the evidence, all indications point to the fact that the Defendant, as a major participator in the petroleum industry in Ghana, was fully aware of the bi-weekly pricing windows of the NPA. Defendant did not deny the role of the NPA in establishing petroleum prices, and at no time during this trial has the Defendant raised a challenge or objection to the evidence of several pricing reviews during the period of this dispute. Furthermore, the plaintiff successfully proved that the Defendant was actively aware that avoiding price fluctuations was a key term of the financial engineering that was obtained, and that the payment schedule provided was a mechanism to avoid the effects of the fluctuations. As a result, Defendant with their standing in the industry should have been able to reasonably foresee the losses made as a result of the default'.

He also said on page 8 regarding plaintiff's entitlement to its reliefs:

'With regards to the plaintiff's claim for the defendant to settle all indebtedness with UT bank in respect of the transaction, the earlier analysis herein has established that defendant was at all material times aware of the relevant financial engineering that was undertaken by UT bank to facilitate the transaction. Apart from the fact that

plaintiff referred to a meeting with defendant and the bank which defendant never disputed, it is clear that the issue of the payment guarantee was to satisfy the requirements for the grant of letters of credit on behalf of plaintiff for the purchase of gasoil from its suppliers, therefore it being addressed to the bank. Furthermore the issuing of payment cheques in both the name of the plaintiff company and the UT bank preclude the defendants from denying knowledge of the involvement in the financial engineering that was procured by the plaintiff.

In its review of the high court judgment, the court of appeal said in paragraph 30 of its judgment that *'in the light of the failure of the appellant (defendant) to honor its obligations as set out which amounted to a breach of the terms of agreements per Exhibit E and Exhibit I, Respondent cannot be faulted for falling on the (loan) facility to meet an unplanned adjustment due to the breach committed by the Appellant on its obligations thereto*'

Citing the decision on promissory estoppels in **IBM World Trade Corporation v Hasnem Enterprises Ltd 2001 -2002 SCGLR 393**, the court of appeal continued in paragraph 31 to state that *'Nothing prevented the Respondent from falling on the facility Exhibit H dated 16/01/2014 which remained unused and fitted into such purpose when the Appellant breached the payment plan falling under an irrevocable undertaking to make up for the shortfalls due to NPA pricing, exchange rate differentials etc*.

32. *Thus the Appellant's submission that the Trial court misapplied the principle of promissory estoppel does not even arise....*'

From the above, it can be seen that the court of appeal affirmed the evaluation of the high court that on the application of the doctrine of promissory estoppel, the defendant ought to be held liable on its undertakings in the

CIPU, and that the evidence led supported the finding of the trial court that the plaintiff had breached the payment schedule in exhibit E, through the manner of payments found on exhibit F. After this, the court of appeal side-stepped the issues raised by defendant regarding the propriety of the finding that the letters of credit had been granted on the strength of the CIPU when the letters of credit pre-dated the CIPU. The court of appeal just pointed to the stark position that in the light of the breach of payment undertakings, it was logical that the plaintiff should utilize the January 2014 loan facility that was to expire in January 2015, to pay off the losses ostensibly arising from defendant's breach of payments in April 2015. Clearly, it did not matter to the court of appeal whether or not the plaintiff had proved its averment of obtaining a loan from UT bank in April 2015 with terms that the trial court had ordered the defendant to pay, or that the plaintiff had obtained this alleged loan on the strength of exhibit 3 which was dated January 2015 and expired in January 2015

CONSIDERATION OF CLAIMS WHEN GROUND OF APPEAL IS THAT THE JUDGMENT IS AGAINST THE WEIGHT OF EVIDENCE

With all respect to the court of appeal, by raising the ground of appeal that the judgment of the trial court was against the weight of evidence, the crux of the matter in issue before it as an appellate court was a determination of whether the plaintiff was entitled to the reliefs granted to it by the high court. That was not an issue that could be sidestepped in the perfunctory manner that the court of appeal did by making allusions to whether the plaintiff could be faulted for falling on a loan facility to meet an *'unplanned adjustment*', or could be prevented from doing so, because the defendant had breached its payment schedule. The omnibus ground of appeal required a full review of

the judgment of the trial court, in the light of the evidence placed before the court and the applicable law.

And to the extent that the trial judge had granted all the reliefs of the plaintiff including ordering the defendant to pay the alleged aggregate loss of **GhC2,426,972.53** and loan sum of **GhC3,783,866.88** with its purported interest rate, the duty of the court of appeal was to determine whether the award of those reliefs were justified in accordance with law

Rule (8) (1) of the Court of Appeal Procedure Rules 1997 CI 19, directs that any appeal to the court of appeal shall be by way of a re-hearing. And the court of appeal carried a duty to heed the directions it quoted from **Owusu-Domena v Amoah 2015-2016 1 SCGLR 790 at 799** in these words:

'The sole ground of appeal that the judgment is against the weight of evidence throws up the case for a fresh consideration of all *the facts and law by the appellate court.....Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law. Thus when the appeal is based on the omnibus ground that the judgment s against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters*.'

In the instant case, in holding that the awards made by the trial court were consistent with the facts, evidence and the law based on the findings, the court of appeal wholly failed to consider clear and salient applicable legal issues such as the nature of the plaintiff's reliefs being that of special damages, the need to particularize special damages in pleadings as a matter of proper procedure, the need for special damages to be proved as proximate

losses flowing from the breach complained of, and the need for special damages to be restitutionary and no more.

Failure of plaintiff to prove reliefs claimed

From the tenor of the plaintiff's pleadings in paragraphs 10 to 12 of its statement of claim, plaintiff was alleging that on account of the defendant's prior knowledge of the terms of the letters of credit issued to purchase the gasoil and the cost price of the gasoil, including the structure of changes in market price of gasoil, as well as changes in foreign exchange rates set by NPA, the defendant should have foreseen that if it defaulted in paying according to schedule, plaintiff would have to be compensated to the tune of the invoiced value of the gasoil being **$3,759,811.** It is this claim of reimbursement of $3,759,811 that led plaintiff to present the calculations on exhibit G.

In paragraph 10, the plaintiff averred that *'the failure of defendant to pay in accordance with the schedule agreed upon culminated in plaintiff losing a total amount of* Gh2,426,972.53 *in the transaction which is the subject matter of this suit*'.

As required by **Order Rule 11 (12) (1) a of CI 47** referred to and the cases cited supra, no particulars were provided in this pleading to outline how the defendant's breach led to the identifiable loss of Gh2,426,972.53. It takes a reading of the exhibits tendered at trial, especially exhibits A and G, for the understanding to be reached on how the alleged loss of Gh2,426,972.53 was arrived at, and how it was meant to allow a full recovery of plaintiff's expected returns of **$3,759,811**on the purchase price of the gasoil.

Exhibit A represents market rates in the different pricing windows issued by NPA from January to March 2015, and nothing more. On a review of exhibit

G, the first page reveals that the calculations done by plaintiff as its losses are a general aggregate of what GHC11,755,342.48, the second invoiced sum set out on exhibit C as the value of the entire gasoil sold, was supposed to be in dollars as at 12th February 2015, using a dollar rate of GH3.20 to the dollar and arriving at a value of **$3,673,544.52.** Interestingly, this very sum reveals that even if defendant had paid for the gasoil according to schedule, plaintiff still could not have recovered the purchase price of the gasoil which was **$3,759,811,** by 12th February 2015.

The next calculation on the first page of exhibit G uses the sum of GhC11,921,315.45 and what it was supposed to be in dollars as at April 7th 2015. The foundation of this sum of GhC11,921,315.45, can be found on the second page of exhibit G. It is the 'total' of figures described as the ex-refinery price (core) of different quantities of gasoil priced differently in different pricing windows and stated as the 'Quantity Sold' between January and 1st March 2015. From the calculations on this second page of exhibit G, the entire 5,500 metric tonnes was loaded by the end of the 1st March 2015 pricing window. My understanding of the presentation is that this GhC11,921,315.45 is supposed to be the final cost of the gasoil by the end of the discharge period of 1st March 2015. Plaintiff took what was supposed to the rate of cedi to the dollar, being GHC3.84 as at 7th April 2015, and arrived at a dollar value of $3,104,509.23 when this GhC11,921,315.45 is multiplied by GhC3.84.

I must also state here that from the record, the only invoice that the plaintiff gave to defendant after their agreements in exhibit E, is exhibit C, which was dated 13th January 2015. Exhibit C is a proforma invoice for GhC11,755,342.48, the sum that plaintiff claimed, and defendant accepted in their pleadings as the purchase price for the 5500 metric tonnes of gasoil their transaction was supposed to cover, even though the CIPU stated the volume

of gasoil sold as 5000 metric tonnes and sum due for it as GhC10,727,808.00. Thus plaintiff's averments on the price of the gasoil, was different from what its evidence portrayed.

From the calculations on exhibit G, plaintiff concluded that it had lost **$569,035.29**, which sum is the difference between **$3,673,544.52** and **$3,104,509.23**. The plaintiff then converted **$569,035.29** at GHc3.84 to the dollar to arrive at a loss of GhC2,185,095.51. To this figure, plaintiff added GhC852,124.04 as gasoil price differential from 16th January 2015 to 29th February 2015, and arrived at a total loss in market price and foreign exchange of **GhC3,037,222**. At this point, it is important to also state that Plaintiff's pleadings claimed an alleged liquidated loss of **GHC2,426,972.53**, a sum distinctly different from the **GhC3,037,222** presented on exhibit G

Clearly the projections on exhibit G only represent what the plaintiff would have earned had the defendant paid for the gasoil on the dates that it loaded the gasoil, using NPA prices, multiplied by the highest forex rate of GhC3.84 to $1 in March 2015. The calculations ignore any changing forex rates over the two months, though plaintiff's case is built around alleged changing forex rates, a position accepted by the two lower courts.

After identifying the dollar value of what plaintiff would have earned on 12th February 2015 (the date of alleged breach) according to the final invoiced sum of GhC11,755,342.48, and using the NPA dollar rate of GhC3.20 to $1, (which sum came to $3,673,544.52), the rest of the calculations on exhibit G failed to factor in the truly critical element of what plaintiff actually received from the defendant in dollar terms, by 21st April 2015, when the last payment was done.

There are two major legal fault lines with the position of plaintiff in basing its alleged losses on the NPA prices for gasoil on the dates of loading, and NPA forex rates on the first and last dates of loading and that is why the courts below should have rejected the case made for the losses and evidence supporting it.

First, the plaintiff's stated cause of action is the breach of a signed and completed contract, the CIPU tendered as exhibit E. The losses that could have been foreseen by the parties had to be derived from that written contract and no other source. Nowhere in that contract did the parties leave the price of the gasoil they transacted in to be in abeyance and or linked to NPA price differentials and dates of loading, such that if payments are not made on time, defendant could have foreseen that plaintiff would need to be paid these sums.

Below is the full wording of the CIPU.

Dear Sir,

RE: CORPORATE IRREVOCABLE PAYMENT UNDERTAKING

KNOW YE ALL MEN BY THESE PRESENTS that we, Ghana Oil Company Limited (GOIL), confirm that we are purchasing 5,000 M/T of Gasoil, currently in TOR Storage tank, from IN-PETROL GHANA LIMITED /GOENERGY COMPANY LIMITED (hereinafter referred to as the suppliers, who undertake to grant 30 days credit for each supply invoice). We do hereby undertake to make payment for each invoice submitted by IN-PETROL GHANA LIMITED/GOENERGY COMPANY LIMITED, in the joint names of IN-PETROL/UT BANK LIMITED, ACCRA, (hereinafter referred to as the Bank), we herein bind ourselves, heirs, executors, administrators and

assigns_____ DATED THIS 07 DAY OF JANUARY, 2015.

In furtherance to this undertaking, we indicate below the schedule of how payments would be made to your good self and UT Bank Limited.

PAYMENT DATE	PAYEE	AMOUNT GH¢
30TH DAY AFTER COMMENCEMENT OF LOADING	IN-PETROL GHANA LIMITED/UT BANK LIMITED	2,145,561.60
32ND DAY AFTER COMMENCEMENT OF LOADING	IN-PETROL GHANA LIMITED/UT BANK LIMITED	2,145,561.60
34TH DAY AFTER COMMENCEMENT OF LOADING	IN-PETROL GHANA LIMITED/UT BANK LIMITED	2,145,561.60
36TH DAY AFTER COMMENCEMENT OF LOADING	IN-PETROL GHANA LIMITED/UT BANK LIMITED	2,145,561.60
40TH DAY AFTER COMMENCEMENT OF LOADING	IN-PETROL GHANA LIMITED/UT BANK LIMITED	2,145,561.60

Exhibit E does not provide for the price of the gasoil being set at the date of loading, neither does it provide for the price to be linked to any market factors. The clear wording of the CIPU aligns with the plaintiff's position, upheld by both courts below, that, the contractual obligation of defendant was to pay the sums fixed and guaranteed in the CIPU over a ten day period

that ran from the 30th day of commencement of loading to 40th day. There was nothing more besides.

The trial court was therefore right in finding that the obligation to pay that was breached, was linked to the date of commencement of loading as set out on exhibit E. Having accepted that the obligation to pay matured on 12th February 2015, and payments after 12th February 2015 constituted a breach of contract, it is clearly inconsistent with the court's own holding, for the court to turn round and accept the calculations on exhibit G that assert that the quantum of money due on the contract was to be calculated in accordance with NPA rates as at the dates of each loading. That position is totally contradictory of the content of exhibit E, and the scope of the transaction between the parties.

The only focus for calculating plaintiff's losses that should have been accepted by the court was what the quantum of payment was supposed to be on 12th February 2015, and what plaintiff had lost in payments as at 21st April 2015, when the breach that began on 12th February was finally cured. This is what would have clarified the true sum required for restitution of plaintiff's required earnings on 12th February 2012 - the alleged date of breach - and satisfied the other requirements of the law on damages being what could be foreseen as lost when there is a breach of contractual duty. It is also the only context in which the alleged loss would be proximate to the breach.

To present the case that the final price of the gasoil in issue was to be determined after complete discharge of the product is to set up a case contrary to the terms of the very contract that the plaintiff's action relied on. With the terms of exhibit E laid out before the court, the alleged claim that the sum due for the gasoil was linked to the changing price differentials of NPA

should have been dismissed by the trial court and the court of appeal, because it is wholly unsupported by the clear terms of the contract between the parties. I do recognize that the parties accepted that the gasoil price changed from the GhC10,727,808.00 stated on exhibit E to GhC11,755,342.48 on exhibit C. But the only inference one can make from that change is that the parties accepted a price change to GhC11,755,342.48 but not that the final purchase price was to be linked to NPA price and forex rate differentials, or was to be determined in accordance with loading dates..

The second defect in plaintiff's claim and acceptance of the evidence presented arises from the general principle underlying the award of damages that, a plaintiff who manages to prove losses flowing from breach of contract is entitled to compensation for the pecuniary loss sustained, as if the contract had been performed. This is the principle of *'restitutuo in integrum*'.

In **Juxon-Smith v KLM Dutch Airlines 2005-2006 SCGLR 438,** the Supreme Court stated the principle in these words on page 455 to 456 *'...in contract, the correct statement of the law on the measure of damages is: where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed*'. See also **Royal Dutch Airlines & Another v Farmex Ltd 1989 -90 2 GLR 623 at 625** where this court stated the principle on page 644 thus: *'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 can do it, be restored to the position he would have been in had that particular damage not occurred. This means that the plaintiff has to be put in the position he would have achieved* ***if the contract were performed****, and he is allowed to recover damages on the basis of returning him to the position before the contract was made. The amount of money adjudged to be due him must be assessed* ***as at the time the***

contract was broken.....*What was required to put the plaintiffs in the position they would have been in is sufficient money to compensate them for what they had lost*'. (emphasis mine)

Thus, damages cannot be awarded to place the plaintiff in a position that is not justified from the breach, neither can damages be awarded for loss that is too remote from the alleged breach. In **Victoria Laundry (Windsor) Limited v Newman Industries Limited 1949 2KB 528**, the House of Lords per Asquith LJ said on page ...that *'the test of remoteness was whether the loss was 'reasonably fore-seeable as liable to result from the breach*'.

This is why a claim in special damages must, apart from indicating the source of the loss, also provide precise particulars of how the losses were calculated. **Chitty on Contracts** cited supra, states on page 1799 that '*Special damage must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded, since the purpose of pleading special damage is to prevent surprise at the trial by giving the defendant prior notice of any item in the claim for which a definite amount can be given in evidence'*.

In the instant case, it is clear that the appropriate question that could resolve any award of damages to plaintiff, and that should have been the consideration of the court, was how much in dollars the plaintiff would have obtained if defendant had paid for the sums stated on exhibits C or E by 12th February 2015, and how much in dollars the plaintiff actually received by 21st April 2015. This could be the only tenable measurement of losses, but not projections around NPA fixed prices of gasoil as at the dates of loading.

As noted earlier, the statement of claim showed a deplorable paucity in exact particulars of how the claimed losses were arrived at. Now, whether or not a

party is entitled to damages or any quantum of pecuniary losses awarded arising from a breach of contract is a matter of law, and that paucity should not have allowed the high court to go on a market odyssey for NPA related price differentials, because of alleged industry arrangements.

The principles a court can apply to resolve any dispute is the law on that area of dispute and nothing different As stated in **Harlley v Ejura Farms (Ghana) Ltd 1977 2 GLR 179 at 209**, *'Where the question, ...whether upon admitted facts, certain legal consequences follow, then a decision as to whether they follow or not is a question of law, never of fact*'.

Neither the plaintiff nor the court had the luxury of conjuring any parameters for arriving at the losses the plaintiff was supposed to have sustained from the defendant's breach of the payment schedule. As long as a cause of action is identified as breach of a contract, the parameters for a court award have been fixed by law to be losses that were foreseeable, proximate to the performance of the contract, and restitutionary for the victim of the breach.

As can be seen from the contents of Exhibit G, the calculations thereon showed no relationship to any actual transaction that plaintiff had itself been engaged in as a result of the failure of defendant to pay for the gasoil in accordance with the undertakings, or actual changing of the payments of the defendant into dollars for the purpose of paying same to its bankers for the letters of credit.

Exhibit G was an expression of the Ghana cedi to dollar value of what the plaintiff considered it would have earned, if the cost of the gasoil sold had been divided piecemeal and each lot calculated on the dates it was loaded. And while projecting these figures that it could have earned per various lots

on the dates of loading, plaintiff interestingly failed to take cognisance of the dollar value of the payments that it was receiving from defendant during that same period of time.

The significant point to be made here is that these projected earnings cannot reflect what was needed to bring plaintiff into restitution of what it should have been paid by the 12th February 2015, because the calculations took no account of what plaintiff was receiving during the same period of time from defendant in Ghana cedis, to allow for fair and full accounts between the parties.

Because of this failure on exhibit G as evidence of alleged losses of plaintiff, it resoundingly failed all the tests of foreseeability, proximity and restitution required for the award of losses, by any name called, flowing from breach of contract.

Payments made by defendant

The evidence of defendant's payments has to be pieced together from various parts of the records. First, Plaintiff pleaded in paragraph 11 of its Statement of claim, and stated in paragraph 26 of its' witness' statement that defendant's first payment of **GH2,260,885.53** was done on 9th February 2015.

Plaintiff also tendered its bank statement as Exhibit F. Exhibit F shows the payments made by defendant from 4th March 2015. In addition to Exhibit F, plaintiff counsel pointed out various dates on which defendant was supposed to have made payments, when cross examining the defendant's witness. Most of these payments can be identified on exhibit F.

The payments are: **GhC2,260,885.53** on 9th February 2015; GhC**1,103,035.33** and **GhC217,238.**12 respectively on 2nd March 2015; GHC**2,260,885.53** on 10th March 2015; GhC**1,866,907.92** on 27th March 2015; **GhC1,800,000** on 7th April 2015; GhC**1,615,879.35** on 9th April 2015; and a final and last payment of GhC **635,890.66** on 21st April 2015.

The defendant's payments totaled GhC11,760,722.44. In arithmetic sense therefore, by 21st April 2015, the defendant had truly paid plaintiff fully for the gasoil purchased under exhibit E being GhC**10,727,808**, with an additional **GhC1,032,914.44.** Exhibit C, the pro-forma invoice given to defendant on 13th January 2015 that set the gasoil sold at a new cost of GhC11,755,342.48, was also overpaid by GhC5379.96

The record also shows that Exhibit G is totally devoid of the different changes to Forex rates applied to petroleum products over the months of February and April. Without evidence on what defendant's Ghana cedi payments meant in dollars as at the dates they were made, there is no proper record to even allow an award in restitution for plaintiff, if indeed, these payments did not reflect the dollar value of the gasoil as at 12th February 2015.

In essence therefore, though plaintiff was alleging losses on the basis of delayed payments, the calculations on exhibit G were artificial and unconnected to either Exhibits C and E, the only contracts on the transaction, and unconnected to exhibit F, the record of payments.

NPA price differentials

But this is not the only difficulty with the artificial record that exhibit G represents. Plaintiff's own case regarding entitlement to the alleged NPA

price differentials is contradicted by its own pleadings. Plaintiff stated in paragraph 6, 10 and 11 of its statement of claim that:

6. Plaintiff avers that in fulfillment of the functions and objectives of the national Petroleum Authority, bulk distribution companies which by virtue of price and/or foreign exchange fluctuations make profits over and above the pricing set by the Authority pay the resulting profits referred to as 'over recoveries' to the National Petroleum Authority and where losses are made due to price fluctuations referred to as 'under recoveries the oil companies are reimbursed for the losses.'

10. *Plaintiff avers that to the knowledge of defendant the payment in Ghana cedis was scheduled in such a manner that plaintiff would effectively recover with profit the entire amount of US$3,759,811 being the purchase price for the 5500 metric tonnes of gas oil plaintiff purchased from BP Oil International Limited but that the failure of defendant to pay in accordance with the schedule agreed upon culminated in plaintiff losing a total amount of GH2,426,972.53 in the transaction which is the subject manner of this suit.*

11. Plaintiff avers that apart from the first payment of GHC2,260,885.53 by cheque on 09/02/15 by defendant, all subsequent payments were made outside the agreed schedule which resulted in losses to plaintiff *due either price changes and/or exchange rate differentials as determined by the National Petroleum Authority*

To these pleadings, the defendant admitted that there was an industry arrangement for companies to recover losses or to hand over profits to the National Petroleum Authority. It answered in **paragraphs 1, 2, 3, 6 and 7** of its Statement of Defence:

1. *The defendant admits paragraphs 4 to 6 of the statement of claim.*

2. The defendant admits paragraph 7 of the statement of claim in so far as it relates to the oil and gas industry but ***denies paragraph 8 of the statement of claim***
3. The defendant in answer to paragraphs 9 to 11 avers that it paid the plaintiff for the 5500 metric tonnes of gas oil supplied it in full and the plaintiff indeed accepted the said payment without any complaint.

6. The defendant in further denial of the above paragraphs aver that the defendant merely assisted the plaintiff with the verification process by providing the relevant information to enable the plaintiff like all the other companies claim under recovery forex differentials from the Ministry of Finance through the National Petroleum Authority

7. The defendant avers that it remains committed to provide the relevant necessary information to the appropriate authorities for the payments to the plaintiff and remains committed in assisting the plaintiff recover the amounts due it from the Ministry of finance through the National Petroleum Authority

The Reply plaintiff gave to this defence is found in paragraph 8 of its Reply in these words:

8. *Plaintiff says in reply to paragraphs 6 and 7 of defendant's statement of defence that defendant as an oil marketing company (OMC) could not have collected forex losses on behalf of plaintiff under the arrangement with the National Petroleum Authority and that defendant's breach of the irrevocable payment schedule between plaintiff and defendant resulted in losses to plaintiff for which reason plaintiff has a cause of action against defendant.*

My lords, the above pleadings can only mean one thing. The plaintiff acknowledged a system in place for companies to recover any losses arising

from price and foreign exchange differentials in oil transactions generally, through the National Petroleum Authority. This was an industry arrangement that cast an obligation on a national institution to regulate losses and profits due to trade in oil by absorbing them.

From the plaintiff's own pleading therefore, it cannot be inferred that this regime cast an obligation on oil trading or marketing companies whose business transactions have been the cause of another company experiencing under-recovery of trading capital or undue profits to pay the precise price and foreign exchange differentials set in every pricing window.

The defendant confirmed this regime and pleaded in its Statement of Defence that it had provided all records necessary for plaintiff to utilize this system if it experienced any 'under' or 'over recoveries' in the transaction with defendant. In its Reply, plaintiff did not admit or deny that it had used the system to recover any alleged losses connected to price differentials or changes in foreign exchange rates. It simply replied that it had a cause of action against the plaintiff.

The only conclusion from these pleadings is that, even as extrinsic evidence, it could not have been in the reasonable contemplation of the defendant that should it fail to comply with the scheduled payment, it would be called upon to stand in the shoes of NPA and pay up the same sets of moneys that NPA would pay or claim as part of its regulatory function. This is why on the foreseeability test required for proof of general or special damages, the claim for 'losses' centered on the price and foreign exchange differentials should have failed.

It should also have failed because it was the case of the plaintiff that it was an importer of oil products, and not a retailer of gasoil. Having sold the gas oil in issue, it could not have been in the reasonable contemplation of the defendant, as purchaser of the gasoil, that should it fail to pay for the gasoil it had bought on time, it would be depriving the plaintiff of higher prices for the same oil the plaintiff had already sold before the default period, and so plaintiff should be compensated with market retail prices. Indeed, this is why because of the restitution requirement in awarding reliefs related to breach of contract, plaintiff's focus in this action should have been on proving what it was entitled to as at 12th February 2015 in dollars, and the value in dollars for the Ghana cedi payments it received during the default period. This overreaching into what the gasoil could have cost on the dates of loading, in the face of exhibits C and E, moved plaintiff's evidence out of the purview of its cause of action

Did Plaintiff prove any case in law to merit any reliefs just because defendant undoubtedly breached its undertakings in the payment schedule in the CIPU?

In **Asare-Baah 111 v Attorney General & Electoral Commission 2010 SCGLR 463 cited supra, this court stated on page 474** *'To identify the real substance of actions brought before the court, we have observed that the proper action is to examine the writ as well as the pleadings and in this type of litigation, the reliefs and the facts (verified by affidavit)*'

See also the decision of this court in **Opoku & Others (No 2) v Axes Co Ltd (No 2) 2012 2 SC GLR 1214** where the court stated on page 1222 that *'The cause of action on which the claim is founded must be determined by looking only at*

the writ and the accompanying statement of claim, without any other extrinsic document.'

In **Phipson on Evidence, 19th Edition Sweet & Maxwell, 2018**, the learned author defines cause of action on page 1550 as *'a cause of action may be taken to be the minimum facts that a claimant must allege and prove in order to succeed in his claim*'.

From the seminal definition by Lord Diplock in **Letang v Cooper 1965 1 QB 232**, *'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*'.

The plaintiff's cause of action was unarguably in breach of contract. The failure to pay for the sum endorsed on the CIPU by 12th February 2015 was the minimal fact that allowed plaintiff to claim for reliefs directly flowing from that failure. So it is the duty of this court to also determine whether the plaintiff proved any losses from that breach of contract to merit a variation of the high court judgment, instead of a setting aside of the awards. I am afraid that from the records before us, there was no evidence that related to the cause of action stated in the pleadings that could assist us to grant any reliefs.

If plaintiff lost money in changing the defendant's Ghana Cedi payments into USA dollars for the purpose of paying for the dollar sum invoiced on exhibit B and supported by the letters of credit given in its favor by UT Bank Ltd, the particulars of those losses should have been provided in the pleadings and shown in the evidence. A case was not even made in the pleadings regarding losses on the dollar value of delayed payment, to allow us to consider it. The case made was an obscure claim to the market value of the gasoil on the dates

it was loaded, without a corresponding acknowledgment of receipts as at those dates.

If plaintiff wanted general damages, which in its estimation, ought to be measured at market retail prices fixed in the pricing window as at each date of loading, and also at the forex related price on the dates of payments, that case should have been articulated in its pleadings and reliefs, to enable the defendant to present its defence to the specific position in law and fact, if a defence existed. There was no case for general damages made on grounds of changing market prices during the default period. And this court cannot consider awarding such damages, because the evidence shows that plaintiff was fully paid for the gasoil, with more besides, by the end of the default period. So any damages would have to consider those payments made.

A duty is always cast on a party to prove the actual case it asserts, and if it fails to provide proof of matters set up in its own case, a court has no option but to dismiss its case. The tenets from the seminal case of **Dam v Addo** cited supra continue to hold sway. A court cannot set up a different case for a party who comes to court riding on a different cause of action in order to give it reliefs.

Since there was no proof of entitlement to the nature of losses claimed, in the light of the cause of action set up by plaintiff, the claim for **Gh2,426,972.53** ought to have been dismissed by the trial court and we so dismiss it. The judgment for reliefs (a) and (b) is reversed.

THE AWARD OF PAYMENT OF ANY MONEY DUE TO UT BANK FROM LOAN OF GHC3,783,866.88 - Claims (c) and (d)

On the totality of the evidence brought to the courts, there is no link between the contractual obligations of the plaintiff to its banker and supplier found in exhibits B, D, and 3, and the loan draw down line item found on the Plaintiff's bank statement exhibit F. There was also no link between the contractual obligations between the plaintiff, its banker and defendant expressed in the payment schedule on exhibit E, and the said loan in issue. Claims (c) and (d) ought to have been dismissed as well.

Before closing off this judgment, it must be clarified, since this is the last court of appeal, that the evidence before this court can only lead to the conclusion that defendant was indeed not privy to the plaintiff's transactions with its bankers, though the trial judge went on an ambulatory course to find that defendant had prior knowledge of the letters of credit and loan obtained by plaintiff, and the court of appeal side stepped that finding.

As already stated, the plaintiff's loan facility tendered as exhibit 3 is dated January 2014, and the letters of credit (exhibit D), is dated 19th December 2014. Both of these predated the CIPU, and so it would be a chronological impossibility for the letters of credit to have been issued on the basis of the CIPU.

Both the letters of credit and invoice were transactions conducted in dollars, while the payment guarantee on the CIPU was fixed in Ghana Cedis, without room for changes to the dollar currency. It can also be seen that neither the letters of credit (exhibit D) nor the invoice for the gasoil (exhibit B) mention the defendant in any manner whatsoever, unlike the CIPU that the defendant actually issued in favor of UT Bank Limited.

Plaintiff's sole witness also made it clear that defendant was only informed about UT's requirement of a CIPU and defendant obliged plaintiff by giving it the CIPU. He said on page 98 of this appeal record

'A. *This transaction was not a direct transaction between UT Bank and the defendant but a direct transaction between plaintiff and the defendant. UT bank financed the product for the plaintiff by providing the letter of credit to British Petroleum (BP) our supplier and it was a requirement from UT Bank that the buyer of the product produces a payment guarantee and this was conveyed to the defendant upon which they produced their irrevocable corporate payment undertaking. The bank was aware they had to pay the LC to BP on 24th February 2015. So as a result, we gave the Defendant some credit period and then after to pay according to schedule such that we will recover all the amount applied to Bank of Ghana for USD for the bank to pay the LC on the 24th February 2015*'.

This testimony clarifies that the plaintiff, aware of UT's conditions for the LC, and aware of its own obligation to UT, asked the defendant for the CIPU and the defendant obliged by giving the plaintiff the CIPU, and nothing more.

Finally, the fulcrum of plaintiff's case was that the physical loading of the gasoil by the defendant commenced on 2nd January 2015. It is this triggering date that defined defendant's obligation to pay the invoiced sum by 12th February 2015. 2nd January is five full days before 7th January, the date that the CIPU was even signed. This means that even the sale transaction between plaintiff and defendant was not dependent on the payment guarantees in the CIPU. The CIPU constituted a later guarantee given to plaintiff and its bankers in assurance of defendant's payment for the gasoil, after the transaction had been put in effect with a first loading on 2nd January 2015, and nothing more. Its breach should have invited a determination of the actual

losses of the value of the money over the default period, and not what the same gasoil could have fetched over the default period.

The appeal is allowed. The trial court's awards of reliefs (c) and (d) are against the weight of evidence and are hereby set aside, as well as the award on costs. The judgments of the high court and court of appeal are set aside and plaintiff's suit is dismissed.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

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