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

AMADU, JSC

CIVIL APPEAL

NO. J4/33/2019

29TH APRIL, 2021

MAERSK GHANA LIMITED ……. DEFENDANT/APPELLANT/APPELLANT

VRS

B. T. L. LIMTED ……. PLAINTIFF/RESPONDENT/RESPONDENT

JUDGMENT

AMEGATCHER JSC:-

1. This is a maritime dispute which has travelled from the High Court through the Court of Appeal and now before the Supreme Court. In this court, the maritime aspect has, to a considerable extent, been reduced into a procedural matter of capacity to sue and the quantum of damages awarded for damage to perishable cargo.

2. The Plaintiff/Respondent/Respondent (hereafter referred to as the Respondent) instituted this matter against the Defendant/Appellant/Appellant (hereafter referred to as the appellant) on 28th June 2010, seeking the following reliefs endorsed on the Writ of Summons and Statement of Claim:

    a. **Specific damages in the sum of Forty – Six Thousand Three Hundred and Fifty dollars ($46,350.00) to be paid by Defendant to Plaintiff being the cost of 1,030 boxes of fresh yams, the freight, clearing and handling charges in the USA.**

    b. **Interest on the said sum of Forty-Six Thousand Three Hundred and Fifty dollars ($46,350.00) at the commercial bank lending rate of interest from 1st February 2010 to and inclusive of the final date of payment.**

    c. **General damages for the inconvenience, pain, distress and loss of customers and income to Plaintiff resulting from not fulfilling their contractual obligations to their customers because of Defendant' negligence and resultant damage.**

    d. **Cost**

3. The respondent is a limited liability company set up under the Companies Act and engages in the export of non – traditional foodstuffs to the United States of America (USA) while the appellant is a shipping line based in the port of Tema, Ghana. The respondent contends that since 2002 it has engaged the services of the appellant in shipping its goods to the USA and had so far shipped over one hundred, 40-footer containers through the appellant. On 5th January 2010, respondent contracted the appellant to ship 1,030 boxes of fresh yams in a 40-footer refrigerated container to the USA. The appellant brought the refrigerated container to the respondent in Accra on 11th January 2010, where the boxes of fresh yams were loaded, and the container returned to the Meridian Port Services at the Tema Port on 12th January 2010. At the Port, while the container was undergoing a Pre-Trip Inspection (PTI), the reefer technician noticed that the reefer unit of the container had malfunctioned and sent a message to the appellant requesting for another refrigerated container to transfer the boxes of fresh yams. The respondent says that it later received a phone call from the appellant informing it that the container which had the boxes of fresh yams loaded into it had malfunctioned and that the boxes of fresh yams had been transferred into another container. Though the respondent through its agent sought to see the state of the fresh yams, it was not allowed access by the appellant saying that the container was in a restricted area and out of bounds.

4. The respondent says that the appellant in a bid to avoid paying damages for its own negligence in supplying a faulty container, went ahead and shipped the consignment to the USA at a great monetary loss to the respondent. The consignment on arriving in the USA was found to have gone bad. The respondent, upon noticing the bad state of the yams, tried to contact the USA branch of the

appellant company to make a complaint but to no avail thus compelling it to contact the appellant to make a complaint. Respondent was there informed to put in a formal claim and assured that the matter would be resolved when the representative returned to Ghana. The respondent's representative upon arriving in Ghana made a formal complaint to the appellant through its solicitors, Matthews Consult. However, despite the demand notices and several reminders to appellant to pay for the loss in accordance with international shipping regulations and appellant's own terms and conditions of the contract of carriage, it failed to do so.

5. The respondent contends that the appellant blatantly and negligently breached the duty owed to respondent under the shipping contract. This was by not shipping its 1,030 boxes of fresh yams from Ghana to the USA in the state in which it was loaded onto appellant's refrigerated container by respondent in Accra under the required temperature and in good condition. The appellant on the other hand contends that its duty was to supply the container to the respondent. The respondent was responsible for loading and returning the container to appellant for shipping. The appellant, further, says that it is not liable for the contents, weights, quantity nor quality of the cargo stored in the said containers. The appellant admits that its attention was drawn to the malfunctioning of the said reefer by officials of the Meridian Port Services, and, therefore, supplied another container to transfer the boxes of fresh yams into it of which appellant informed the respondent. It is the appellant's contention that it conducted a survey of the condition of the said cargo in the presence of all interested parties including officials from Customs Excise & Preventive Services (CEPS) and the said cargo was found to be fully wholesome before same was shipped to the USA. It further

contends that the said cargo was cleared from the port in the USA by the agents of the consignee without any objection whatsoever.

6. The appellant further contends that there was nothing endorsed at the back of the bill of lading giving any notice of any loss or damage occasioned to the goods at the port of discharge in Newark, New Jersey, USA. It also further contends that as long as the bill of lading was not endorsed giving notice of any loss or damage, it forms a prima facie evidence that the goods were delivered in the same condition in which it was received by the appellant in Ghana for shipment. The appellant also contends that in terms of the conditions of carriage endorsed on the overleaf of the bill of lading, it is exempt from any tortious or contractual liability from loss or damage to goods in its actual or constructive possession in respect of this contract of carriage. The appellant further contends that there is no evidence to show how the yams were declared unwholesome and destroyed upon arrival in the USA. The appellant maintains that at all material times to the institution of this action, the respondent's interest, risk and title in the goods had passed onto the named consignee: Kyewaa LLC and, therefore, the respondent could not maintain this action for want of capacity.

7. On the 27th day of June 2013, the High Court, Accra presided over by Amoako Asante J (as he then was) delivered Judgment in favour of the respondent. The trial court found the appellant liable to the respondent for the damage caused to the yams because of its negligent handling of the carriage. The court entered judgment in favour of the respondent to recover the sum of US$46,350.00 special damages together with interest, "nominal general damages of Ghc20,000.00" and costs of Ghc5,000.00. The appellant dissatisfied with the Judgment of the High Court lodged an appeal at the Court of Appeal dated 8th July 2013. On 23rd February 2017,

the Court of Appeal dismissed the appeal as lacking merit. The quantum of the general damages was, however, reduced from GHC 20,000.00 to GHC10,000.00. The award of special damages was also revised to nominal damages and the amount reduced from US$46,350.00 to US$30,000.00. The appellant, again, dissatisfied with the Judgment of the Court of Appeal lodged this instant appeal at the Supreme Court. The respondent, also, dissatisfied with the same Judgment on the issue of special and general damages also cross appealed.

8. In this court, the record reveals that after the Court of Appeal's findings on liability, the appellant threw in the towel on that leg of the claim and limited itself to that part of the judgment awarding the respondent nominal damages of US$30,000.00 and the capacity of the respondent to institute the action. We are, therefore called upon to decide quantum of damages and the capacity of the respondent to institute the action.

PRELIMINARY LEGAL OBJECTION:

9. On 25th September 2019, the respondent filed a notice of preliminary legal objection under rule 17(1) of the Supreme Court Rules, C.I. 16. The appellant had also given indication of taking a similar step in its Statement of Case. However, at the hearing of the appeal, no such notice had been filed by the appellant showing that it had abandoned the idea. The basis of the respondent's legal objection was that appellant had stated in its Statement of Case to this court that it had paid the judgment debt in this appeal. However, in the opinion of the respondent, appellant's calculation of the judgment debt was wrong so there were still outstanding payments to be made by appellant to respondent.

This notice, raising a preliminary legal objection, was frivolous to say the least. The rules of court in operation in the various hierarchy of the courts have provisions for dealing with disputes relating to calculation of judgment debts. Lawyers plying their trade within the justice delivery system are under an obligation to familiarise themselves with these rules so that they can represent the interest of their clients to the best of their professional ability. The preliminary objection contemplated by rule 17(1) of C.I. 16 is a legal objection which should be decided by the court on the face of the appeal record without the need to attach exhibits to the notice as was done in respondent's notice. The grounds for the objection must also be legal. In ordinary parlance, the result of a successful objection is what we call a technical knockout. Examples of grounds anticipated under rule 17(1) are the filing of a notice of appeal to this court outside the time limit provided by the rules, failure to obtain leave of the court or special leave before filing an appeal contrary to a mandatory provision of the rules and failure to settle records of appeal as required by the rules. Others are failure to follow a mandatory provision of the rules or order of the court relating to the appeal, the appeal showing no reasonable cause of action and the absence of proper parties in the appeal due to failure to substitute a deceased party. Any of these grounds may end up in the appeal being dismissed in limine or if the objection is capable of remedy, to place the appeal on hold until the basis of the objection is rectified.

None of the grounds contemplated by rule 17(1) has been raised in respondent's notice of preliminary objection. We find the current notice of preliminary objection legally incompetent and have no hesitation in dismissing same.

GROUND (B) OF THE NOTICE OF APPEAL-CAPACITY OF A CONSIGNOR TO SUE:

10. The appellant in this ground contends that the Court of Appeal erred in holding that the respondent rather than the named consignee in the bill of lading had the capacity to institute this action. The appellant argued that in accordance with the Bills of Lading Act, 1961 (Act 42) and the Sale of Goods Act, 1962 (Act 137), the respondent did not have the capacity to institute the present suit and invited the court to dismiss the action in limine and allow the appeal. Appellant's reason being that the subject matter of the suit which is the cargo of yams had at all material times to the institution of the suit by the respondent been passed from the respondent to the consignee, Kyewaa LLC. The appellant referred to Exhibit "A" the bill of lading, that listed the respondent as the consignor of the consignment of the yams and Kyewaa LLC as the consignee. In support of its contention, it referred the court to section 7(1) of Act 42 supra which falls under the part: **Rights and liabilities of consignees and endorsees** and is headed: **Consignees or Endorsees of Bill of Lading may sue.**

11. The respondent, however, submitted that respondent had the capacity to institute the action and that the company, BTL Ltd. and the consignee, Kyewaa LLC were owned by the same shareholder who transacted the business of exporting yam, gari and smoked fish from Ghana to the United States to sell for profit. When in Ghana, the name of the business is BTL and in the US it is Kyewaa LLC where respondent's representative and her daughter Ruby Chriss are the Directors. Further, respondent's representative paid for the freight and the cargo expenses through Kyewaa LLC, the company she runs in the US with a Bank of America money order.

12. The Sale of Goods Act 1962 (ACT 137) is an act which regulates contracts in which goods are sold and bought. The Act lays down a few compulsory legal rules concerned with an array of presumptions and implied terms, which aim at reflecting the commercial expectations in most agreed sales contracts. In the absence of any contrary agreement these terms will govern a contract within the Act's remit. It can be gleaned from the record and appellant's Statement of Case that appellant relies heavily on section 61 of the Act which deals with cost, insurance and freight in submitting that the respondent did not have the capacity to bring this suit because the risk and title of the property had transferred to Kyewaa LLC.

13. We are not attracted by the submissions of the appellant's counsel. We have looked at the Sale of Goods Act within the ambit of the facts in the appeal before us. The Sale of Goods Act 137 is an Act **"to codify with amendments the law relating to the sale and hire purchase of goods."** By the provisions of section 1, it is limited to contracts whereby a seller agrees to transfer property in goods to a buyer for a consideration called the price, consisting wholly or partly of money. It thus deals with the contractual relationship between a seller and buyer and the responsibility, risks and title associated with the goods in question. Even the provisions made in Part VII for C.I.F and F.O.B sales referred to by counsel for appellant in sections 59-61 are confined to obligations of sellers and buyers in goods to be shipped under contracts analogous to those sales.

    We do not think the Sale of Goods Act has any bearing on this appeal. There is no dispute between a buyer and a seller on ownership of goods or when the risks associated with the goods had been transferred. The appeal before us deals with

the contractual agreement or relationship between a carrier (appellant) and a shipper (respondent) and whether a breach of contract had occurred because of the appellant's negligence. On the contrary, the Bills of Lading Act focuses on commercial carriage of goods by sea and the relationship between the consignor and the carrier, the consignor and the consignee and the consignee and the carrier about the carriage of the goods and its associated responsibilities and risks. Section 1 of the Act makes it clear that the provisions and the Hague Rules of 1924 shall apply to **"the carriage of goods by sea in ships carrying goods from any port in Ghana to any other port whether in or outside Ghana."** Section 7 relied on extensively by counsel for the appellant provides as follows:

"7 (1) A consignee of goods named in a bill of lading, and an endorsee of a bill of lading to whom the property in the goods mentioned in the bill passes under the contract in pursuance of which the endorsement was made, shall have transferred to and vested in that consignee the rights, and be subject to the same liabilities, in respect of the goods, as if the contract expressed in the bill of lading had been made with the consignee or endorsee.

(2) Nothing in this section shall prejudice or affect any right of stoppage in transit or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being a consignee or endorsee, or of his receipt of the goods by reason or in consequence of the consignment or endorsement.

Our understanding of section 7 of the Act is, first, it acknowledges the primary contract of carriage of goods by sea to be between the shipper (consignor) and carrier. Secondly, it imposes rights and obligations on carriers, consignors, and

consignees for domestic and international carriage of goods by sea. There may be cases where a consignor is no longer interested in or sue for goods lost at sea because the buyer whom the goods have been consigned to has discharged all obligations under the sale to the shipper. We cannot also turn a blind eye to the likelihood of the common law doctrine of privity of contracts being applied to defeat a claim a consignee who has paid outright for commercial goods may bring against a carrier for goods damaged or destroyed by the carrier in transit.

The Act provides a window for consignees to sue for compensation for loss on the production of a bill of lading which is consigned to it. The Act also makes it clear that in case of a dispute between the consignor and consignee about who has the right to sue to claim for compensation for damage to the goods, resort would be had to when ownership and risk in the goods would be deemed to have passed. Further, the Act provides a window for a carrier to sue to claim the cost of freight when a consignee who has no contract with the carrier refuses to pay for the goods. In our opinion, these rights and obligations do not take away or limit the contractual right of the consignor to sue the carrier and enforce any rights for the damage or loss to the goods shipped under the primary contract. These obligations carefully crafted into the Act is not surprising because since the turn of the twentieth century, international trade among nations have soared because of interdependence in the economic sphere. The increases in volumes of commercial carriage of goods by sea has compelled the international community to find a workable and uniform way of addressing the rights and obligations of the key players in the maritime business. The Hague Rules of 1924, which Ghana is a signatory to, now form the basis of national legislation in all the world's major trading nations. The Hague Rules is what Ghana has incorporated into domestic legislation by the passage of the Bills of Lading Act in 1961.

14. Bills of lading have taken such a centre stage in carriage of goods by sea that its legal significance and the effect of naming a party as a consignor or consignee should be of interest to us in this opinion. According to Black's Law Dictionary (9th ed, 2009), a bill of lading is a document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods. It is also a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods. The practice of looking to the bill as a contract may be said to be uniform; and indeed, has been adopted by Ghana's legislature in Section 2 of the Bills of Lading Act, 1961 (Act 42). Case law in England and Wales on the subject supports the interpretation given to the Ghana Act.

15. In the English case of **Fraser v. Telegraph Constructions Co. (1872) L.R. 7 Q.B. 566 at 571** Blackburn J. said:

> **"the Bill of Lading must be taken to be the contract under which goods are shipped, and until I am told differently by a Court of Error I shall so hold."**

16. Lord Hatherley L.C. also explained in the case of **Barber v. Meyerstein (1870) L.R. 4 H. L. 317 at pp. 329-330** that in the case of goods which are at sea being transmitted from one country to another, there has been adopted, for the convenience of mankind, a symbol which is a mode of dealing with delivery of actual possession of property. This is the bill of lading which is an effective representation of ownership of the goods, and its force does not become

extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

17. It has been the position in the development of the law of carriage of goods by sea in the eighteen and early nineteenth centuries that where there is a delivery to the carrier to deliver to a consignee or the goods are delivered to a carrier to be carried without any special contract being made, the right to sue for a breach of duty on the carrier's part appears to be in the person to whom the goods belonged at the time of the bailment. The pattern then was that a consignor can only sue a carrier if a special contract had been made between the two such as the payment of the freight. Failing that, the consignee so named on the bill of lading is the proper person to bring the action against the carrier should the goods be lost. This position tended to support the submissions of the appellant that the proper person to bring the claim against it was Kyewaa LLC, the consignee named in the bill of lading, because it, not the respondent, paid for the freight and therefore the latter lacks the capacity to bring this case. See Exhibit "C".

18. That would have been the case if the evolution on the law of Bills of Lading had ended there. However, later developments in the law of carriage of goods by sea in the latter nineteenth and the twentieth centuries have proved otherwise. Thus, in the case of **G.W. RY. V. Bagge (1885) 15 Q.B.D. 625** it was held that where goods are shipped in the ordinary way, and a bill of lading is taken for them by the shipper, without giving any notice that he is acting only as an agent, then whether the consignee is named or not, the contract is, in the first instance, between the ship owner and shipper himself, although the freight be made payable abroad by the consignee. The principle behind the above case is based on estoppel, which has the effect, as between the consignor and the carrier, of precluding the carrier from

disputing that the consignor has a sufficient interest in the goods to support an action for substantial damages for loss of or damage to them.

19. Dealing with the development of this area of maritime law in the twentieth century, three cases stand tall. We have, therefore, decided to discuss them because of their legal significance. In the case of **The Albazero [1976] 3 AII ER 129**, the plaintiffs ('the charterers') chartered a vessel from the defendants ('the ship owners'). A cargo of crude oil was shipped covered by a bill of lading issued pursuant to the charterparty and naming the charterers as consignees. During the voyage, the vessel and her cargo became a total loss. At the time of the loss the property in the cargo was no longer vested in the charterers but in the endorsees of the bill of lading ('The Cargo Owners'). The charterers brought an action in rem claiming damages against the shipowners for the loss of the cargo. A preliminary issue was set down to decide whether the charterers were entitled to recover damages despite that, at the time of the loss, they had no property of interest in the goods and had sustained no loss or damage by reason of their non-delivery. The House of Lords held per Lord Diplock that an original party to the contract was to be treated in law as having entered into the contract for the benefit of all persons who had or who might acquire an interest in the goods before they were lost or damaged, and was entitled to recover, by way of damages for breach of contract, the actual loss sustained by those for whose benefit the contract had been entered into.

20. The Albazero was followed by another House of Lords case of **Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] 2 All ER 145.** In this case the buyers agreed to buy from the sellers a quantity of steel coils. The steel was badly stowed on board the shipowners' vessel and suffered damage during the

voyage from Korea to the United Kingdom. During that voyage, and after the damage had occurred but before it was discovered, the sellers tendered the bill of lading to the buyers for payment, but the buyers were unable to make payment. The parties then agreed to vary their contract to provide that the sellers would deliver the bill of lading to the buyers to enable them to take delivery of the steel, that the buyers would not, however, become the holders of the bill of lading but would merely take delivery as agents for the sellers and that after delivery the steel would be stored to the sole order of the sellers. When the damage to the steel was discovered the buyers brought an action against the shipowners claiming damages for breach of contract and negligence. The trial judge found for the buyers in contract. On appeal by the shipowners, the question arose whether the buyers were entitled to sue the shipowners in negligence assuming they did not have title to the steel. The House of Lords held that the buyer of shipped goods who had not become the holder of the bill of lading but who had, under the terms of a cif or c & f contract with the buyer, assumed the risk of damage to the goods was prevented by his lack of legal ownership or possessory title from suing the shipowner in negligence for damage occurring to the goods during carriage. The fact that a buyer under a cif or c & f contract was the prospective legal owner of them made no difference to his inability to sue in respect of damage caused prior to his becoming the owner.

21. The most recent decision on the subject was delivered by the English Court of Appeal in **East West Corporation v DKBS 1912 A/S and another: Utaniko Ltd v P & O Nedlloyd BV [2003] 2 AII ER 700.** The claimants named a Chilean bank as the consignee of shipped goods. The bank did not complete payment for the goods, but the carriers released the goods to the bank. The claimant sued the carriers for the negligence in its agents releasing the goods. The trial court held

that the claimant by naming the bank as consignees in the bills and by delivering such bills to the bank for collection of the price on their behalf parted with all rights to immediate possession as well as the contractual rights of suit to the bank. The claimants contended that they had title to sue in contract by virtue of being shippers whose rights of suit had not been extinguished. On appeal, the English Court of Appeal applying The Albazero (supra), and Leigh & Sillavan Ltd v Aliakmon Shipping (supra) held that the claimants always had been acting for themselves and the bank had merely been their agents. The claimant being the original bailors of the goods to the defendants under the bill, a relationship of bailment continued in existence between the claimants and defendants, despite the transfer of the bills and contractual rights to the banks. So, the claimants retained the right to immediate possession of the goods at all material times, and on that basis were entitled to hold the defendants responsible in bailment for any loss or damage resulting from breach by the defendants of their duty as bailees.

22. These twentieth century English authorities are in tandem with our own understanding of the provisions of our Bills of Lading Act (supra). We apply the reasoning in those cases to the facts of this case and state the proposition that the consignor can sue the carrier for loss of or damage to the goods consigned despite that the consignor at the time of the loss did not have the property or the right to possession of the goods. Our conclusion is based on our acceptance of the definition of consignor in the long line of **Dunlop v Lambert cases [1839] 6 CI & Fin 600** that a consignor is a legal term of art meaning a person who himself or by his agents shipped the relevant goods or at least had an immediate right to possession of them on shipment. Thus, where goods are shipped in the ordinary way, and a bill of lading is taken for them by the consignor or shipper, without giving any notice that he is acting only as an agent, then if the consignee is named,

the contract would, in the first instance, be between the carrier (shipowner) and the shipper (consignor) himself, although the freight be made payable abroad by the consignee.

23. That is the scenario in the appeal before us. We are convinced that based on the analysis the facts portrayed in the evidence before the trial court, the respondent had the capacity to institute this action for damages to recover the losses incurred for the negligence of the carrier. This ground of appeal, therefore, fails and is accordingly dismissed.

GROUNDS 3(A) OF THE APPELLANT'S NOTICE OF APPEAL-THE AWARD OF NOMINAL DAMAGES:

24. The appellant has argued in this ground that the Court of Appeal erred in awarding respondent nominal damages of US$30,000.00 despite its finding that respondent had failed to prove its claim for special damages of US$46,530.00. At page 294-295 of the record, the Court of Appeal held as follows:

"Even though the plaintiff failed to prove special damages, it is still entitled to an award of nominal damages for the unwholesome yams because of the negligence of the defendant…Nominal Damages does not mean small damages but an amount to be determined by the court sufficient enough to adequately compensate the plaintiff for the loss of his goods. The amount should be as near as possible to the amount lost or value of the goods endorsed on the writ of summons…. Much as we believe plaintiff lost some yams and deserve damages, we do not think plaintiff has been able to establish the amount of US$46,530.00

as special damages. However, we hold plaintiff is entitled to nominal damages but not special damages as cost for the yams. We hereby award the plaintiff nominal damages of US$30,000 or its Ghana Cedi equivalent."

25. In coming to this conclusion, the Court of Appeal relied on the High Court cases of **Ahenkorah v Mubarak [1972] 1 GLR 429 at 430** and **Norgbey v Asante [1992] 1 GLR 586 at 516**. In the Norgbey case, Acquah J (as he then was) sitting at the High Court, Ho also relied on the dictum of Ollennu J (as he then was) in **Yirenkyi v. Tarzan International Transport [1962] 1 G.L.R. 75 at 78** and held as follows:

"The nominal damages referred to by Ollennu J. (as he then was) does not mean that the claimant should be awarded just a trivial sum. It is called nominal because on the face of it the claim is being made under the heading special damages, while in reality he is being awarded damages at the court's own discretion. For in making some award on failure to prove the value, the court is expected to have regard to the pre- and post-accident value of the property, and the figure to be awarded must be a reasonably fair approximation of the pre-damaged value of the property."

26. Counsel for the respondent also referred us to the Court of Appeal case of **Hullblyth Gh Ltd v Anglogold Ashanti Ltd [2013] 59 G.M.J 89 at 111-112** and this court's decision authored by **Twum JSC in Delmas Agencies Gh Ltd v Food Distributors Int'l Ltd [2007-2008] SCGLR 748** where both courts held that substantial nominal damages was payable in event of failure to prove special damages.

27. Our own research has revealed two other cases decided by the Supreme Court, all incidentally authored by Twum JSC in which a similar legal proposition was made. In the case of **Attorney General v Faroe Atlantic Co. Limited [2005-2006] SCGLR 271** Twum JSC, explaining the law on the award of general and special damages at page 290 of the report made the following statement:

"My Lords, in my view, a claim for damages for breach of contract will entitle the plaintiff to nominal damages only unless the plaintiff gives particulars of special damage. No particulars of general damage are ever ordered".

Again, in **Youngdong Industries Ltd v RoRo Services [2005-2006] SCGLR 816 at 839** his lordship reiterated his proposition on nominal damages as follows:

"The Plaintiff, as it has been pointed out, claimed general damages. General damage is such as the law will presume to be the natural or probable consequence of the Defendant's act. It arises by inference of the law and therefore need not be proved by evidence and may be averred generally. I accept that the detention of the Plaintiff's goods between 26th March 1994 and 29th July 1994 when the Defendant purported to hold them on behalf of the original Co-Defendant infringed the Plaintiff's right of possession of the goods. The law implies general damage in every infringement of an absolute right. I will award the Plaintiff nominal damages which I assess at ¢50,000,000.00".

In **Delmas Agencies Gh Ltd v Food Distributors Int'l Ltd (supra)** Twum JSC observed that where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. Where the plaintiff fails to prove

the measure of damages, **"the law implies general damage in every infringement of an absolute right. The catch is that only nominal damages are awarded"**.

28. Later decisions of this court delivered after Twum JSC led hypothesis on nominal damages made a volte-face on the proposition that where special damages is not proved, then the quantum of damages to be awarded would be nominal damages which should be substantial. The apex court did not follow the reasoning behind the awards in the earlier cases. The court, rather, seized the opportunity to formulate the correct position of the law. In the case of **Lizori Ltd v Boye & School of Domestic Science & Catering [2013-2014] 2 SCGLR 889**, also referred to us by counsel for the appellant, the Court of Appeal awarded the plaintiff Ghc10,000 being ten percent of the whole contract sum as nominal damages. On appeal Benin JSC speaking on behalf of the Court did not mince words at all in saying that nominal damages as the name implies must not be huge or substantial since its main purpose is to vindicate the right of the successful party in the action. The Court quoted a passage from McGregor on Damages (18th ed) paragraph 10-006 where the learned author said that in England, the range awarded for nominal damages by the courts over the years is between £1 and £5. The Court then reduced the award from Ghc10,000 to Ghc1,000.

29. The other case is **Birim Wood Complex Ltd v Andreas Bschor GMBH & Co. Kg [2016-2017] 1 GLR 194. In this case,** in assessing damages on appeal, Pwamang JSC expounded the position of the law on award of nominal damages at page 214 as follows:

"The settled position of the law is that General Damages are at large, meaning the court will award a reasonable amount having regard of the circumstances of

the case. A court may award nominal damages under General Damages where no real loss has been occasioned by the infringement of a right, or award substantial damages where actual loss has been caused to the plaintiff."

These later decisions are clearly inconsistent with the position taken earlier by this court. Somehow, the later cases did not cite the three cases propounded by Twum JSC and did not depart from them. Not surprisingly, courts lower than this court continued to apply the proposition that where a party is unable to prove special damages but has suffered substantial damages in tort or in contract, substantial nominal damages would be awarded as held by the Court of Appeal in this appeal. And why not? Because the settled principle is where a lower court is faced with two conflicting decisions of a higher court, the lower court may choose which one to follow or none. This choice is what has bedeviled our lower courts for a decade, majority opting for the Twum JSC proposition. We think this appeal has afforded us the timeous opportunity to liberate all courts from the shackles of this confusion and to restate the correct legal position in tandem with the common law. We find ourselves in entire agreement with the views expounded by our learned brothers Benin and Pwamang JJSC's in **Lizori Ltd v Boye & School of Domestic Science & Catering** and **Birim Wood Complex Ltd v Andreas Bschor GMBH & Co. Kg** respectively (supra).

30. A good starting point is the distinction (if any) between general damages and nominal damages. According to Black's Law Dictionary (9th ed. 2009), general damages are what the law presumes follow from the type of wrong or harm complained of and need not to be specifically claimed. In the absence of proof of special damages, general damages are what the law will give a person who has suffered actual loss or injury or has suffered a tort or breach of contract but has

suffered no significant losses because of such breach. They are usually damages at large and can be substantial or small (nominal) depending on the circumstances of each case. Types of damages which can be classified under the broad headline of general damages are Nominal Damages, Substantial Damages, Aggravated and Parasitic Damages, Exemplary Damages, and Incidental/Consequential Damages. The list is not exhaustive. Any of these classifications can be awarded by the court when exercising its jurisdiction to award general damages depending on the facts, evidence, and circumstances of each case.

31. In the case of nominal damages, Black's Law Dictionary (9th ed. 2009), explains are a trifling or small amount of money awarded to a plaintiff when a breach of contract or legal wrong is suffered but when there is no substantial loss or injury to be compensated. The practical significance of a judgment for nominal damages is that the plaintiff's legal right is vindicated, giving the plaintiff, in, effect, a moral victory. The judgment has the effect of a declaration of legal rights and may deter future infringements or may enable the plaintiff to obtain an injunction to restrain a repetition of the wrong. The obtaining of nominal damages will also, in many cases, entitle a plaintiff to costs. See Halsbury's Laws of England 4th Edition Vol. 12 par. 1104-1114; Murray on Contracts 5th Edition page 753 & 791 and Chitty on Contracts 13th Edition Vol 1 pages 1601-1603.

32. Based on our research, the correct proposition of the law governing the award of nominal damages as part of general damages may be restated as follows: Whenever a court is exercising its jurisdiction to award damages, it may award special damages, if a party pleads it and leads evidence to specifically prove that it has suffered that loss and expended money as a result. Where the party fails to prove the specific loss by evidence but can prove that it has suffered an injury or

loss, the law will presume general damages, but the classification under that head of damage which the court should award is substantial damages i.e., the result of an effort at measured compensation. On the contrary, where a party succeeds in proving by evidence that there is a breach of contract or an interference with a right but has suffered no actual injury, loss or damage, a court exercising the power to award general damages should grant the classification known as nominal damages. This re-statement of the law to the extent that it conflicts with that part of decisions of this court in **Attorney General v Faroe Atlantic Co. Limited** (supra), **Youngdong Industries Ltd v RoRo Services** (supra) and **Delmas Agencies Gh Ltd v Food Distributors Int'l Ltd (supra)** and all other previous decisions on classification of nominal damages as substantial awards made when special damages are not proved are overruled. This implies that this court has departed from that position by virtue of the powers vested in us by article 129 (3) of the Constitution. This is a significant public policy development because the misdescription of damages as nominal instead of substantial and the award of huge sums under wrong categorization could work an injustice to potential litigants who risk the danger of having their genuine awards reversed on appeal because of the wrong labelling and misapplication of the award.

33. In this appeal, the Court of Appeal concluded that the respondent did not lead any positive evidence to prove the cost of the yams and therefore had failed to prove special damages. The Court, rightly in our view, concluded that though the respondent could not prove special damages, the evidence led in support of the unwholesome yams arose from the appellant's negligence. The Court, further, held that the fact that the respondent lost the yams would entitle it to damages sufficient to compensate the respondent for the loss of the goods. However, it is the categorization of that type of damages as nominal damages and the award of

US$30,000.00 for that description that the Court of Appeal misapplied the law resulting in the formulation of this ground of appeal. The award of compensation for loss or damage cannot under any circumstances be nominal. Further, the award of the sum of US$30,000.00 out of a claim for US$46,350.00 cannot, by any stretch of legal imagination, be nominal. In our view, the Court of Appeal wrongly labelled the award of the US$30,000.00 as nominal damages. This ought to be corrected. While we agree with the submission of the appellant that US$30,000.00 awarded the respondent and labelled as "nominal damages" was totally wrong, we differ from the appellant's submission that the respondent is not entitled to substantial damages for the loss of the yams carried by the appellant to its destination in the United States of America. We differ because it has been proved that the appellant was negligent when in the absence of respondent, it transferred the yams into another container and thereby caused damage to the respondent's cargo of yams resulting in loss of income or profit. In any case, the appellant in this appeal is not attacking the finding on liability but the quantum of damages awarded as "nominal damages". Since we have concluded that the respondent is entitled to damages but the nomenclature under which the Court of Appeal granted damages is erroneous, we find this ground of appeal also unmeritorious and same is dismissed.

GROUNDS 3(i), (ii) and 3 (iii) OF THE RESPONDENT'S CROSS APPEAL-SPECIAL DAMAGES:

34. The respondent has cross-appealed for the sum of US$12,637.86 being special damages awarded by the trial court and found by the Court of Appeal to have

been proved at the trial but was not awarded by the intermediate appellate court. The amount is made up of US$11,453.36 being freight, clearing and handling charges paid to the appellant and US$1,184.50 cost of fumigation. At page 293 of the record, the Court of Appeal held that the respondent was able to prove the payment to appellant of US$11,453.36 and cost of fumigation of US$1,184.50 totaling US$12,637.86 but could not prove the actual cost of the yams it lost. However, in awarding damages at the end of the judgment, the Court of Appeal stated that the respondent is entitled to nominal damages but not special damages for the cost of the yams. The Court then went ahead to award nominal damages of US$30,000.00 to the respondent. It is this final order omitting special damages earlier acknowledged which prompted this cross-appeal.

35. In the case of **Royal Dutch Airlines (KLM) and Another v. Farmex Ltd (1989-90) GLR 266**, a case cited by the parties, the Supreme Court held as follows:

> **"with regard to the measure of damages for breach of contract, the principle adopted by the courts was restitution ad interregnum, thus, if the plaintiff has suffered damage, not too remote he must, as far as money could do so, be restored to the position he would have been in, had that particular damage not occurred. What was needed to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost."**

36. In the case of special damages, the law is clear that it must be specifically proved and aimed at compensating the affected person for actual loss suffered. Thus, in the case of **Ekow Essuman (Deceased) Subst. By Ruth Essuman (Mrs) Bodja Essuman & Nana Asare Bediako and Aboso Goldfields Limited; (Civil Appeal**

No. J4/39/2019 SC dated 11th December 2019**; Unreported)** Gbadegbe JSC speaking on behalf of the court expounded.

> **"it is observed that as the claims are derived from a contract and most of the heads of damage are in respect of specific sums of money that are computable by arithmetic calculation and the right thereto arose before the termination of the contract, they are in their nature special damages save the claim for general damages for breach of contract. In the circumstances, better practice required such claims to have been designated as such and all the monetary claims made under one relief with particulars of the separate amounts being provided. For example, going by the action herein, the amount being claimed as cost of tailings and the outstanding balance for haulage and the consequential loss of profits would have been lumped together as a claim for special damages."**

37. So strict is the rule construed that the failure of the plaintiff may prevent him from leading evidence at the trial on same as was said in the cases of **Ilkin v Samuels [1963] 2 All ER 879, 886** and **Hayward and Another v Pullinger and Partners Limited [1950] 1 All ER 581, 582** and concurred in by the learned authors of Atkin's Court Forms, 2nd Edition, Volume 32 as follows:

> **"Where, however, the plaintiff claims that he has suffered special damage, such damage must be alleged with particulars in his statement of claim, or he will not be permitted to lead evidence of it at the trial."**

38. It is the appellant's contention that the respondent did not plead special damages by particularizing same as mandated by law, and, therefore, is not entitled to it as

illustrated in the case of **Delmas Agency Company Ltd v. Food Distribution Company Ltd. (supra).** The respondent, however, contended that it submitted Exhibit "C" (delivery order found at pages 207-209 of the record) and Exhibit "IC" (fumigation cost found at page 209 of the record), showing proof for the payment of the freight and other incidental costs as well as fumigation cost. Prior to the evidence, respondent had pleaded the freight, clearing and handling charges in paragraph 26(1) of its statement of claim. Though not individually particularized, it was lumped together with the other heads. Thus, the appellant was put on notice from the commencement of the trial that respondent intended to make a claim for freight, clearing and other handling charges. Respondent was able to supply cogent evidence at the trial to prove the costs involved in the freight and other incidental cost (USD 11,453.36), fumigation cost (USD 1,184.50) without any serious challenge from the Appellant.

39. Thus, the learned justices of the Court of Appeal having reviewed the evidence and satisfied themselves that that leg of special damages was proved as held by them, were bound by law to award the sum to the respondent or give legal justification for not awarding that sum. The Court of Appeal by some oversight did not include that leg of special damages in its awards. We think it is an oversight because no reasons were given for the failure after the court had categorically dealt with it and found it to be proven in its judgment. It is the duty of this court to correct the oversight and in the interest of justice award that sum to the respondent.

40. We have taken a second look at the total sum of US$46,350.00 claimed by the respondent in this action. The trial court awarded the respondent the total sum even though at the end of the evidence the actual special damages proved was the

US$12,637.86. When this sum is deducted from the original claim, an amount of US$33,712.14 was outstanding as the possible value of the yams. The High Court awarded this sum as well to the respondent. On appeal to the Court of Appeal, the special damages of US$33,712.14 in so far as it represented the value of the yams was set aside. This is how the Court of Appeal put it at pages 293-295 of the record:

"The plaintiff was able to establish the payment to Maersk for USD11,435.36, cost of fumigation USD1,184.50 totaling USD12,637.86. This they deducted from their claim of USD46, (350) and had a balance of USD33,712, (14) saying that is the cost of yams. We do not think the plaintiff by this method had established the actual cost of the yams she lost……Much as we believe plaintiff lost some yams and deserve damages, we do not think plaintiff has been able to establish the amount of USD46, (350).00 as specific damages."

41. The Court of Appeal, then, purported to re-assess the damages and awarded the respondent US$30,000.00 which it termed, nominal damages. The Supreme Court had some fifty years ago in **Bressah v. Asante & Another [1965] 1 GLR 117** stated the circumstances under which an appellate court would interfere with an award of damages by a lower court in the following words:

> **"An appellate court would only interfere with the quantum of damages on the ground that the trial judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it an erroneous estimate".**

42. The Court of Appeal found that the trial court erred when it awarded special damages even though there was no evidence to back it. The Court of Appeal in

assessing its own damages was magnanimous in awarding respondent the sum of US$30,000.00. If this sum is added to the US$12,637.86 special damages proved by the respondent, the total award in its favour would come to US$42,637.86 short of a little below US$4,000.00 to make up its total claim of US$46,350.00. Since we have awarded the respondent the US$12,637.86 it proved, it is our opinion that confirming the entire amount awarded by the Court of Appeal would be on the high side especially the failure of the respondent to lead evidence to prove the total loss. Accordingly, we shall review the US$30,000.00 damages awarded by the Court of Appeal to US$20,000.00 substantial damages. Having now awarded the respondent US$12,637.86 as special damages and US$20,000.00 substantial damages under general damages for the loss of the yams, we do not think the respondent is entitled to another award of general damages of the Ghc10,000.00 classified and awarded by the Court of Appeal. This award formed the basis of ground of appeal 3(iii). We, accordingly, set aside the award of Ghc20,000.00 by the trial court as well as the reviewed quantum of Ghc10,000.00 general damages and dismiss this ground of appeal.

43. In conclusion, we dismiss the appeal of the appellant. We also dismiss the cross-appeal ground 3(iii) of the respondent's cross-appeal but allow ground 3(i) of the cross appeal. We review the damages awarded by the trial court and the Court of Appeal to read as follows:

    a. The respondent is awarded the sum of US$12,637.86 or its Ghana Cedis equivalent being special damages for freight, clearing and handling charges including fumigation.

b. The respondent is awarded general damages to the tune of US$20,000.00 or its Ghana Cedis equivalent as compensation for loss suffered by it for the damage to the yams.
c. The sums awarded shall attract simple interest at the prevailing bank rate or failing that the 91-day treasury bill rate from 1st February 2010 till date of payment. For the avoidance of doubt, the 91-day treasury bill rate shall be the rate existing on 27th June 2013.
d. The respondent shall be entitled to costs of this appeal.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

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