IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

PWAMANG, JSC

AMEGATCHER, JSC

OWUSU (MS.), JSC

AMADU, JSC

CIVIL APPEAL

NO. J4/20/2015

27TH MAY, 2021

SULLEY DOLLEY …….

PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. MESSRS FND INVESTMENT (GH) LTD.

DEFENDANTS/APPELLANTS/APPELLANTS

2. ADE COKER

JUDGMENT

AMADU JSC

(1) This appeal is from the decision of the Court of Appeal dated 2nd May 2013 which dismissed an appeal by the Defendants/ Appellants/Appellants *(the Appellants)* from the judgment of the High Court in favour of Plaintiff/Respondent/Respondent *('the Respondents')*.

(2) In the High Court, the Respondent claimed against the Appellants per for an amended writ of summons filed on 7/9/2011 the following reliefs;

*"(1) **An order for the recovery of the amount of US$400,000 (Four Hundred Thousand Dollars) paid to the Defendants at their request and supported by MEMORANDUM OF UNDERSTANDING dated 17th day of May 2006 and signed by both parties and their witnesses and which the Defendants have failed to pay to the Plaintiff despite the abrogation of the said MEMORANDUM OF UNDERSTANDING by the Defendants themselves.***

(2) Interest on the above US$400,000 (Four Hundred Thousand Dollars) at the rate of 3% (three percent) per month from May 2006 up to date of final payment of the US$400,000 (Four Hundred Thousand Dollars).

(3) An Order for the recovery of an amount of US$200,000 (Two Hundred Thousand Dollars) paid to the Defendants by the Plaintiff at Defendants request and supported by MEMORANDUM OF UNDERSTANDING dated 6th day of August 2008 and signed by both parties and their witnesses and which the Defendants have failed to pay to the Plaintiff despite the abrogation of the MEMORANDUM OF UNDERSTANDING by the Defendants themselves.

(4) Interest at the rate of 3% per month (three percent) on the above US$200,000 (Two Hundred Thousand Dollars) from February 2009 up till date of final payment of the US$200,000 (Two Hundred Thousand Dollars).

(5) An Order for the Recovery of an amount of GHC100,000 (One Hundred Thousand Ghana Cedis) paid to the Defendants by the Plaintiff at the Defendants' request and supported by MEMORANDUM OF UNDERSTANDING dated 13th day of August 2008 and signed by both parties and their witnesses and which the Defendants have failed to pay to the Plaintiff despite the abrogation of the MEMORANDUM OF UNDERSTANDING by the Defendants themselves.

(6) Interest on the said GHC100,000 (One Hundred Thousand Ghana Cedis) at the rate of 2.5% (two point five percent) from May 2009 up to date of final payment of the GHC100,000.00 (one hundred thousand Ghana Cedis).

(7) Any other order or orders as to this court may seem just".

(3) At the close of trial, though the Learned High Court Judge found in favour of the Respondent, she did not grant the reliefs for interest payments in the terms the Respondent prayed for. Her final orders were as follows;

"(1) An order for the recovery by the Plaintiff of an amount of US$400,000.

(2) Since the contract (Exhibit 'A') was terminated in May 2009

and interest had been paid by the Plaintiff as agreed, Plaintiff is not entitled to any pre-judgment interest on the principal amount of US$400,000.

(3) An order for recovery by the Plaintiff of an amount of US$200,000.

(4) Interest at the rate of 3% per month on the said amount of US$200,000 from February 2009 until May 2009.

(5) An order for the recovery by the Plaintiff of an amount of GHC100,000.

(6) Interest on the said GHC100,000 at the rate of 2.5 % per month from April 2009 until May 2009.

(7) I will further order that Defendants pay interest on all the three (3) principal amount at the agreed upon interest rates from November 2009 until date of final payment.

(8) Costs assessed at GHC5,000 against the Defendants".

While in paragraph 2 of her final orders, the Learned Trial Judge stated that the Respondent was not entitled to an order for interest at the agreed interest rate because the respective memoranda had been terminated, her order at paragraph 7 seems to grant the relief for interest she had earlier said the Respondents were not entitled to.

(4) On appeal to the Court of Appeal, the Appellants' appeal was dismissed but the Learned Justices of the Court of Appeal also ignored the fact of termination of the memoranda upon which the Respondent sued and granted the Respondent reliefs with interests in the following terms;

"1. The Defendants/Appellants are ordered to pay the Plaintiff/

Respondent the sum of US$400,000 (Four Hundred Thousand United States Dollars) with interest thereon at the contractual rate of 3% per month from May 2009 to date of final payment.

2. ***The Defendants/Appellants are ordered to pay the Plaintiff/ Respondent the sum of US$200,000 (Two Hundred Thousand United States Dollars) with interest at the contractual rate of 3% per month from February 2009 to date of final payment.***
3. ***The Defendants/Appellants are ordered to pay the Plaintiff/ Respondent the sum of GHC100,000 (One Hundred Thousand Ghana Cedis) with interest at the contractual rate of 2.5% per month from June 2009 to date of final payment".***

This issue of payments of interest will be dealt with exhaustively in this judgment.

(5) APPEAL TO SUPREME COURT

By notice of further appeal to this court, the Appellants assailed the judgment of the Court of Appeal on grounds formulated and set out as follows:-

"a. The judgment is against the weight of the evidence.

b. The learned justices with all due respect to them erred in law when they failed to give sufficient consideration to the issue of the illegality of the entire transaction between the parties.

c. The learned justices failed to give sufficient consideration to the issue of restitution.

d. The learned justices failed to give sufficient consideration to the status of the 2nd Defendant/Appellant/Appellant who was sued in his capacity as the chairman and Chief Executive of the 1st Defendant company".

Contrary to the intention to file further grounds of appeal upon the receipt of the record of proceedings, no further grounds had been filed nor argued by the Appellants.

(6) In their statement of case in this appeal, the Appellants have changed strategy by relying on completely new particulars of illegality different from those considered in the High Court and the Court of Appeal. In the High Court, it was the Trial Judge who in her judgment *suo motu* raised an issue about whether the 2nd Appellant acted within the law by raising capital from his company whereas it not a public liability company. This was because the evidence of the 2nd Appellant was that the monies covered by the memoranda were investments the Respondent made in the 2nd Appellant's company. The Trial Judge held that such conduct contravened Section 9(3)(d) of the Companies Act, 1963 (Act 179) *(now repealed)* and would not only be illegal but will render the memoranda the parties signed unenforceable. However, the Trial Judge proceeded to dismiss that contention holding that since the Respondent did not base his action on the illegality, the remedy of restitution was available to them by which the court could order the Appellants to return the monies to them. The Appellants then made this issue a ground of appeal and argued before the Court of Appeal that, the Trial Judge did not properly apply the principles of the defence of illegality that she herself raised and that, if she did, she would not have granted the remedy of restitution but would have dismissed the Respondent's action on ground of illegality. On this issue of the defence of illegality and restitution, the Court of Appeal took the view that there was no breach of Section 9(2)(b) of Act 179 since the facts in this case do not portray a public offer by the Appellants to raise capital. In the view of the Court of Appeal, since there was no illegal conduct the defence did not arise.

(7) In the instant appeal, when the Appellants stated in their grounds (b) and (c) that the Court of Appeal did not adequately consider the illegality of the whole transaction and also whether restitution as a remedy was available in the circumstances of the case, it was expected that they were referring to Section 9(2)(b) of Act 179. Since the grounds of appeal alleged that the Court of Appeal erred in law without particulars of the error as required by the Rule 8 (4) of the Court of Appeal Rules, 1997 (C.I.19), the Appellants could not be referring to a point of law the Court of Appeal did not have the opportunity to consider. However, contrary to the above, the Appellants have in their Statement of Case argued the ground of illegality on the basis of the provisions of the Money Lenders Ordinance, Cap 176, the Loans Recovery Ordinance Cap 175, the Exchange Control Act, 1961 (Act 71) and the Foreign Exchange Act 2006 (Act 723). Under Cap 176, a license is required before a person can engage in the business of money lending. Consequently, the Appellants now contend for the first time in this court that the Respondent herein lent money to them on three occasions without being licensed for the purpose. Furthermore, the Appellants allege that the transactions were in foreign currency and by the provisions of Acts 71 and 723, both Respondent and Appellants required licenses to deal in foreign currency and not having procured those licenses, the transactions breached those statutes and therefore are unenforceable The Appellants case is therefore that the three Memoranda of Understanding that the Respondent based his claims on in this case, violate the above listed statutes and consequently are illegal and ought not to be enforced by the court. Neither can the court order restitution in favour of the Respondent for moneys passed on the basis of the illegal instruments.

(8) The Appellants admit that this is the first time they are raising the issue of breaches of these statutes but they argue that it is permissible to do so. They have referred us to the cases of **Kwarteng Vs. Amissah [1962] 1 GLR 241**, **Kwame Vs. Serwah [1993-1994] 1 GLR 429** and **Ghana Commercial Bank Ltd. Vs. CHRAJ [2003-2004] SCGLR 91** and submitted that where a fundamental point of law arises on the basis of evidence on record the point can be taken for the first time on an appeal. The Respondent however asserts that the principle of law being relied upon by the Appellants is not applicable on the facts of this case in that, for a ground of law to be allowed at a late stage in a case, the evidence on the record must be conclusive as to its applicability. They argue that whether or not they had licenses to lend money and deal in foreign currency are questions of fact and since the issues were never raised at the trial stage and evidence not having been adduced on them, it is presumptive for the Appellants to claim they had breached the statutes in question.

(9) We have perused the record of the case and read the evidence that was led at the trial and are of the opinion that there is not much dispute as to the facts of the case. At the trial, only the 1st Respondent and the 2nd Appellant and one other witness testified and tendered documents. What it means is that the Appellants submissions will be tested against the evidence on record in order to determine whether there is conclusive proof of violations of the statutes as they allege. If there is no proof of violations, then as the Court of Appeal held, there will be no proof of illegality and the defence would not arise. We intend to consider all the grounds of appeal together under the headings of the statutes in issue.

(10) **The Money Lenders Ordinance, Cap 176.**

The evidence of the Appellants at the trial was that the Respondent invested in their business for returns and that they were able to pay returns on the investment up to May 2009. Thereafter, their business went bad in consequence of which they wrote to abrogate the investment agreement. This is what led to the consideration of Section 9(2)(b) of Act 179 dealing with the conditions under which investments may be made in a limited liability company. From the submissions of the Appellants in their statement of case, they seek to abandon this evidence of the payment being an investment to one of it being a loan contracted from a money lender by the 1st Appellant. But the law does not allow the Appellants to change their case at will especially after judgment has been given based on a certain set of facts. In the case of **Ekpe Vs. Antai (1944) 10 WACA 19** at page 22 Kingdom C J, approved the following fundamental statement of the common law; *"The law of estoppel has been very clearly defined by Lord Shaw in the judgment of the Privy Council in the case of* ***Hoystead Vs. The Commissioner of Taxation [1926] A.C. P. 165*** *wherein he says:-* ***"In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view to obtaining another judgment upon a different assumption of fact; Secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should, be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."***

(11) Therefore, the transactions that resulted in this suit cannot be re-packaged by the Appellants as one between them and a person engaged in the business of money lending for which the Respondent required a license under Cap 176. Another issue raised by the Appellants is the source of the funds paid to the Appellants by the Respondents which in the contention of the Appellants gives rise an issue of illegality. When the same issue confronted this court in **Mensah & Others Vs. Ahenfie Cloth Sellers Association [2010] SCGLR 650,** this court per Brobbey JSC at page 697 held that :- "***In deciding the issue of the core or main business of the Plaintiff, the source from which the money is obtained to be loaned out should not be allowed to cause any confusion. A person lending money may take his own money to lend out or borrow from a source like a bank to lend out. Where the money comes from is irrelevant. It is the object of giving out the money which matters. That object determines whether it is money given out as a benevolent gesture, friendly assistance or may be lent to make more money by way of profit from the interest earned on the money lent".*** In the instant case, contrary to the contention of the Appellant, we find the source of the funds given to the Appellants by the Respondent as inconsequential in the determination of the appeal. The Appellants argument on the issue is consequently rejected and dismissed.

(12) Apart from our view that the evidence does not support a money lending transaction so as to require a license, this court has now settled the question of enforceability of money lending agreements entered into without the requisite money lenders license as required under Cap 176. In the **Mensah & Others Vs. Ahenfie Cloth Sellers Association** (supra) this Court enforced a contract which contravened the statutes on moneylending, i.e. Cap 176. Speaking for the court,

Brobbey JSC held at page 705 as follows; ***"It was not the true intention of the legislature when it passed Caps 176 and 175 to prohibit lending and borrowing. Moneylending and borrowing were not proscribed or prohibited by Cap 176 or 175. All that the legislature did by the two statutes was to regulate the methods of lending and borrowing by getting lenders to acquire licenses which place some obligations on them for the protection of borrowers. That was what Section 5 of Cap 176, which regulated lending money without license was intended for. A contract may be in violation of a statute and yet it may be enforceable. Such a contract can be described as voidable. It is not void but may be enforced on the satisfaction of certain conditions".*** For the reasons explained above, the defence of the Appellants that the two lower courts ought not to have granted the Respondent reliefs under the Memoranda of Understanding for being money lending transactions in violation of Cap 176 is dismissed.

(13) The Exchange Control Act, 1961 (Act 71) and the Foreign Exchange Act, 2006 (Act 723).

The Appellants contend that the Memoranda covering payment to them in foreign currency violated the above statues that make it an offence for a person resident in Ghana to lend or make payment in foreign currency. The first payment of US$400,000.00 was made at a time Act 71 was in force and the second payment of US$200,000.00 was made when Act 723 had come into force. However, the Appellants appear not to pay attention to the full wording of the provisions. First, Section 1(2) of Act 71 provided as follows;

"Section 1 - Dealings in Gold and External Currency.

(1) The Minister responsible for Finance (in this Act referred to as "the Minister") shall prescribe such banks or other bodies or persons as he

thinks fit to be authorised dealers in gold and external currency for the purposes of this Act.

(2) Except in such circumstances as may be prescribed, no Ghana resident other than an authorised dealer shall buy or borrow any gold or external currency from, or sell or lend any gold or external currency to, any person other than an authorised dealer.

Thus, by subsection (2) of Section 1, it is lawful for an authorized dealer to sell or borrow external currency and it is also lawful to sell or lend external currency to an authorized dealer. So if for the sake of argument we consider the new case of the Appellants that the investment made by the Respondents was lending external currency, the question which arises is; what is the proven evidence in this case? The evidence on the record is that the Appellants were operating as a forex bureau and a bank and that is how the Respondent came into a business relationship with them leading to him investing in them. That testimony of the Respondent that the Appellants operated a forex bureau from which he regularly changed cedis to foreign exchange to send to his children studying abroad was not controverted under cross-examination. The lawyer for the Appellants in cross examining Respondent was rather concerned about whether the Respondent did due diligence investigations about the Appellants. Though in his testimony, the 2nd Appellant stated that his company was into real estate development, he did not deny that he operated openly as a forex bureau and regularly sold external currency to members of the public. We take judicial notice of the fact that by the 2006 when the parties entered into the transactions in question in this case, the Minister of Finance of Ghana had licensed many companies in Ghana as forex bureau entities to deal in foreign currency. The irresistible inference from the

evidence on record is therefore that, the Appellants were authorized dealers in foreign currency. Consequently, contrary to the claim of the Appellants, there has been no violation of Act 71 in the transactions in question since the external currency was lent to an authorized dealer.

(14) **The Foreign Exchange (Act 723). Section 1 and 3.**

They provide as follows:-

"1. Authority of Bank of Ghana

(1) The Bank of Ghana is the licensing, regulatory and supervisory authority to give effect to this Act.

(2) The Bank may require a person who is resident or who conducts business in the country to;

(a) furnish the Bank with details of part or the whole of that person's foreign exchange transactions; or

(b) provide returns in a form prescribed by the Bank accompanied with details of that person's foreign exchange transactions.

3. Requirement of a License

(1) A person shall not engage in the business of dealing in foreign exchange without a licence issued under this Act.

(3) The Bank (Bank of Ghana) shall prescribe the banks or other corporate bodies or persons that it considers competent to engage in the business of dealing in foreign exchange.

(4) *The Bank shall issue or renew a licence to engage in the business of dealing in foreign exchange subject to conditions that the Bank shall determine from time to time.*

(5) *The business of dealing in foreign exchange includes the*

(a) purchase and sale of foreign currency,

(b) receipt or payment of foreign currency,

(c) importation and exportation of foreign currency, and

(d) lending and borrowing of foreign currency.

Section 29 of the Act makes it an offence to engage in the business of dealing in foreign currency.

(15) From Section 3(1), it is clear that what the Act prohibits is engaging in the ***"business of dealing in foreign exchange"*** without a license. The Act does not proscribe the possession of foreign exchange by a resident of Ghana. The evidence on the record is that the 1st Respondent made the payments of the foreign exchange to the Appellants from his foreign exchange account with SSB Bank. There is no dispute about the fact that banks in Ghana at the time of the transactions were authorized by the Bank of Ghana to open accounts in foreign exchange for residents from which accounts the holders of the accounts could make and receive payments in foreign currency. This was clearly anticipated by Section 1(2) which empowers the Bank of Ghana, the supervising and regulatory agency of government, to review transactions in foreign exchange by any Ghanaian resident.

(16) It is therefore fallacious to assert that the two payments made by the Respondents to the Appellants in this case amounted to the ***"business of dealing in foreign exchange."*** When the Act classifies lending foreign exchange under the definition of the business of dealing in foreign exchange, it must be understood to mean lending as a regular business activity and not a specific lending to only one

person on account of a specified agreed purpose as in this case. Therefore even if we treat the investment the Respondent made in the 1st Appellant as lending by the Respondent, our view is that it does not qualify as engaging in the business of lending foreign exchange and therefore no license was required under Section 3 of Act 723. As we stated earlier, the borrowing in foreign exchange by the Appellants would not be in violation of the provision since the Appellants were authorized to deal in foreign exchange. The effect of the above explanation of Act 723 is that on the evidence on record, there was no violation of the Act and the defence of the Appellants on this ground also fails and is dismissed.

(17) In any event, the Appellants must realize that a contract entered into in violation of a statute is not automatically void and unenforceable. In **Schandorf Vs. Zeini [1976] 2 GLR 418** the Court of Appeal dealt with a case of sale of a house wherein part of the purchase price was paid in foreign currency contrary to the Exchange Control Act, 1961 (Act 71). The Defendant raised the defence that because the payment contravened the Act, the court ought not to decree specific performance of the agreement but the Court of Appeal rejected this argument and affirmed the judgment of the High Court. The case of **Zagloul Real Estates Co. Ltd. (No.2) Vs. British Airways [1998-99] SCGLR 378** involved rent payment in cedis instead of in foreign currency, which resulted in a violation of the External and Diplomatic Missions (Acquisition or Rental of Immoveable Property) Law, 1986 (PNDCL 150). In the Supreme Court, the issue of restitution under the illegal tenancy agreement came up but the court refused to order restitution for the reason that the indemnity agreement at the center of the dispute was a clever device dishonestly contrived by both parties to defeat the ends sought to be achieved by the statute. The common law has over the years maintained a

distinction between contracts that the law would consider void for breach of statute and those that may be enforced even though they are in violation of a statute – See the case of **In Re Mahmoud & Ispahani [1921]2 KB716.**

(18) The modern approach to determining the defence of illegality is for the court to exercise a discretion in deciding whether or not to enforce illegal contracts applying a number of factors. In **City & Country Waste Ltd. Vs. Accra Metropolitan Assembly [2007-2008] SCGLR 409** at pages 436 of the report this court, through Date-Bah, JSC approved of the following recommendations in the Law Commission's Paper No 154; ***"We have said that we believe that there is a continued need for some doctrine of illegality in relation to illegal contracts and that, in certain circumstances, it is right that the law should deny the plaintiff his or her standard rights and remedies. However, we have also explained how, in some situations, we believe that the plaintiff is being unduly penalized by the present rules. This injustice would seem to be the inevitable result of the application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the defendant, or may be merely incidental to the contract in question. We consider that the best means of overcoming this injustice is to replace the present strict rules with a discretionary approach under which the courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. The adoption of some type of discretionary approach has the support of the vast majority of academic commentators in this area; and it is the approach which has been followed in those jurisdictions where legislation has been implemented."***

(19) Also, in the recent decision of this court in the case of **Ernestina Boateng Vs. Phyllis Serwah & 2 Ors**. **Appeal No.J4/8/2020** dated **14th April 2021 in Civil Appeal No/J4/11/2020** Pwamang JSC stated at page 19 of the judgment as follows:- ***"In line with our decision in City & Country Waste case, we adopt the discretionary approach for determination of the question whether or not to allow a claim for recovery of trust property that on the evidence is tainted by illegality. The discretion is to be exercised on consideration of the following factors; a) the seriousness of the illegality, b) whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts, and c) whether it would be harmful to the integrity of the legal system to allow the claim".***

(20) On the facts of the instant case and considering the purpose of the foreign exchange control legislations, even if we accept the new case of the Appellants that the Respondent by the second Memorandum of Understanding covering the US$200,000.00, engaged in the business of lending foreign exchange without license contrary to Section 3 of Act 723, the violation is of such a minimal nature that the court would exercise its discretion in favour of the Respondents by ordering restitution of the money to them because the statute itself has provided for the penal consequences of any violations which will therefore not render restitution unavailable to the Respondents under the circumstances.

(21) **Loans Recovery Ordinance, Cap 175**.

In their arguments, the Appellants have complained that the interest that was awarded in favour of the Respondent by the High Court and the Court of Appeal

presumably on the terms contained in the memoranda is excessive and unconscionable so this court should exercise the authority conferred on it by Section 1 of Cap 175 and re-open the transaction and revise the rate of interest downwards. In the case of **Royal Beneficiaries Association Vs. Mrs. Vivian Mensah & Others Civil Appeal No.J4/22/2013** dated 26/7/2013 this court per Anin Yeboah JSC *(as he then was)* considered similar circumstances as in the instant case and held thus:- ***"It is apparent that the appellant had paid fifteen million cedis for every week and had indeed paid for thirty eight weeks out of the fifty - two weeks which was agreed as the terms of the contract. It must be pointed out that by simple calculation of the outstanding balance the appellant had paid C570,000,000 and was left with only C 210,000,000 .00 to be paid to the Respondent. Given the amount of money paid by the Appellant to the Respondent a so-called company limited by guarantee, we are of the view that the whole transaction which is obviously unconscionable should be re-opened for the court to impose its terms favorable under the circumstances ."***

(22) In the case of **Mensah Vs. Ahenfie Cloth Sellers Association** (supra) this court re-opened a money lending transaction and revised the interest payable downwards. Thus, there is abundant authority for the submission that, in appropriate cases, the court would re-open money lending transaction and reduce the interest payable. However, there is even a more fundamental issue about the interest awarded by the courts below in this case that has to be addressed first. In deciding to award the interests claimed by the Respondent on the dollar amounts claimed, which was on the basis of the agreement contained in the respective memoranda, both lower courts stated that they were applying the ***Courts (Award of Interest and Post-Judgment Interest) Rules, 2005 (C.I.52).*** The issue is whether the Courts below complied with C.I.52 and its interpretation by the court which is

binding on them. The structure of C.I.52 is in two parts with different provisions; one dealing with pre-judgment interest which may be awarded to cover the period from the accrual of the cause of action to the date of judgment. The second is interest payable for the period between judgment and final payment of the substantive judgment debt. Section 1 in respect of pre-judgment interest provides as follows;

Rule 1- Order for payment of Interest

"1. If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action that interest shall be calculated

a. at the bank rate prevailing at the time the order is made, and

b. at simple interest

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner, the court shall award that rate of interest calculated in that manner".

(23) In awarding the Respondent interest on the amounts found due, being US$400,000.00, US$200,000.00 and GHS100,000.00, respectively, the Court of Appeal ordered interest at 2.5% per month from June 2009, to date of final payment. The court said the parties were subject to a contractual rate by which the court was referring to the memoranda that were signed stating the rate as 2.5%. Those memoranda provided that interest was to be paid until further notice. But the undisputed evidence before the court was that the agreements in this case were effectively terminated by the letter written to that effect by the Appellants dated 28th May, 2009 tendered by the Respondents as Exhibit "D" which the Respondents have acknowledged. Even in the endorsement of the reliefs on the writ of

summons, the Respondent stated clearly that the respective memoranda had been abrogated. What this means is that at the time the Respondent commenced action in court, there was no subsisting agreement on a rate of interest payable on the monies given by the Respondent to the Appellants. In those circumstances, the Court of Appeal erred in ordering interest at the rate of 2.5% per month. Under the provisions of Rule 1 of C.I.52, the interest rate ought to have been at the prevailing rate and at simple interest. The correct pre-judgment interest payable in the case is therefore at the prevailing annual rate of interest from June 2009, to the date of judgment of the High Court, which is 12th October 2011. It is provided in Rule 2 on post-judgment interest as follows:-

Rule 2 - Post Judgment Interest

"2. (1) Subject to sub-rule (2) each judgment shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment

(2) Where the transaction which results in the judgment debt is

a. contained in an instrument,

b. evidenced in writing, or

c. admitted by the parties

and the parties specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which is to run to the date of final payment, then that rate of interest shall be payable until the final payment". (Emphasis supplied).

(24) Under Rule 1(1), of C.I.52, judgment debts are to bear interest at the statutory rate on the date of judgment up to the date of final payment. A different rate of interest would only apply to a judgment debt if there is a subsisting

agreement that states a rate to run to the date of final payment. In the instant case, firstly, there is no subsisting agreement on a rate of interest payable. Secondly, even the terminated agreement did not provide that in the event of default and the court gives judgment, the rate of 2.5% shall run till the date of final payment. Therefore, the post judgment interest in this case is to be at the prevailing rate as of 12th October 2011 and from that date till final payment of the amounts found due to be paid to the Respondent. It would be noted that whereas Rule 1 uses the term "***bank rate prevailing***", Rule 2 mentions ***"statutory interest rate".*** However, Rule 4 states that statutory interest rate is the bank rate of interest prevailing.

(25) Rule 4 (2) of C.I.52 provides that:- ***"Where there is doubt as to the prevailing bank rate, the 91 days Treasury Bill rate as determined by the Bank of Ghana shall be the prevailing bank rate***".

The question which arises in this case is, what is the applicable prevailing rate since the Respondent sued to recover the money in foreign currency and the court has awarded the judgment in foreign currency? This question was settled in the majority judgment of this court in the case of **Royal Dutch Airlines KLM Vs. Farmex Ltd. [1989-90] 2 GLR 682.** The Headnote of the Report is as follows;

"Held, granting the application (Adade and Aikins JJ.S.C. dissenting): the rate of interest payable on the sum of £23,800 awarded as damages should be the pound sterling commercial rate at simple interest prevailing in the United Kingdom as at the date of final judgment, i.e. 19 December 1990 and not the bank rate prevailing in Ghana." In that decision Wiredu JSC *(as he then was)* at page 694 explained the reason for the majority opinion as follows:- ***"On its face, the language of L.I. 1295 of 1984 impels me to conclude that its application is to be limited to transactions dealt with in local currency and must not be stretched to cover and include transactions involving the use of foreign currencies . . . Equity***

follows the law and the principle of law underlying the award of damages is restitutio in integrum. If this principle is to be achieved in the instant case then I think the proper view to take of the matter is to allow the application and to construe the term "Bank rate " as at 19 December 1990 as stated in the order of this court with reference to the "Bank rate" prevailing at the relevant date in the United Kingdom.

(26) Indeed this court applied this interpretation of prevailing rate on a judgment awarded in United States Dollars in the case of **Clipper Leasing Corporation Vs. Attorney-General & Ors**, **Civil Appeal No.J4/4/2015** unreported judgment dated 9th March, 2016. In that case this court held *inter alia* as follows:- ***"Appellant would be entitled to interest on the amount. The lease agreement in this case did not state any rate of interest to be applied in the event of default in payment. In the suit in the London court Appellant claimed interest at the rate of 1.5% or such rate as the court may award. However, in accordance with the Courts (Award of Interest and Post Judgment Interest) Rules, 2005 (C.I.52) and the decision of this court in the case of Royal Dutch Airlines (KLM) Vs. Farmex Ltd. (No.2) [1989-90] 2 GLR 682, we award interest at the prevailing bank rate of interest of the United States Dollar in New York."***

(27) In the instant case, since the Respondent sued for payment in United States Dollars and have obtained judgment in that currency, the interest they are entitled to is simple interest annual rate of the interest prevailing in New York on 14th October, 2011 payable on the total sum of USD600,000.00 from June 2009, till date of final payment. As for the interest rate of the sum of GHS100,000.00, it shall be at the simple interest at the 91 day Bank of Ghana Treasury Bill as of 14th October 2011, payable from June 2009, till date of final payment. These are the rates of

interest the Respondent is legally entitled to. In the circumstances the complaint of the Appellants about excessive and unconscionable rate of interest claimed by the Respondent and awarded by the courts below loses its force and does not deserve to be considered.

(28) For all the reasons set forth, the appeal by the Appellants against the judgment of the Court of Appeal dated 2nd May, 2013 fails subject to the correction of the order for payment of interest as hereinbefore stated.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

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