IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DORDZIE (MRS.) JSC (PRESIDING)

PROF. KOTEY JSC

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/155/2022

27TH JULY, 2022

EMMANUEL N. A. KOTEY

AND 173 OTHERS ..... PLAINTIFF/APPELLANTS/APPELLANTS

VRS

1. **KWAME PIANAM**
2. **NEW WORLD INVESTMENT LIMITED**
3. **UNITED BANK FOR AFRICA**

..... DEFENDANTS/RESPONDENTS/ RESPONDENTS

4. **BEN AMEGATSE**
5. **KOFI AMO-ADDAI**
6. **HILDA MALM**

..... DEFENDANTS/RESPONDENTS

7. UNIQUE ACCESS PROPERTIES ….. DEFENDANT

JUDGMENT

LOVELACE-JOHNSON (MS.) JSC :-

The designation of the parties in the High Court will be maintained in this appeal.
On 27th June 2013, the Court of Appeal dismissed an appeal by the plaintiffs against the judgment of the High Court in this matter. Being dissatisfied with this dismissal, they have launched a further appeal to this court.

The plaintiffs per their amended writ had claimed for the following at the trial court:

(a) An order pursuant to section 202, 209 and 218 of the companies Act, 1963 (Act 179) that the purported issue of new shares to the Nigerian entity was in breach of the statutory rights of the Plaintiffs, in breach of the 3rd Defendant's Regulations, it is oppressive and in disregard of CIT's proper interests as a Shareholder of the 3rd Defendant, unfairly discriminatory and unfairly prejudicial CIT members.

(b) An order pursuant to sections 203, 209, 210 and 218 of Act 179 and equitable considerations that the 3rd Defendant failure to offer adequate employment opportunities to the members of CIT infringed their legitimate expectations and was in disregard of CIT's proper interests as a member and an order requiring the 3rd Defendant to provide remedy to members of CIT in order to give full effect to the critical understandings under which members of CIT promoted and subscribed to the regulations of the 3rd Defendant.

(c) An Order declaring that the shares initially subscribed by the 4th Defendant was for and on behalf of members of CIT and that the purported dilution of the same by the

Defendants is wrongful and that the plaintiff are entitled to the percentage shareholding they were credited with upon incorporation of the 3rd Defendant.

(d) An order declaring the 1st, 4th, 5th, and 6th, Defendant in breach of their fiduciary duties as trustees of CIT and its members by using their fiduciary positions to acquire personal benefits and profits and further orders stripping them off the positions they occupy and recovery of all moneys and assets accruing to them at the expense of the plaintiffs for the benefit of CIT.

(e) Damages against.

i. The 1st and 2nd Defendants for failing to carry out their contractual obligations to safeguard the financial and other economic interest of the Plaintiffs;

ii 1st and 2nd Defendant for breach of trust and for professional negligence.

iii 3rd Defendant for failing to carry out its obligations to offer employment avenues for members of CIT by adopting employment policies that automatically rendered members of CIT unfit for consideration for employment in the 3rd Defendant thereby frustrating the purpose for which the Plaintiffs agreed to invest in the 3rd Defendant; and

iv 4th, 5th and 6th Defendant for breaching their obligations towards the CIT under the Trust Deed.

(f) An order directing the 1st 2nd and 3rd Defendant to account for the income accruing from the use of the assets purchased in the name of CIT or in the alternative mesne profits.

(g) *A declaration that the Plaintiffs have beneficial interest in all the assets taken over from BHC and a further order restraining the Defendant from disposing of the assets or in the alternative an Order rescinding any transfer already made by or any of the Defendants to the Co-Defendant.*

(h) *An order directed at the 1st, 2nd, and 3rd Defendants to disclose original copies of all correspondence and Agreement between the 2nd and 3rd Defendants and what factors went into the pricing of the shares allotted to STB Capital Markets Limited and what assets purchased from BHC were transferred to the 3rd Defendant and what the status of the other assets not so transferred is.*

(i) *Any further or other orders which this Honourable Court considers fit or proper.*

(j) *Costs.*

The background to this case, in a nutshell, is that upon the liquidation of the Bank for Housing & Construction (BHC), its ex-employees (plaintiffs) upon the advice of the 1st defendant, who was the Chief Executive Officer of the 2nd defendant/company formed the Consortium Investment Trust (CIT), managed by nine trustees, with the purpose of investing the end of service benefits of the plaintiffs. The invested funds were to be used to "take equity shares in the proposed bank *which is to acquire selected assets of the liquidated Bank for Housing and Construction in pursuance of a worker-management buy-out of selected assets of the liquidated BHC".*

Realizing that the funds of CIT were not sufficient for assets to be purchased from BHC and to bring the proposed bank into being, an 'Anchor investor" Kumi & Co was first brought in who provided funds for the purchase of the assets. Later other investors,

including Nigerian ones were brought in to make the banking venture a reality. The 3rd defendant was incorporated under the name Unique Access Banking Ltd, later changed to Standard Trust Bank Ghana Ltd and finally, the United Bank for Africa Ltd.

It appears that at this point, the plaintiffs being dissatisfied with how CIT was being handled and the participation and control of the Nigerian investors issued the present writ for the aforementioned reliefs, all of which were dismissed by the trial court as not having been proved.

As stated earlier the court of appeal similarly dismissed their appeal for the same reason.

Per their amended grounds of appeal filed on 24th December 2020, the plaintiffs' complaints with the court of appeal decision are as follows

Ground A

The Court of Appeal erred when it dismissed the Appellants' claims in respect of the assets and properties of the former Bank for Housing and Construction (BHC).

Ground B

That the Court of Appeal erred when it ignored the findings of both the High Court and Court of Appeal in ***Suit No. FT (IV) 10/2001 Kumi and Company Limited v. New World Investment Company Limited*** *with regard to the Appellants interest in the assets of BHC.*

Ground C

The Court of Appeal erred in law when it failed to find that the 1st Defendant/Respondent/Respondent (the 1st Respondent) as a consultant to the Appellants stood as a fiduciary and he could not claim or be beneficially entitled to a proprietary interest in the assets he was instructed to acquire for their benefit.

Particulars of Error

i. *As an advisor or consultant to the Appellants, the 1st Respondent owed them fiduciary duties.*

ii. *As a fiduciary, the 1st Respondent could not place himself in a situation where his personal interest could conflict with his fiduciary duties to the Appellants; and*

iii. *As a fiduciary, all the gains or profits made by the 1st Respondent in respect of the beneficial interests in the assets of BHC were in breach of his fiduciary duties to the Appellants.*

Ground D

The Court of Appeal erred in law when it failed to find that the 1st Respondent as a consultant to the Appellants stood as a fiduciary and could not be beneficially entitled to shares issued by the 3rd Defendant/Respondent/Respondent which he was instructed to set up for the benefit of the Appellants.

Particulars of Error

i. *As an advisor or consultant to the Appellants, the 1st Respondent owned them fiduciary duties;*

ii *As a fiduciary, the 1st Respondent could not place himself in a situation where his personal interest could conflict with his fiduciary duties to the Appellants; and*

iii *As a fiduciary, all gains or profits made by the 1st Respondent in the acquisition of shares in the 3rd Defendant/Respondent/*

Respondent bank were in breach of his fiduciary duties to the Appellants ought to the disgorged by him for the benefit of the Appellants.

The errors of law alleged in Grounds A and B relate to the court's dismissal of the plaintiffs claim to the assets and properties of BHC, and the ignoring of the findings regarding these assets in suit **No FT (IV) 10/2001 Kumi & Co Ltd v New World Investment Co Ltd.**

Grounds C and D relate to breaches of a fiduciary duty allegedly owed by the 1st defendant to the plaintiffs in his dealings with them as a Consultant/or as an Advisor. A summary of the arguments of counsel for the plaintiffs on the first two grounds are as follows

- The 1st, 4th and 6th defendants testified in a high court case entitled **Kumi and Company Limited v New World Investment Company Limited Suit No FT (IV) 10/2001**to the effect that the disputed properties were bought in the name of CIT members for the banking project.
- In the light of the above testimony, further similar admissions in the present proceedings on this issue (examples of which are listed in counsel's statement of case) and the fact that the defendants made no claim of ownership to these assets in their pleadings, it was wrong of the two lower courts to dismiss the plaintiffs prayer for a declaration that they were the beneficial owners of the BHC assets.
- Section 51(3) of the Evidence Act, 1975 relating to inadmissibility of irrelevant evidence is invoked to urge this court to disregard the findings of the two lower courts because they contradict findings of fact in earlier proceedings ie the **Kumi** case earlier referred to.
- The court in the **Kumi** case, having ordered that Kumi and Co be refunded the money they provided for the purchase of the assets, the beneficial interest in the

said assets reverts to the plaintiffs who would then make a refund to the 2nd defendant

- The refund of the above money by the 2nd defendant to Kumi and Co could only put them in the latter's shoes, which was NOT ownership of BHC assets so they could not purport to own what that company did not own on the basis of the **nemodat quod non habet principle** and only became creditors of the plaintiffs.

Regarding these two grounds, counsel for the Defendants response is succinct

- The entity, that is the 7th defendant, which to the knowledge of the plaintiffs, (per the paragraph 6 of their Amended Statement of Claim) was holding the assets in dispute was never served to participate in the trial so the lower courts could not have made any orders against that company since this would have amounted to interfering with their rights without giving them a hearing.
- Notwithstanding the fact that the disputed properties were offered to the former workers (plaintiffs herein) who made up the CIT, the fact is that they were paid for by another investor, Kumi and Co and are also registered in the name of the 7th defendant, a company that the Plaintiffs chose to strike out as a party to the suit.
- The assets in question were acquired for the banking project and not for the sole benefit of the plaintiffs.

The trial court made a finding that there was no claim or evidence led against the 7th defendant (or co-defendant as that company was sometimes described in the proceedings), **See page 510 of volume two of the ROA**. The Court of Appeal also described the appeal against the 7th defendant as frivolous and further stated at **page 315 of the ROA**, after discussing the complaints raised in the present two grounds, that

they do not suffice to enable it to conclude that the judgment was against the weight of evidence and thus had led to a substantial miscarriage of justice.

In short both lower courts made findings that there was no merit in the complaints under discussion thus leaving the plaintiffs with the unenviable task of convincing this court to set aside their concurrent findings. A host of cases including the following cited by both counsel

1. **Koglex Ltd (No 2) v Field [2000] SCGLR 175**
2. **Fynn v Fynn [2013-2014] 1 SCGLR 727**
3. **Fosua & Adu-Poku v Dufie (Deceased) and Adu-Poku Mensah [2009] SCGLR 310**

enumerate the circumstances under which this court will interfere with such concurrent findings. These, in sum, are *when the findings are not supported by the evidence on record, or reasons for them are unsatisfactory, or they are based on a wrong proposition of law, or are inconsistent with crucial documentary evidence on record or are as a result of the improper application of some principle of evidence.*

How successful have the plaintiffs been in proving that the findings of the two lower courts are tainted by any of the above listed circumstances?

At the end of the trial at the high court, the claims of the plaintiffs were all dismissed which would include a dismissal of their relief (g) which was for

A declaration that the plaintiffs have beneficial interest in all the assets taken over from BHC and a further order restraining the Defendants from disposing of the assets or in the alternative an Order rescinding any transfer already made by or any of the Defendants or Co-Defendant.

The court of appeal also dismissed the grounds of appeal filed against the judgment of the high court as being without merit which would include ground (d) which stated that

The trial judge, with all due respect, erred in law when she dismissed the Appellants claims in respect of the assets and properties of the former BHC even though the defendants never claimed ownership of these assets and properties in their statement of defence.

It appears that the plaintiffs take the position that the dismissal of their claim to the assets and property of BHC means ownership of those properties automatically vests in the defendants hence the complaint that the latter never claimed any proprietary interest in the said assets. **See pages 6 and 7 of the plaintiffs statement of case.**

That is not the position of the law. The dismissal of the plaintiffs claim without more, and in the absence of a proven counterclaim by the defendants did not automatically vest the properties in dispute in the defendants. It left the said properties exactly where they were before the suit was completed and the orders of the court dismissing the claims made, in this case with the 7th defendant who is not a party to this suit.

Plaintiffs are strengthened in their belief that they are entitled to the properties in question by their contention that in the **Kumi** case the defendants admitted that the properties were purchased by them.

What are the facts and findings of fact in the **Kumi** case regarding ownership of the assets and properties of BHC?

On 25th October 2001, Kumi & Co Limited sued New World Investments Ltd, the 2nd defendant herein for a declaration that BHC head office complex among other properties were theirs, recovery of their possession, an account for monies had and received from them for the purchase of those properties and perpetual injunction.

Counsel reproduces portions of the proceedings in which the 1st defendant states that the securing of assets of BHC had been facilitated by former workers of BHC and the Union leaders.

At page 292 of exhibit V, (the proceedings in that case) is a letter dated 16th June 2000 (exhibit E) from Price Waterhouse Cooper on behalf of the Official Liquidator of BHC offering the Unionised staff the sale of certain property of BHC. The letter clearly stated that the vehicles were to be paid for within 7 days and the landed properties within 30 days and in addition, a 10% non-refundable payment was also to be made within 7 days in respect of the latter.

Notwithstanding the failure to mention this in their statement of claim, the evidence shows that the plaintiffs were not able to meet these terms and that it was Kumi and Co, described as an "anchor investor" which paid for the properties. It is not in dispute that the plaintiffs put some monies in the CIT which had been created for the purpose of investment. Exhibit C has this to say about the CIT to be created

"The former BHC workers are forming a trust to be used as the vehicle for their investment in the proposed bank. The Trust will open a bank account into which the former employees will pay part of their end of service benefits. These amounts will determine their share in the proposed bank's equity shareholding'.

A total reading of exhibit V shows that it was NOT plaintiffs who paid for the assets in question inspite of the way the defence in that case was couched and its tenor. A look at page 62 of exhibit V shows all the questions in cross-examination (which is evidence on oath unlike the pleadings) starting with an admission that it was Kumi and Co which paid for the assets in question. That portion of cross examination is reproduced hereunder

Q. ***Are you saying that before you advanced the money*** to New World Investment Ltd for the purchase of those items, you were never told that there was a proposal involving the bank called Unique Access?

A. *No. I was not told*

Q. Do you also want the court to believe that **at the time you advanced money for the purchase of those items**, you've never has any discussion with New World Investment Ltd. Concerning the distribution of shares to other interested bodies in the proposed company?

A. It was a proposal but there was no concrete approval.

Q. Please answer the question. Are you saying at the time there was nothing like that?

A. There was nothing like that.

Q. Are you saying that **the time you advanced money for the purchase of assets of former BHC**, you were never told by New World Investment Ltd. that, there were other interested parties, who ought to be given certain shares?

A. No, not at all.

Q. Do you also want the court to believe that you never had any discussion concerning the distribution of shares to parties who were involved in this transaction?

A. It was a proposal, it was not concretised.

Q. Did New World Investment Ltd. inform you in precise terms?

A. No My Lord.

Q. Are you saying **at the time you advanced this amount of money for the assets of the former BHC**, New World Investment Ltd never discussed the issue about distribution of shares to other interested parties.

A. It was discussed but it wasn't concretised.

Q. So, do we then take it that **at the time you advanced money for the purchase of the assets of the former BHC** you were not aware that there were other interested parties who were interested in shares in the proposed bank?

A. They could have been many but subject to my approval.

At page 237 of exhibit V, the trial court made a finding of fact that

"4. The PW1 advanced the colossal sum of c3,518,000,000.00 for the purchase of the assets listed in the statement of claim"

This finding is repeated at page 240. To the trial court in exhibit V, the issue was NOT whether the PW1 in that case (on behalf of Kumi & Co) paid for the assets but whether having decided to withdraw from the venture he was '*entitled to recover the assets so purchased with his money, or just the money he advanced?"*

It is the findings of fact in exhibit V which are of relevance on this issue and the court of appeal reviewing that case, at page 198 of volume three of the ROA, upheld this finding. The alleged attempt by the defendant in that case to say that it was the plaintiffs in the present case who purchased the assets, fell flat on its face. Indeed one cannot even say after a comprehensive reading of the proceedings that this was the position of the defendant in that case. At page 245 of exhibit V, the trial court had this to say about Kumi's relationship with the BHC assets

On the plain facts of this case, he brought no assets into the company; others had toiled to apply for them and had them sold to them'

The court of appeal in that matter stated in its 5th finding at page 194 that

The offer to purchase the assets of the BHC now in dispute was made by the workers of BHC and ***it was to them the offer to sell them was made by the official liquidator.***

These are the crucial findings counsel for the plaintiffs says are binding on the defendants and concludes that plaintiffs are the purchasers of the properties.

There is no doubt that it was the unionized staff which offered to buy the assets in question and the official liquidator accepted their offer and informed them of the consideration and the terms of its payment.

It is also clear that the unionized staff were not able to pay this consideration at all and in the manner stipulated.

It is also clear that Kumi & Co paid for the assets in question as an investor in the proposed banking project when the unionized staff or the plaintiffs were unable to fulfill the terms of the offer to them to purchase the assets by the Official Liquidator which was full payment within seven days in respect of the vehicles and thirty days in respect of the landed properties and a non-refundable deposit of ten percent within seven days of the acceptance of their offer to purchase. After payment by Kumi and Co, the assets were then registered in the name of Unique Access Bank, now the 3rd defendant for the banking project, and are now registered to the 7th defendant which is no longer a party to this suit.

It does not make sense in these circumstances for the plaintiffs to claim that they are the beneficial owners of the assets just because they are members of the union that made the offer to purchase which was accepted but failed to make the required payments

stipulated in the acceptance letter. Not a cedi of their money went towards the purchase.

If the plaintiffs hold the opinion that the exchange of exhibits B and G between them and the Official Liquidator amounts to an offer and acceptance properly so called in law, and so created a binding contract between them and the said Official Liquidator, it is to him that they must take their complaints about the assets in question having been sold to and transferred to another entity.

In any case paragraph 16 of the amended statement of claim in this matter states the amount of money put into the CIT by the plaintiffs as 1,098,035,000.00 cedis, a different sum from the amount admittedly paid by Kumi & Co, for the properties. How do the plaintiffs calculate their alleged beneficial interest in the light of these two very different sums?

The trial judge found that monies invested on behalf of the plaintiffs by the 2nd defendant in the banking project have yielded manifold returns, about 10.55 billion cedis which was transferred to the trustees of CIT and shared to its members. See the evidence of 1st defendant at **page 125 and 126 of volume two of the ROA and exhibits 15 and 16.**

In the light of this they cannot claim beneficial interest in the disputed properties as though their purchase was the purpose of the money they invested at the expense of the entity which refunded the money paid by 2nd defendant to Kumi and Co, even if as the plaintiffs keep stressing, the said refund was voluntarily made by the said 2nd defendant.

The more important thing regarding the complaints in these two grounds of appeal is the defendants position that it is Unique Access Properties Limited which holds the

assets in question as owner. Counsel for the Plaintiffs states in his reply that there is no evidence of this on record. One of Kumi & Co's complaints through their PW1's evidence in chief was the fact that the properties had been transferred to Unique Access Banking Ltd even though he, PW1 had provided the money. **See page 57 of Exhibit V.**

As stated earlier, it is clear from the evidence that Kumi & Co got a refund of their money. Exhibit N at page 307 of exhibit V is a letter from the Official Liquidator which states that he has assigned the properties to Unique Access Banking Limited. Exhibit V was tendered by the plaintiffs in this matter in support of their case and no issue was made about the said letter.

The plaintiffs state in paragraph 6 of their amended statement of claim that

The Co-Defendant has purportedly been promoted and registered by the 1st defendant to receive or hold assets originally acquired with the support and contributions of the plaintiffs for the operations of the 3rd defendant.

In response the defendants admitted the said registration of the Co defendant for the purpose of holding the assets acquired by the Unique Access Bank Limited. What other evidence do the plaintiffs want? They made the allegation and it was admitted.

It therefore being undisputed that the 7th defendant (Co-defendant) was struck out as a party, clearly the two lower courts could not have made orders against it regarding the disputed properties which it now held (whether rightly or wrongly and for whatever reason) because it would have amounted to interfering with their proprietary rights without giving them a hearing. There are several cases on this issue such as

In re Ashalley Botwe Lands [2002-2004] SCGLR 420

Barclays Bank v Ghana Cable [1998-1999] SCGLR

In conclusion, on grounds A and B, we are satisfied that the dismissal by the Court of Appeal of the plaintiffs claim to the BHC assets in question was not in error since it is supported by the evidence on record and the law. Having come to this conclusion for the above reasons, the provisions of the Evidence Act, 1975 (NRCD 323) such as sections 51(3) relied upon by counsel for the plaintiffs are of no moment since their application will not change the said conclusions. These two grounds of appeal fail and are dismissed.

The plaintiffs had sought under leg (d) of their claim in the trial court for a declaration that the 1st, 4th 5th and 6th were in breach of their fiduciary duties as trustees of CIT and its members by virtue of their actions. They also sought orders stripping them of positions they occupy and recovery of monies and assets which had accrued to them at their expense. The trial court dismissed this claim. The court of appeal refused to disturb the trial court's findings in that regard hence the present grounds C and D.

Under grounds C and D, the relevant arguments of the plaintiffs can be summarised as follows

- 1st defendant's position as an Advisor or Consultant to the plaintiffs is not in dispute since this was not challenged in the proceedings at the trial Court.
- In that position, he owed a fiduciary duty to the plaintiffs
- These duties were breached when (i) he and an Associate, unnecessarily and without any legal justification, took 90% of the shares of the 3rd defendant Company and made himself a Director and thus becoming a Principal, secretly, without giving plaintiffs the opportunity to decide whether to continue using his services or terminate them (ii) he became the Board Chairman of the 3rd defendant which position resulted in him favouring the Nigerian investor and the 3rddefendant, an act which was contrary to his duty to the members of the

CIT (iii) he incorporated the 7th defendant, 90% of whose shares are owned by him and his associate and (iv) he took decisions relating to BHC as a principal owner when at all times his role was that of a facilitator.

In response to the above, counsel for the defendants argues as follows

- Seeing that the statement of case only makes arguments against the 1st defendant, it is submitted that the appeal against the 2nd and 3rd defendants have been abandoned
- In all his dealings relating to the CIT, the 1st defendant acted in his capacity as an employee of the 2nd defendant ie its Chief Executive Officer and that the 2nd defendant performed the role of Promoter for the establishment of the proposed bank

What has to be determined is the persona the 1st defendant assumed in his dealings, if any, with the plaintiffs and whether this persona was attendant with fiduciary duties.

In paragraph 2 of the plaintiffs statement of claim, they describe him as *"a management and investment consultant and Chief Executive Officer of the 2nd Defendant and Chairman of the 3rd Defendant"* This description is admitted per paragraph 2 of the statement of defence. The 1st defendant's position that he did not act in his personal capacity in his dealings with the CIT finds support from an unusual quarter, that is the evidence of the 43rd and 58th Plaintiffs Roselyn Ahetsu Tsegah and Abdul Rahin Iddi-Puyo respectively who confirmed that the CIT dealt with the 2nd defendant company, an artificial person through the 1st defendant, its 'human' CEO so to speak. See **pages 200 and 312 of volume one of the ROA.**

It is trite that where a party's evidence is corroborated by that of his opponent or his opponent's witness, the court cannot prefer that of his opponent without good and stated reason. See the cases of

Osei Yaw v Domfeh [1965] GLR 418 SC.

Manu v Nsiah [2005-2006] SCGLR 25

Achoro & Anor v Akanfela & Anor [1996-97] SCGLR 209 @ 214

In the light of the evidence of these two plaintiffs we find no reason to reject the 1st defendant's position that he acted as an employee of the 2nd defendant. We confirm the findings of fact to this effect by the two lower courts.

Further it is trite that when an officer of a company in the normal course of business acts for that company, no personal liability is created in the absence of other clear indications to the contrary. See

Morkor v Kuma [1998-99] SCGLR 620 @635

An examination of the activities of the 1st defendant in relation to the plaintiffs will help determine if their relationship was such as imposed a fiduciary duty on him *'as an advisor and Consultant for the plaintiffs who he owed fiduciary duties',* to use the words of counsel for the plaintiffs.

The definition of a fiduciary relationship in the 10th edition of Black's Law Dictionary provided at page 20 of the statement of case of counsel for the defendants is worth adopting. The definition describes a fiduciary relationship in part as follows

' a relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship…….Fiduciary relationships usually arise in one of four

situations……(3) ***when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship…..****'*

The fiduciary duty here, if there is one, would require the 1st defendant to act for the benefit of the plaintiffs in his dealings with them within the scope of their relationship, here, the actualization of the objects of the trust.

The CIT was created on 5th April 2000. Per paragraph 3.12 of the Trust deed (Exhibit E) 2nd defendant was made its Fund Manager. The statement of case of counsel for the plaintiffs, at pages 11 and 12 lists six ways in which the 1st defendant allegedly breached his fiduciary obligations to the plaintiffs. These relate to crediting a certain percentage of shares of the 3rd defendant to himself and a friend, becoming board chairman of the 3rd defendant, favouring the Nigerian investor and the 3rd defendant, incorporating the 7th defendant and taking decisions on BHC assets as though he was a principal owner.

A careful scrutiny of the evidence will show that all the allegations above are in relation to actions taken by 1st defendant after the CIT was set up. In the light of the fact that 2nd defendant was the fund Manager and 1st defendant it's CEO, those actions could only have been taken by him in that capacity. The CIT does not make provision for an advisor or a consultant after its set up. In exhibit J, written on the letterhead of 2nd defendant, for example, the opening sentence states as follows

'We write as investment advisers on behalf of….'

It is signed by the 1st defendant as CEO. The exhibit is dated June 23 2000. Exhibit K is dated July 13 2000. Exhibit L is dated August 14 2001. Exhibit M is dated 29 October 2001. Exhibits Z and AA are dated dated December 15 2005 and July 4 2006 respectively. Exhibit N, is a letter from the CIT. All these describe 1st defendant as CEO of the 2nd defendant. All these go to confirm the findings of the two lower courts that the 1st

defendant dealt with the plaintiffs as the employee of the 2nd defendant at the time the acts complained of took place.

The scope of the relationship between the 2nd defendant as Fund Managers and the CIT is what will determine whether or not it was a fiduciary one. The purpose of CIT was to take equity shares in the proposed bank and they indeed have a percentage of equity shares which from the evidence was what their monies could afford.

The grounds of appeal filed at the court of appeal stated in ground (l) that

That the trial judge, with all due respect, erred when she refused or failed to make a finding that the 1st and 2nd Respondents breached their duties as agents of the Appellants having regard to the manner in which they issued shares in the 3rd Respondent and subsequently caused the dilution of the shares of CIT in the 3rd Respondent.

Paragraph 3.12 of the deed creating the CIT states that the Fund Manager (2nd defendant) was to manage the CIT *'subject to the policy guidelines and direction of the Trustees'.*

As rightly stated by the court of appeal, this complaint related to the alleged dilution of shares through the admission of the Nigerian investor and the shares he was allowed to hold and the fact that he was given these shares without reference to CIT.

In dealing with this ground of appeal, the court of appeal after a discussion of the arguments of counsel for the plaintiffs and the relevant portions of Act 179 and the Banking Act, 2004, Act 673 concluded on the issue of dilution of shares that the actions of the 2nd defendant, listed as complaints against the 1st defendant, (their employee), was in line with the mechanism (as outlined by the 1st defendant in his evidence) usually followed with establishing a project such as this, ie persons who satisfied the Bank of Ghana's requirements were initially registered as directors and subscribers to

the shares and later when qualified investors were found, these persons then allocated the shares they held to the latter. This evidence was accepted by the trial court. The court of appeal was given no reason to dispute it. We have also not been given any reason to do so.

Seeing that the CIT clearly stated that 2nd defendant's management was subject to their guidelines and direction, the plaintiff's complaints would only have some validity if they are able to show that they suffered some loss in the course of this management through the action or inaction of the 2nd defendant that they did not sanction or that these were done on their blind side.

There is no such allegation in the statement of case against the 2nd defendant as Fund Manager and exhibit 6, being minutes of the CIT board of Trustees (found at page 164 of volume three of the record of appeal (ROA)) confirmed CIT's preparedness to take 2.5% of the shares which was later reduced when they could not afford to pay for all of this allocation. The meeting also clearly captured the fact that the Nigerian investor was going to hold 81.7%. Surely the allocation of shares to the Nigerian investor who had brought in the bulk of the money needed for the banking project was not done surreptitiously.

Having found that the BHC assets in question were not purchased by the plaintiffs, how they were dealt with was really not the business of the plaintiffs but that of the CIT only to the extent that that body is a shareholder in the 3rd defendant.

We are satisfied that there was no direct relationship between the 1st defendant in his personal capacity in his dealings with the plaintiffs so there certainly could not have existed any fiduciary duty which could have been breached by him. The trial court found that 1st defendant's position as the chairman of the Board of the 3rd defendant did not result in the breach of any duty to the CIT, which was a shareholder in the said

entity since it did not prejudice them in any way. We confirm the finding of the court of appeal, which finding also confirmed the same finding by the trial court that no allegations of breach of trust and professional negligence were proved against the 1st defendant by the plaintiffs.

In relation to the 2nddefendant company which was plaintiffs' employer, no arguments were made against them in the statement of case filed on behalf of the plaintiffs but our earlier analysis shows that even if the submissions against the 1st defendant were transplanted unto them, no breach of trust has been proved against them. We confirm the findings of the two lower courts in that regard too. That being so we are unable to hold in terms (a) to (d) sought at page 16 of the statement of case of counsel for plaintiffs.

The reason for this is that they are not supported by the evidence on record.

In conclusion, the appeal fails in its entirety and is dismissed. The decision of the court of appeal is hereby affirmed.

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

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