IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

OWUSU (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/50/2021

25TH MAY, 2022

EXPOM GHANA LIMITED …….

PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. VANGUARD ASSURANCE COMPANY LTD. ……. 1ST DEFENDANT/APPELLANT

RESPONDENT

2. TM-STAR INSURANCE SERVICES LTD. …… 2ND DEFENDANT

JUDGMENT

MAJORITY OPINION

PROF MENSA-BONSU (MRS.) (JSC):-

This is a case that arose over an insurance claim that was repudiated by the insurer on grounds of crime and fraud, and the trajectory that it subsequently travelled to reach the Supreme Court for determination.

Background

The plaintiff, Expom Ghana Limited, (now the appellant herein, but who shall be referred to as the plaintiff to avoid confusion with the appellant in the Court of Appeal)was a manufacturer of tomato paste. It had come into this line of business after taking over the business, assets and liabilities of another company owned by the same shareholders, by name, 'Trusty Foods Ltd. The respondent herein, Vanguard Assurance (also referred to as1st defendant, to avoid confusion with the respondent in the Court of Appeal), and the 2nd defendant, TM-Star Insurance Services, were an Insurance Company and an Insurance Broker respectively. Sometime in 2008, Expom Ltd took over Trusty Foods Ltd., together with all its assets and liabilities. These included an 'All Risks Insurance Policy' with the 1st defendant. The 'All Risks Insurance Policy' entered into by Trusty Foods policy was for the following: -

> "All real and personal property of every kind and description of Trusty Foods Limited's own or for which they may be held responsible including but not limited to Buildings, Plant, Machinery, Stocks, Inventory and Equipment as detailed (in the contract) as well as Public and Product liability".

The policy, which had a validity of one year, from 20th November, 2006, to 20th November, 2007, was for a maximum value of five million Euros (E5,000,000). This was subsequently renewed for the years 2007-2008 and 2008-2009.

The whole contract had been arranged by the 2nd defendant, who allegedly, made representations to the plaintiff that the 1stdefendant was a credible insurance institution that paid claims on time.

The takeover of Trusty Foods Ltd by Expom Ltd was brought to the attention of the Insurers, who did not object. When the subsisting Insurance was due to expire in 2009, the 1st defendant prompted plaintiff to renew and this was duly done. It was therefore renewed for the period 20thNovember, 2009 - 20th November, 2010 i.e a period of twelve months; and in the name of the new company, Expom Ltd. The sum assured was fifteen million Euros (E15,000,000), and the premium was quoted as fifty thousand Euros (E50,000)This means that to the knowledge of the 1stdefendant, the contract was now held by the new company, Expom Ltd., and they dealt with the new company accordingly.

On 10th May, 2010, a fire occurred on the plaintiff's premises which destroyed the plaintiff's raw materials and goods. The Ghana Fire Service and Ghana Police Service were called in and they both attended and helped to put out the fire. After the Fire Service and Ghana Police had investigated the cause of the fire, they issued a report attributing the cause of the fire to an electrical fault.

The plaintiff submitted a claim with all the requisite documentation, to the defendant to make good the loss, including the expense of clearing the debris of the damage by fire as provided under the contract. The defendant's, initial reaction was silence. However, after at least two letters reminding them of the claim, the 1st defendant lodged a complaint with the Police Criminal Investigations Department, accusing some staff of

the plaintiff's - a director and three other persons - of the crime of deliberately burning down the premises (or arson, at common law). They were arrested, questioned and admitted to Police enquiry bail. The 1st defendant, then, communicated its refusal to honour payments due under the contract of insurance, and repudiated liability. In consequence, the plaintiff, fearing that the failure of the defendant to honour the terms of the contract would lead to it having to fold up and go out of business, took legal action.

By writ filed on 11th October 2010, the plaintiff sued the insurer, Vanguard Assurance and the Broker, TM-Star Insurance Services, for the following claims: -

i. *A declaration that Defendants are liable to indemnify Plaintiff for the loss and damage suffered by Plaintiff as a result of the fire that damaged Plaintiff's raw materials and goods on 10th May 2010.*

ii. *A declaration that under and by virtue of the insurance contract between Plaintiff and 1st Defendant, 1st Defendant is under an obligation to indemnify Plaintiff in respect of all costs incurred by Plaintiff in clearing the debris left as a result of the fire incident that destroyed Plaintiff's raw materials and goods on 10th May 2010.*

iii. *An order directed at Defendants to pay forthwith the Plaintiff the sum of four million, nine hundred and forty-two thousand three hundred and eleven euros, fifty-three euros cents (E4,942,311.53) being the value of the raw materials and goods damaged by fire which occurred on Plaintiff's premises on 10th May 2010.*

iv. *An order directed at 1st Defendant to pay all cost incurred by Plaintiff in clearing all the debris left at Plaintiffs' premises as a*

result of the fires that destroyed Plaintiff's raw materials and goods on 10th May 2010.

v. *Compensation by way of interest on the aforesaid sum of E4,942,311.53 at the prevailing bank rate from 11th May 2010 when Plaintiff made its first demand for payment of the aforesaid sum to the date of final payment which interest shall to the extent possible compensate Plaintiff for the loss of profits resulting from the Plaintiff's inability to carry on production by reason of Defendant's refusal to honour their obligations under the contract of insurance concluded between Plaintiff and 1st Defendant timeously.*

Interest on any and all sums expended by Plaintiff in clearing the debris left as a result of the fire which caused damage to Plaintiff's raw materials and goods on 10th May 2010.

Costs for prosecuting the present suit on a full indemnity basis."

In the statement of defence filed on 9thNovember, 2010, the 1stdefendant denied that there was a valid and subsisting contract between it and plaintiff. It contended that Expom Ltd., the plaintiff, had fraudulently misrepresented to it that it was the same legal entity as Trusty Foods Ltd. Consequently, the plaintiff, which was a stranger to the contract, had no insurable interest in the raw materials which according to them, *"had expired or were about to expire*" at the time of the fire. The 1stdefendant further accused plaintiff of having deliberately "*caused the fire that destroyed the goods and raw materials.*" Further, that the "*Plaintiff took calculated steps to prepare the grounds for this claim"* that had been "*actuated by malice*". It also alleged fraud and provided the following particulars of fraud: -

a) *Fraudulently misrepresenting to the Defendants its relationship with Trusty Foods Ltd.*

b) *Deliberately omitting to submit vital documents in respect of its operations immediately prior to the fire, with the view of deceiving the 1st Defendant into paying the claim.*

c) *Deliberately causing the fire with the view to making a false claim*".

The contract of insurance carried a clause titled "*Watchmen's Clause as follows:*

> *"It is hereby declared and agreed that this policy is issued on the condition that a Night watchman is continuously on the within mentioned premises at all times between the hours of 6.00pm and 6.00am when the premises are closed against customers and/or callers*".

It had also excepted from liability under Section 2:

> *"(a) loss of or damage where any inmate or member of the Insured's household or of his business staff is concerned as principal or accessory or loss of damage due to the willful or negligent act or with the connivance of the Insured".*

Based on all these, the 1st defendant had repudiated liability.

Further to these substantive grounds, the defendants pleaded that there was an arbitration clause in the contract and the plaintiff should have invoked that clause first, before instituting this action. They therefore prayed that the action be set aside.

The Pre-trial Conference/Settlement of issues agreed to be tried, settled on ten (10) issues: -

1. *Whether or not Plaintiff has an insurable interest in the goods that were destroyed by the fire on the Plaintiff's premises?*
2. *Whether or not Plaintiff deliberately caused the fire that destroyed Plaintiff's goods and raw materials*
3. *Whether or not Plaintiff's claim against the 1st Defendant is actuated by malice?*
4. *Whether or not Plaintiff failed to mitigate the loss?*
5. *Whether or not Plaintiff fraudulently misrepresented materials facts to 1st Defendant*
6. *Whether or not the tomato paste had expired or neared expiration and therefore had no value.*
7. *Whether or not the 1st Defendant is liable to indemnify the Plaintiff for the loss and damage allegedly suffered on 10th May 2020*
8. *Whether or not the Plaintiff is liable to pay interest on the quantum of indemnity, if at all.*
9. *Whether or not Plaintiff is entitled to damages for loss of profit resulting from their alleged inability to carry on production.*
10. *Whether or not the Plaintiff is entitled to the quantum of indemnity claimed, if at all".*

All these issues are highlighted herein, in order to demonstrate the twists and turns that transformed the nature of the case as it travelled through the hierarchy of courts.

On 20thApril, 2011, following a motion by 1st defendant to stay proceedings pending arbitration, a ruling was delivered. The High Court ruled that the evidence of

1st defendant's conduct led to the inexorable conclusion that it had waived its right to arbitration, as it had waited too long to file the procedures to truncate the trial. In any case, the High Court said, that the allegations of fraud and arson levelled by the 1st defendant against the plaintiff being criminal, would take the case out of the remit of Arbitration. The case therefore travelled its "normal course" at the trial court although the 1st defendant had filed a notice of appeal on 28th April, 2011 and a stay of proceedings pending appeal on 29th April 2011.

The High Court eventually delivered judgment on 8th January, 2013. In the judgment, it made a finding that a broker was not "an agent to the Insurance Company whose engagement with another party he brokered", and therefore the action against 2nd defendant was dismissed.

Of the issue that the plaintiff had no insurable interest in the raw materials that got destroyed by fire, the court said,

> "The logical deficit in this argument lies in the suggestion that even though Expom had taken over the assets and liabilities of Trusty Foods including the policy, even though the policy had been renewed in the name of Expom, and even though Expom had assumed payments of premiums in its own name, because the takeover process was still ongoing, Expom did not have an insurable interest in the raw materials. That certainly cannot be an acceptable deduction".

Quoting Collinuaux's *Law of Insurance* 7th Ed at 112 paragraph 4-45,the Judge explained that the burden of proof for grounds alleging the existence of circumstances of exception under a contract of insurance lay on the Insurance Company and this burden had not been discharged. It also cited the Indian case of *Narvinva Kamat & Anor* v

Martins &Ors. (1986) Commonwealth Law Reports, p.84 in which the Supreme Courtof India made the following pronouncements: -

> "*The burden to prove that there was a breach of the contract of insurance was squarely placed on the shoulders of the Insurance Company. It could not have been discharged by it by a mere question in cross examination. The 2nd Appellant was under no obligation to furnish evidence so as to enable the insurance company wriggle out of the liability under the contract of insurance. The insurance company could have got the evidence produced to substantiate its allegation. Applying the test, who would fail if no evidence is led, the obvious answer is the insurance company".*

The court then concluded that "*the plaintiff therefore showed the prima face evidence required of it to shift the burden onto the defence to prove the exception alleged*".

The High Court stated convincingly that the defendant failed to prove that there was arson or that there was fraud. No evidence was led to show the outcome of the complaint to the police to establish criminal conduct of plaintiff or the basis of the allegation of fraud. Commenting on the posture of the 1st defendant, the High Court observed, with some justification, that the defendant had made some "*desperate attempts … to wriggle out of liability by every conceivable excuse*". Consequently, the High Court held that the 1st Defendant was bound to indemnify plaintiff "*for the loss suffered as the result of the fire in fulfilment of the terms of the policy*."

The 1st defendant promptly filed a notice of appeal on 15thJanuary, 2013. On the notice of appeal, the grounds set down were: -

a) *The judgment was against the weight of the evidence*
b) *The excessive costs awarded*
c) *Additional grounds to be filed upon receipt of the judgment*.

Additional grounds of appeal were later added (with different numbering style) as follows: -

> *"3. The learned trial judge misapplied the law on indemnity when he awarded 4,942,311.53 euros as the value of Plaintiff's raw material and goods damaged by fire together with interest as well as 500.000 euros as costs.*
>
> *4. The cost awarded is excessive having regard to the circumstances of the case.*
>
> *5. The trial judge failed to adequately consider the defence of the 1st Defendant/Appellant.*
>
> *6. The award of 400,000 Euros for the clearance of the debris cannot be supported by the evidence adduced at the trial".*

The 1st defendant argued these grounds beginning with 'Ground 5' that "*The trial judge failed to adequately consider the defence of the 1st Defendant/Appellant.*" It was on this point that the 1st defendant submitted that there had been a breach of the 'Watchmen's Clause', although the trial court had said they had failed to discharge the burden of proof which had shifted to them. On its part, the plaintiff mounted a vigorous defence of the judgment of the High Court, arguing that as far as it was concerned it had complied with the Watchmen's Clause.

On 15thJanuary, 2015, the Court of Appeal delivered its judgment, upholding the appeal of the 1st defendant. In the judgment of the Court of Appeal, it indicated that

> *"the question in this appeal is whether the Appellant was freed from liability under the policy by reason of the Respondent replacing the security men on duty at its premises with a driver and a carpenter on the night of the fire outbreak."*

"Simply put", the Court said, *"the issue is whether the action or inaction of the Respondent contrary to the security warranty which formed part of the renewed policy dated 1st November, 2009"* could justify the repudiation of liability.

At this point the Court of Appeal, in a surprise move, indicated that it had no intention of pronouncing on all the issues raised in the grounds of appeal because the1st defendant (then appellant) had raised an issue in its brief whose effect was,

> *"in reality an objection **in limine** that is to say if it is determined in the Appellant's favour, then this court need not proceed to consider the other legal matters canvassed on the briefs"* (emphasis in original).

It went on further to justify its posture thus:

> *"By the terms of the security warranty the Respondent promised or agreed expressly or absolutely with the Appellant to keep its premises guarded by "**security men/personnel** at all times after the close of work from 6.00pm to 6.00am. To the extent that the parties had agreed to the warranty, then each was entitled to strict performances regardless of materiality" (Emphasis in original).*

The Court then read a text which defined 'Warranty' in insurance contracts and drew the following conclusion:

> "from the above, both text… and case law are unanimous that in insurance contract warranties are fundamental terms which must be complied with by the insured and it is quite

> irrelevant that the breach is unconnected with a loss that occurs".

It is against this judgment that the instant appeal was lodged. On 1st April, 2015, the plaintiff filed a notice of appeal to the Supreme Court with the following grounds:

> a) The Court of Appeal erred in its interpretation of the warranty of the watchmen's clause in the insurance contract to mean a detachment of security personnel instead of the ordinary meaning of "security personnel".
>
> b) The Honourable Court's conclusion that there was a breach of warranty of the watchman's clause on the sole grounds that person's [sic] who watched the property on the night of the fire had other professions e.g. driver and carpenter is unjustifiable.
>
> c) The judgment is against the weight of evidence.
>
> Additional grounds of Appeal shall be filed upon receipt of the judgment ".

No other grounds were filed, and so we proceed on these three grounds only. Further, a close examination of the grounds shows that grounds (a) and (b) are essentially two sides of the same issue. In order to avoid repetition, therefore, the two grounds shall be dealt with together.

Grounds (a) and (b)

> *a) The Court of Appeal erred in its interpretation of the warranty of the watchmen's clause in the insurance contract to mean a detachment of security personnel instead of the ordinary meaning of "security personnel".*
>
> *b) The Honourable Court's conclusion that there was a breach of warranty of the watchman's clause on the sole grounds that*

person's [sic] who watched the property on the night of the fire had other professions e.g. driver and carpenter is unjustifiable.

This appeal therefore has, following the intervention of the Court of Appeal, narrowed down the issues further, to whether or not the interpretation of the clause that disposed of the case *in limine* in the Court of Appeal was right or wrong; and whether the two persons left on duty to perform guard duties on the night of the fire satisfied the warranty pertaining to "Watchmen" or "Security personnel"?

The plaintiff has complained that the trial judge failed to consider the Watchmen's Clause which the contract of insurance carried as follows:

> *"It is hereby declared and agreed that this policy is issued on the condition that a Night watchman is continuously on the within mentioned premises at all times between the hours of 6.00pm and 6.00am when the premises are closed against customers and/or callers".*

The 1st defendant quoted the text of the Watchmen's Clause under the contract and in one sentence disposed of it by the sentence

> *"My Lords, a driver and carpenter were made to keep watch on the night of the fire after the Respondent had sent home eleven (11) security personnel. This was in breach of the policy."*

Narrow as the issues have become, there is an even more fundamental issue which must be cleared before the correct interpretation can be properly explored. By the amended statement of case of the 1st defendant and the Reply of the plaintiff, it is clear that a more fundamental question is whether the new clause relied on as an endorsement of the renewed contract was, in fact a part of that insurance policy in the

first place. For, if it did not belong, then whatever its interpretation, it could not displace those clauses that were agreed upon as belonging to the contract. No party to a contract can vary its terms by unilateral action after the fact, and make the terms more onerous of performance than what was agreed upon.

In a twist to the trajectory of this case, the Court Appeal discovered an "endorsement to the renewed policy" which carried the 'Security Warranty' exhibited on p466 of Vol 1 of the Record of Appeal. This, it heavily relied on, to come to its conclusions.

The plaintiff, on appeal to this honourable court, submitted in his Reply filed on 26th July, 2021 to defendant's amended statement of case filed on 13th July, 2021, that the document from which the Court of Appeal lifted the supposed clause on "Security personnel" in preference to the 'Watchmen's Clause' in the contract was never a part of that contract put in evidence at the trial court. As counsel put it in points (iv) and (v) on page 3 of the Reply to the respondent's amended statement of case,

> *"The document was never tendered in evidence and therefore cannot be referred to in any way as evidence much less construed to include an essential ingredient such as a fraudulent clause in a contract which is in issue".*

He went on further to submit that :

> *My Lords apart from the policy (Exhibit 'G') there was no other document in evidence governing the terms of the "all asset risks policy" between the parties. Exhibit 'G' therefore is the … document that must be looked at in determining liability or otherwise.*

Counsel for the plaintiff commented on the 'Security Warranty' quoted by the Court of Appeal, and characterised it as a "strange and extraneous quotation not found anywhere in the insurance contract (Exhibit 'G')". He further submitted that by importing it into the case and making it the basis of the decision, the Court of Appeal, had misdirected itself. To this submission, counsel for the 1st defendant in paragraph 6.3 of the amended statement of case responded thus:

> *"**Assuming without admitting** that the "Security Personnel Warranty" was not part of the policy signed between the parties, the Respondent submits that the Appellant breached the Watchmen's Clause which is a warranty under the policy. The breach discharged the Respondent from any obligation to the Appellant".*(emphasis added)

This was a most ineffectual response to such a powerful body blow from the plaintiff. If there was no merit in the plaintiff's submissions in respect of the "extraneous" material, why could counsel not be more definite and categorical in dismissing that argument? Clearly, a matter as important as the foundation of one's victory in the appellate court deserved better, than the adoption of a particular posture only for purposes of argument. Why did counsel for 1st defendant not state with conviction that the plaintiff was mistaken in saying that the "'Security Personnel Warranty' was not part of the policy signed between the parties"? It is also worthy of note that having begun on the note of "Assuming without admitting", counsel for 1st defendant only added "*the Respondent submits that the Appellant breached the Watchmen's Clause which is a warranty under the policy*". He did not seek to establish what the meaning to be attached to the Watchmen's clause should be, to defeat plaintiff's argument since the question of breach was in issue.

How did this 'Endorsement' come to feature so strongly in the judgment of the Court of Appeal when it had not been pleaded? A close inspection of the document made interesting revelation. It bore no 'Exhibit' designation and so, as counsel for plaintiff urged on us, it did not belong to Exhibit "G" the original contract. However, it had been so cleverly attached after the real 'Endorsement' in the Record of Appeal, as to appear to have been part of it. Indeed, only a careful and studied look at the documents could reveal its nature as "extraneous material."

The manner of inclusion in the Record of Appeal was intended to achieve a certain effect, and it certainly did, for, the Court of Appeal mistook it for a document in evidence, made copious references to it and was thereby misled to come to the conclusions it did. Here is why its presence and position on the Record of Appeal was bound to mislead. First, on the evidence, this document was not part of Exhibit "G", and so had not been tendered in evidence and accepted as such at the trial court. This meant that it had nothing to do with the appeal, and so should not have been on the Record of Appeal in the first place. Second the location of its placement on the Record of Appeal at page 457 after the real Endorsement, raised questions. The real Endorsement came directly after the main contract and bore the title 'Endorsement', and was made up of three pages, numbered "3 of 3" in the header, obviously by the computer programme, on pages 454-456 of the Record of Appeal. To reinforce the fact that it was only a three-page document but part of the contract, it carried the usual information that normally concludes any formal document, i.e. signature(s) and the date on which the document was made. Page "3 of 3" of the 'Endorsement', i.e page 456 of the Record, carried the date on which it was signed as: "01st day of December, 2009". It also carried two signature sections beneath the date on the left-hand side and right-hand side respectively. On the left-hand side were the words, "Examined By:" with an illegible signature above the designation "Broker Relations Dept", and stamped with

"Vanguard Assurance Co Ltd. On the right hand side was another stamp of the 1st defendant with an indecipherable signature above the words, "Duly Constituted Authority". A document so concluded must surely be the entirety of the 'Endorsement', and any supposed further attachment not mentioned on that document must raise suspicion as to its authenticity.

Again, the "Combined All Risk Policy" was captured on pages 436-453 with its warranties listed on page 447, including the "Watchmen's Clause". On its part, the document attached and numbered pages 457-466 of the Record bore a different header and was titled "*Fire and Allied Perils Insurance*". This appeared to pertain to a different product as the succeeding pages carried the same header as the cover page, indicating that they all belonged in the same document. It begins with an "Introduction", that reads as follows:

> "*Thank you for choosing the Vanguard Fire and Allied Perils Insurance Policy. If you have any queries or wish to make any changes to your cover, please call [a series of telephone numbers are supplied*] …".

Then on page 462 of the Record, the document bears a sub-title written in capital letters with bold type-face "*Conditions upon which this insurance is granted*". Its last page (i.e. page 466 of the Record), unlike the last page of Exhibit "G" and also the real Endorsement, does not bear any stamp. Clearly, from its look and content, it is an attachment to another document and not the Endorsement "schedule attaching to and forming part" of the to the contract to which the parties subscribed. This was the document which carried the "Security Personnel Warranty" on which the Court of Appeal based its judgment. This document did not feature in the trial at all – not being a part of the 'All Risks Policy' governing the relationship between the parties. This was

the document, described as a 'brochure' for another product of the 1st defendant by the plaintiff, and as the 'Endorsement' to the 'All Risks Policy' by the Court of Appeal.

Significantly, the contract of insurance that was inherited from Trusty Foods and captured as Exhibit 'G' on pages 119-136 of the Record of Appeal, was duly stamped on page 136 with 1st defendant's stamp, whilst the other one ending on page 466 was not so stamped. The question is how and why a completely new policy surfaced at page 457 and was exhibited as part of the Record? In the final analysis, the decision of the Court of Appeal which was to dispose of the case *in limine*, was based upon this "strange and extraneous material".

The Court of Appeal at page 11 of its judgment, stated that a resolution of what warranty was applicable would dispose of the entire case in limine. The wording of the "Security personnel warranty" from the 'Fire and Allied Perils' document, read as follows:

> *It is warranted during the currency of this policy that security personnel will be on duty continuously at all times between the hours of 6.00pm and 6.00am when the premises are closed to the general public".*

From this the learned Court of Appeal judge continued thus:

> *I must say that the respondent's reference to the Watchmen's clause …where the insured (respondent) was required to provide one night watchman at its premises between the hours of 6.00pm and 6.00am was in respect of the insurance policy between the appellant and Trusty Foods Limited covering the period 20th November, 2006 to 20th November, 2007. … The endorsement*

schedule attaching to and forming part of the renewed policy the subject matter of this case relevant to us at pages 465-466 of the Volume one of the record states:

Warranties

1. *Fire Extinguishing Warranty*

2. *Documentary Evidence Warranty*

3. *Security Warranty*

The security warranty mandates the respondent to provide security personnel and not one night watchman (as contended by counsel for respondent) at its premises between the hours of 6.00pm and 6.00am when the premises are closed to the general public. This brings us to the issue of whether the respondent breached the security personnel warranty in the policy…

The Court of Appeal accepted that,

> *"These were the warranties in "the endorsement schedule attaching to and forming part of the renewed policy the subject matter of this case."*

This meant that it did not consider what the "Watchmen clause" in the contract required, having explained its posture that the Watchmen's Clause was in respect of the contract with Trusty Foods. It also indicated, without sufficient evidence that when the contract was being renewed with the new company, that the warranty that was endorsed and added to the contract to supersede the 'Watchmen's Clause'.

The Court of Appeal then proceeded to discuss what would amount to a breach under this "new contractual warranty" that would entitle the 1st defendant to repudiate liability. It defined the new clause in the following terms:

> *"Security Personnel in its ordinary meaning imply persons who have been given training in basic guard responsibilities including money, valuables and building … surveillance and intelligence familiarity with law governing powers of arrest and detention etc."*

Having taken this dictionary meaning of "security personnel" when he should have been interpreting "Watchmen" as understood under the contract, the judge went further and said:

> *"Interpreting the words and looking at the birth of the security warranty clause, I am unable to accept the contention of Counsel for the Respondent that as the insured premises was guarded by a driver and a carpenter as watchmen on the night of the fire outbreak there was no breach of the security warranty/clause. … With all due deference to learned Counsel for the Respondent, a driver and a carpenter cannot metamorphose into security men/personnel under the policy."*

The learned judge then said,

> *"I must hasten to add that security men/personnel should not be viewed simply as glorified watchmen or watch persons in uniform".*

Clearly, the plaintiff is right to complain that the definition used to explain the 'Watchmen's Clause' had appeared from nowhere and been used as the basis of the Court of Appeal's decision. Counsel for plaintiff submitted in his statement of case

> *"My Lords, it is a fact that the insurance contract did not mention the phrase 'Security Personnel' but Watchman and therefore the Court of Appeal … was bound to operate with the stipulation in the contract and not any extraneous importation"*

One has to agree with this position of the counsel for plaintiff. It is trite law that contracts of insurance are contracts of good faith, but, with respect, the good faith is not supposed to be only on one side. How could a breach be founded on a clause that "was not part of the policy signed between the parties"? How could it then be the determining factor of rights and liabilities under the contract? Contracts are not based on speculative assumptions, or what a particular person believes to be fair, but on the specific terms agreed upon between the parties.

The so-called 'warranty' substituted "Security personnel" for "Night Watchmen". If two persons were sent to perform security duties that night, why was that to be considered to be a breach of that warranty? For the Court of Appeal to determine its own meaning of "security personnel" by producing the definition of *a "security guard as a person whose job is to guard*…" What is not clear is why their Lordships did not consider the stationing of the two staff at the gate as being sent "to guard the premises against intruders". It is again unclear how the Court of Appeal came by the "approved syllabus" for training security guards, because it stated,

> *"Security personnel in its ordinary meaning imply persons who have been given training in basic guard responsibilities including*

money, valuables and buildings, basic surveillance and intelligence familiarity with law governing powers of arrest and detention, etc.

With respect, this conclusion is without foundation. In any case, the 1st defendant did not specify qualifications he would accept for persons who had to perform security duties under the supposed new 'Endorsement'. The Court of Appeal took no evidence on what formal training in the technicalities of security work the two men possessed. The fact that they worked as 'driver' and 'carpenter' respectively did not mean they had no prior training. Therefore, by what evidence did the Court come to the conclusion that the eleven (11) persons that were sent home on an allegation of theft at the premises had been trained in all manner of disciplines, that the two knew nothing about? Without any specific evidence, it was impossible to conclude that the training of those two men was any worse than those in uniform. Yet the Court was able to come to the conclusion that the presence of these two did not satisfy the "Watchmen's Clause".

In the contract, the 1stdefendant had gone to some trouble to except coverage under the Policy for "damage by nuclear radiation", but could not specify who would qualify as "a watchman" under the clause? The Court of Appeal went too much out of its way even on "security personnel" on the supposed Endorsement to impose a meaning on the warranty that it clearly did not bear. Even if what the plaintiff's officials did was unwise, high-handed and even irresponsible, it did not constitute a breach of the Watchman's clause or the security warranty.

Counsel for the1st defendant argued five grounds of appeal at the Court of Appeal, and only devoted one sentence to the "unsuitable two" in his submissions. It must be clearly stated that suspicion built on suspicion can never amount to proof. It is clear from the Record that the 1st defendant suspected foul play right from the start, but did very little to secure evidence to make a case. It is also clear that 1st defendant did not trust the

report of the police and Fire Service personnel who attended the scene, yet, they did not contract their own independent investigators till more than a year afterwards. The official reports from the two institutions put the cause as electrical fault, but 1st defendant believed otherwise. The plaintiff's officials whom they suspected of deliberately causing the fire were never prosecuted. Indeed, it is unclear if the investigations were ever concluded. There was thus little effort made to provide credible alternate evidence, but 1st defendant persisted in holding out that the fire had not been caused by an electrical fault. Indeed, long after the incident, the best 1st defendant could get was a report titled "Supplementary Investigations" report which was compiled in 2011 by the Fire Service. The Introduction to the Report tellingly read as follows:

> *The second investigation was conducted into above-named fire outbreak by DOI James Owusu-Agyei, DOIII Stephen Pobee and Emmanuel Mensah of Ghana National Fire Service Headquarters on Wednesday 11th and Friday 13th May 2011. This investigation was necessitated by Vanguard Assurance, insurers of Expom Ghana Ltd, who requested for a second look to complement the first investigations report of the fire outbreak submitted by Station Officer Emmanuel E.A. Okyere of Tema Regional Fire Station. This report therefore does not negate but complement [sic] the first report."*

Such a report would be open to a number of objections as it was a revision commissioned at the instance of the defendant, more than a year after the incident occurred; and written by persons who did not visit the scene of the event at the time it occurred. To make matters worse, the substance was to the effect that it was only intended to "complement", and not contradict the first report. Eventually what that

report did was only to add another possible cause of the fire and so giving two possible causes as follows: 1. Electrical fault 2) Introduction of naked light. The question is: "Which of these two causes was the real cause?". The supplementary report was unhelpful in providing a definite answer, but only affirmed the contents of the original report by stating that it was only "complementary" to what the original report had said. How then could the 1st defendant select one and base its case on it?

Again, it was well after the trial had begun that an expert was brought in. Despite the expert's credentials, he managed a visit to the premises more than two years after the incident and only a few days before giving his testimony, and yet was seeking to discredit the official reports that were available. It is clear that the 1st defendant was not diligent in taking necessary steps timeously to secure evidence that was credible and independent of what the state-sponsored experts had provided. If the trial judge was unimpressed with the testimony of the expert, he cannot, under the circumstances, be faulted.

At page 20 of the statement of case, counsel for 1st defendant submitted that

> *"From the foregoing, it is absolutely clear that no fair-minded judge could disregard such glaring evidence which could logically only lead to the dismissal of Respondent's case at the trial."*

We cannot agree with this conclusion. Indeed, contrary to counsel's submission to the Court of Appeal, there was nothing "glaring" about the evidence provided at the trial court, and only a fair-minded judge would have engaged in the exercise the trial court engaged in, to come to a conclusion whether or not the criminal conduct alleged against the plaintiff had been proved.

After failing to prove criminal conduct to base the repudiation of liability on, the 1st defendant then latched on to other causes, including a suit between the plaintiff and one of its former customers over failure to pay for goods supplied. Counsel submitted to the Court of Appeal on 24th March 2014, that,

> "*My Lords, it is the Appellant's case that the respondent used some of the raw materials it imported from February 2009 to August 2009 to produce the finished goods in July 2009 and sold some to Thonket which went bad before its allocated shelf life. The Respondent realized that the raw materials were not good for production and therefore abandoned its use and set them ablaze.*"

This was an astonishing posture to adopt after evidence had been led at the trial court to establish that the practice of the factory was not to manufacture according to the order of receipt of the raw materials, but according to the needs of the market. This was not successfully challenged under cross-examination. Therefore, the trial judge was right to characterize the resort to the case between Trusty Foods and *Thonket* as based on a conclusion that was "bizarre". How could the fact that the plaintiff was in another court over expired goods with a customer, mean that the raw materials burnt were expired goods? Was there a specific finding in the *Thonket* case by the court that the raw materials used in the manufacture of the goods concerned had, indeed, expired? The fact that a defaulting customer was setting up an excuse for not paying his debts does not mean that the allegations he made were true. Therefore, to build one's own case on the presumed veracity of those allegations, is at best a risky strategy. Fortunately, as the trial judge properly found, the two situations did not seem to be linked at all, for, even if that case managed to establish a claim that plaintiff used expired raw materials to produce the goods in question, that still would do nothing to establish that the raw materials concerned in this instant case were in the same condition. Counsel's

submission in the statement of case that, "*if for nothing at all one party has an interest in both matters*" is the very kind of conclusion that must be avoided. Since when has one party having an interest in two unrelated cases become the basis for drawing inferences of guilt in one of them?

What stands out in this case is that the 1st defendant used suspicion plus supposition plus speculation to arrive at the answer it started out with, to mount his defence. However, suspicions added to supposition and speculation do not amount to proof on the part of one on whom the burden of proof rests as to the existence of any material fact. Indeed, right from Day One, the 1stdefendant had made strenuous efforts to avoid liability yet, did not do enough to secure credible evidence to prove the very serious allegations it made against the plaintiff. It is surprising that it took two years to engage their own expert to attempt to cast doubt on the report of eye witnesses.

The Burden of Proof

The High Court rightly dealt with the burden of proof under the Evidence Act 1975 (NRCD 323). The High Court noted that the burden shifted from the plaintiff onto the defendant when serious allegations crime and fraud were made. However, the 1st defendant failed to discharge the burden. Explaining what the burden of proof means and on whom it rests, the learned author in S.A. Brobbey "*Essentials of the Ghana Law of Evidence*", Datro Publications, Accra, 2014" at p. 75, stated that,

> *"Legal burden is the duty that lies on the party who positively asserts the fact in issue and to whose claim or defence proof of that fact is essential."*

The 1st defendant had made allegations of criminal conduct and fraud against the plaintiff, and so had made positive assertions that required proof. Yet the 1st

defendant was content to merely rely on cross-examination to discredit the plaintiff's evidence without leading any evidence to establish his own assertions, believing that the burden of proof rested on the plaintiff throughout the trial. This notion was addressed by Brobbey JSC in *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors v Kotey & Ors* [2003-2004] SCGLR 420 at pp. 464-465 thus:

> *"It is important to point out that in the evolution of jurisprudence in this country, much caution is called for when relying on some of the popular common law principles, particularly where those principles have been affected by statute law in Ghana. The hackneyed common law principle has always been that a defendant in a civil case assumes no onus of proof and, indeed, is said to be under no obligation to prove his defence. Serious inroads have however been created in this principle by two sections in NRCD 323. The first section which states that:*
>
> *11(1) For purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."*
>
> *The second is section 14 reads that:*
>
> *'Except as otherwise provided by law, unless and until it is specified a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.'*
>
> *These sections of the Evidence Decree, 1975 clearly require a defendant who wishes to win his case to lead evidence on issues he*

desires to be ruled in his favour. The effect of sections 11(1) and 14 and sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything: the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of evidence before the court, which may turn out to be only the evidence of the plaintiff. If the court chooses to believe the only evidence on record, the plaintiff may win and the defendant may lose. Such loss may be brought about by default on the part of the defendant. In the light of statutory provisions, literally relying on the common law principle that a defendant does not need to prove any defence and therefore does not need to lead any evidence may not always serve the best interest of the litigant even if he is a defendant."

See also *Ackah* v. *Pergah Transport Ltd* [2010] SCGLR 728 at 736 per Adinyira JSC.

The serious allegations of criminal conduct made on the pleadings meant that the burden of establishing the facts of the said criminal conduct fell on the 1st defendant to

prove the allegations made as provided under Section 14 of the Evidence Act, 1975 (NRCD 323). At p. 74, *"Essentials of the Ghana Law of Evidence"*, (supra) Brobbey JSC (as he then was) explained the import section 14 is thus,

> *"when it is said that the burden of proof shifts, what is meant is that after one party has adduced sufficient evidence to prove his point, the burden will move to the opposing party to adduce more cogent evidence which will disprove the opponent's case and induce the court to believe him and rule in his favour. The shifting of the burden applies only to the burden to produce evidence. This is the position in civil trials. The burden will not shift in respect of the burden of persuasion in civil trials*

On the question of the standard of proof when crime is alleged in a civil case, the learned author in S.A. Brobbey "Essentials of the Ghana Law of Evidence", supra, restated the law at page 43,

> *"To impute a crime to a person is quite serious and therefore proof of that imputation should not be lightly established. It should carry a high degree of proof to portray the seriousness of the imputation."*

This restatement of the law thus called for 1st defendant not only to lead evidence to prove these serious allegations, but to also meet the standard of "proof beyond reasonable doubt". However, the 1st defendant did neither. Adopting a strategy of attacking the evidence of the plaintiff by cross-examination only, was inadequate to discharge the twin burdens of producing evidence; and persuading a tribunal of fact beyond reasonable doubt. This, the trial judge correctly noted, and one cannot disagree.

The Court of Appeal discussed the law on 'warranties' in Marine Insurance and held that current opinion is to the effect that this approach applies to non-marine insurance as well. The Court of Appeal stated that,

> *Strictly speaking,* ***The Good Luck*** *is a marine insurance authority, the principle of automatic cessation has been held to apply to non-marine policy. It is now clear that* ***The Good luck*** *applies to non-marine insurance contracts as much as it does to marine insurance contracts."* (emphasis in original).

In saying so emphatically, the Court of Appeal relied on the authority of '*The Good Luck*' as if it were a binding authority in this jurisdiction. However, being only of persuasive authority, the Court of Appeal ought to have given opportunity for more critical analysis to determine whether such a posture is helpful in a developing economy where Insurance is viewed with skepticism and even suspicion. Will such an extension of principle from marine insurance serve the purposes of insurance when adopted in a developing economy which is seeking to build its insurance industry? Will it make insurance more attractive as a means of saving a person from financial ruin for an unforeseen event, or become a source of further skepticism as to whether insurance serves any but the purposes of insurers? The adoption of that persuasive authority is insufficiently grounded in everyday realities of life in Ghana.

The third ground of appeal was the usual omnibus clause which has been held in a long line of authorities to open the door for an appellate court to examine the entire case by way of re-hearing. See the well-known and much-cited authority of *Tuakwa* v *Bosom* [2001-2002] SCGLR 61 at p.65 per

Akuffo JSC (as she then was); *Agyeiwaa* v *P&T Corp* [2007-2008] 2 SCGLR 985 when Georgina Wood CJ at p. 989,

> *"The well established rule is that an appeal is by way of rehearing, and an appellate court is therefore entitled to look at the entire evidence and come to the proper conclusions on both the facts and the law."*

In the later case of *Oppong* v *Anarfi* [2010-2012] GLR 159 at p.167 Akoto-Bamfo JSC makes the same point as well. Consequently, the third ground of appeal has also been disposed of by the preceding analysis.

Conclusion

One can argue at length about the meaning of 'Night Watchman', but it will not change the fact that one need not be employed with the tag of "Night Watchman" or even "security man", before one can perform the function. In a country where until recently, most people who worked as "Night Watchmen" were stark illiterates, it is surprising that so much is made of the fact that the people set to watch that night were a driver and a carpenter respectively. In interpreting a clause that did not belong to the contract of insurance to come to its decision, the Court of Appeal was in error. The High Court judgment was well reasoned and thorough in its analysis of the issues presented to it for adjudication and there is no good reason to depart from it.

The plaintiff is entitled to recover the sum of E4,942.311.53 and interest thereon "at the prevailing commercial rate from 11/5/10 till date of final payment. The cost of Four hundred thousand Euros (E400000) awarded for clearing of the debris does not seem unreasonable since 1st defendant led no evidence to rebut same. It is however difficult to justify the costs of E500,000 awarded on full indemnity basis, and therefore that will not

be allowed. Consequently, save for disallowing the costs awarded as full indemnity to the plaintiff, we would allow the appeal, and restore the judgment of the High Court except the award of costs.

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

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

AMADU JSC:-

(1) The key question for determination in this appeal is, which of the two lower courts properly evaluated the evidence and applied the relevant law on same to have arrived at the proper conclusion in their respective judgments. While the trial court in its judgment had found the evidence of the Plaintiff/Respondent/Appellant as sufficient in the discharge of its statutory burden of proof and persuasion the Learned Justices of the Court of Appeal found and held otherwise.

(2) Our determination of this appeal therefore depends substantially on our own re-evaluation of the totality of the evidence on record and our application of the relevant law to determine which party satisfied the standard required by statute in the discharge of their respective evidential burdens of proof and of persuasion. Having ably dealt with the issue of warranty in the lead judgment, I intend to dwell on the aspect of the case of the Respondent with respect to the allegation against the Appellant largely founded on suspicion of criminal conduct but the evidence in support of which fell short of the statutory standard

required of a party in the discharge of the burden of proof of allegations of crime even in civil cases.

(3) In its appeal to this Court, the Appellant formulated three grounds of appeal as follows:

1. "The Court of Appeal erred in its interpretation of the warranty in the watchmen's clause in the insurance contract to mean a detachment of security personnel instead of the ordinary meaning of security personnel.

2.The Honorable Court's conclusion that there was a breach of warranty of the watchman's clause on the sole ground that persons who watched the property on the night of the fire had other professions e.g. ,driver and carpenter is unjustifiable.

3.The Judgment is against the weight of evidence".

(4) The Appellant attacked the decision of the Court of Appeal on its interpretation of the warranty in the watchmen's clause in the insurance contract. Similarly the Appellant assails the finding of the Court of Appeal that the Appellant breached the warranty of the watchmen's clause by putting on duty as watchmen, the Appellant's workers who are a carpenter and driver in satisfaction of the provision of watchmen by the Appellant on the insured premises as provided for in the contract of insurance.

(5) In the Judgment of the Court of Appeal, it held at page 81 of Vol.5 of the record that:-***"Guided by the principle of law in "The Good Luck" supra, I hold that the insured Respondent did breach the security warranty when it acted contrary to the said undertaking. And upon breach of the warranty the Appellant insurer was automatically discharged from all liability as from the date of the breach that is the evening before the fire outbreak when the Respondent sent home the entire security men and replaced them with a driver and a carpenter. Consequently I find that the Respondent is not entitled to any claim."***

(6) The Respondent has argued in support of the finding and conclusion of the Court Appeal aforesaid. However, an examination of the thrust of the Respondent's case regarding the claim of breach of warranty in the provision of security is the element of suspicion and complicity. It must be noted that a multiplicity of suspicions no matter how logical cannot by any imagination translate into a scintilla or mass of evidence on the basis of which a court will make a finding of fact.

(7) The Respondent alleged fraud against the Appellant for the outbreak of the fire at the Appellant's premises which resulted in the destruction of raw materials and goods. Additionally, the Respondent chastised the Appellant for setting up the events which gave rise to the claim in the Trial Court. The Respondent particularized the allegation of fraud against the Appellant by pleading as follows:-

a. "Fraudulently misrepresenting to the Defendant its relationship with Trusty Foods Ltd.

b. Deliberately omitting to submit vital documents in respect of

its operations immediately prior to the fire with the view of deceiving the 1st Defendant into paying the claim.

d. Deliberately causing the fire with the view to making a false claim".

(8) Undoubtedly therefore, the Respondent's allegation fraud and further that the Appellant deliberately caused the fire is criminal in nature as it is an ingredient of an offence within the ambit of Sections 172 to 174 of the Criminal and Other Offences Act 1960, Act 29 (Act 129)*(as amended).*

(9) In the case of **FENUKU AND ANOTHER VS. JOHN-TEYE & ANOTHER [2001-2002]SCGLR 985**this court endorsed the application of the statutory standard of proof on allegations of a criminal nature in civil proceedings. At page 1003 of the report, this court stated as follows:-***"With regard to proof of forgery or for that matter any allegation of a criminal act in a civil trial, one cannot be outside the statutory provisions. In this country, the position is governed by Section 13(1) of the Evidence Decree 1975 (NRCD 323), no amount of foreign authorities, however persuasive can dislodge this requirement of the law. . . Generally in a civil trial, the burden of persuasion is on the preponderance of probabilities. Where, however, a criminal act is in issue in a civil trial, the burden of persuasion requires proof beyond reasonable doubt, though the sufficiency of the evidence required to attain that standard would depend, to a large extent, on the gravity of that particular offence".*** Therefore, the allegation by Respondent against the Appellant is one which requires a higher standard of proof. Consequently, the evidential burden on Respondent to discharge on that allegation is provided for in Section 13(1) of Evidence Act 1975 (Act 323) as follows:- "***In any civil or criminal action the burden of persuasion as to the***

commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt".

(10) In the case of **NTI VS. AMINA 1984-86 GLR 134 CA** the court held per holding (1) as follows:-

(1) "At common law fraud had to be distinctly alleged and proved and not allowed to be inferred from the facts. In the instant case, the Plaintiffs neither gave particulars nor led any evidence on the so called fraudulent design. The Trial Judge should therefore not be expected to make any finding of fraud against the Defendant".

(11) At page 29 of its Statement of Case, the Respondent submitted that:- "*My lord it is submitted that the replacement of eleven (11) professionally trained security personnel (who had, prior to their sacking ,performed their duties so diligently that no fire had gutted the premises) with the services of a driver and carpenter were woefully inadequate. It is further submitted that had these 11 security personnel been on duty that night, the fire would have been avoided altogether. It is noteworthy that the Appellants recognizing its error in sending away the security personnel, quickly recalled them barely twelve (12) hours after they had been sent away. Other more interesting facts worth noting about this twelve - hour period are that;*

a. ***The quantum of money that the Appellant claimed to have been stolen was never disclosed.***

b. ***The guard dogs were not released to guard the premises but were kept in a cage on the night of the fire.***
c. ***The security cameras never worked that night.***

d. The persons (driver and carpenter) who were called in to replace the eleven (11) security men manned the gate only and not permitted to patrol the entire premises. They were therefore not the 'Security personnel' or Night watchmen they were required to be".

(12) Based on the above submission contends that the Appellant had breached the ***"watchmen's warranty"*** in the policy. Section 11(1) of the Evidence Act, 1975 (NRCD 323) provides that: ***"For the purposes of this Act the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue".*** It follows therefore that the Respondent has the burden of proof to discharge having made an allegation of fraud against the Appellant while associating the fire incident with the changes in the personnel required to watch the premises shortly before the fire incident which is in the realm of suspicion and speculation. The failure on the part of Respondent to prove beyond reasonable doubt the fraud alleged against the Appellant beyond mere suspicion that the circumstances by the fire lead to one and only one irresistible conclusion that, as part of the fraud, it was the Appellant which set up the events should result in a ruling against it on the issue. While it is not unnatural to suspect conduct resulting in the commission of a crime or fraud, the proof of same goes beyond mere speculation.

(13) The Respondent submitted further that there was no shred of evidence before the court that the Appellant informed the Respondent about the change of the security arrangement by which the security men on duty were replaced with untrained personnel. The question which arises is whether the insurance contract made provision for any particular quality or expertise of watchmen. The

Respondent submitted that under no circumstances could Appellant state that the ***"watchmen's clause"*** applies to anybody who watched a place at night as against the person who has been trained on basic security responsibilities. An insurance contract being one of strict applicability, the Respondent needed to point to the specific provision in the relevant watchmen's clause embodied in the insurance contract between the parties which defined the qualification or expertise of a watchmen and whether or not the contract provided for the Appellant to report to Respondent any change in personnel.

(14) From an examination of the watchmen clause, I see no detailed qualification of expertise required of any person to be assigned such responsibility at the premises. Neither do I find it necessary to import any extraneous factor to the word **'watchman'** for its understanding. In my view a watchman is simply a watchman and if the parties contemplated a particular expertise in the person or persons in terms of qualification or a person of a particular relevant training or orientation, the necessary provision ought to have made express and unambiguous in the insurance contract.

(15) The Respondent submits further that the Court of Appeal relied on the Endorsement Schedule made between the Appellant and the Respondent with the effective date of November 20, 2009. The Appellant denies this fact and asserts that the Respondent's submission at page 23 of the amended statement of case filed on 13th July 2021 in the following words:- "***My lords the security personnel provision can be found on page 466 of Vol.1of the record of appeal whilst the watchman clause can be found at page 131 of Vol.1 of the record of appeal cannot be accurate".*** The Appellant counters this by submitting that the brochure at pages 454-466 of Vol.1 of the record of appeal is a mere brochure which never became evidence at the trial court as same was never tendered in

evidence. The Appellant submitted that though included in Vol.4 of the record, it only formed part of documents intended to be relied on at the trial. Without a doubt, the procedure of filing documents intended to be relied on at a trial is not the same as the reception of the said evidence during the trial proceedings.

(16) The Respondent reiterated in its statement of case the fact that guard dogs were not released on the night of the fire outbreak and further that the security cameras never functioned while the two men who replaced the eleven security personnel only manned the gate. All these, however logical, only give cause for suspicion. In judicial proceedings, the Respondent needed to have produced, credible cogent and admissible evidence in accordance with the requisite statutory standard to prove the fraud it alleges against the Appellant. And such evidence must be capable of dislodging the official documentary reports on the fire incident which is a legal document and other evidence upon which the Appellant was adjudged by the trial court as having successfully discharged its statutory burden at the trial. In the case of **BOATENG (NO.2) B MANU (2) & ANOTHER [2007-2008] SCGLR 1117 at 1118**, this court held *inter alia* that:***"It is well established that a finding of fraud is not to be made without clear and cogent evidence".***

(17) Therefore, the Respondent having alleged fraud and raised suspicion with respect to the Appellant's conduct prior to the fire incident was required to lead evidence in proof of the fact that the guard dogs were not released purposely to facilitate the fire incident which damaged the Appellant's premises It was also crucial for the Respondent to establish on their evidence that the two men posted as watchmen on the night of the fire incident were not qualified or unsuitable within the meaning of the watchmen's clause in the contract or that they were compromised to facilitate the fire and the resultant fraud perpetuated by the

Appellant on the Respondent. It was not enough to allege that the security cameras never worked without establishing further who may have caused same not to function and that it was not a mere coincident. What was required was legal evidence and not mere conjecture or suspicion. As Lord Devlin stated in the case of **HUSSEIN VS. CHONG FOOK KAM [1970] AC 942 PC.** *'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking;* ***"I suspect but I cannot prove".*** *Suspicion arises at or near the starting point of an investigation of which the obtaining of prama facie proof is the end'.* To establish a case on mere suspicion is therefore insufficient to discharge the statutory evidential burden the Respondent carried.

(18) The Respondent also attacked the evidence of the Lance Corporal George Anyimah-Mensah the author of Exhibit K;-the Police report on the fire incident. Contrary to the contention of the Respondent, I do not find anything detractive from the evidence of the said witness on which to doubt the credibility of the witness contrary to the position or the Respondent. The same evaluation applies to the charge against Osafo Gyane the author of Exhibit 'W' the report of the Electricity Company of Ghana. The trial court which had the exclusive advantage of the perception and admission of the evidence, as well as the demeanor of the witnesses, did not find the credibility of the said witnesses as doubtful or incredible. As an appellate court, unless the said testimonies of the witness are so glaringly improbable that no court or tribunal after examining the evidence adduced and properly instructing itself would not accept as credible, the Court of Appeal could not have treated its reevaluation of the evidence properly when it ignored the failure by the Respondent to discharge its statutory burden and proceeded to aside the judgment of the trial court on grounds of breach of

warranty per se. The law is that mere discrepancies cannot amount to disbelief. See **RT. BRISCOE GH LTD. VS. BOATENG [1968] GLR at 11-12.** Whereas in my view it is merely coincidental that on the night the two watchmen were posted to watch the Appellant's premises, fire erupted resulting in substantial loss, suspicious as it may be to the Respondent, only legal evidence can be employed to establish a case of wrong doing against the Appellant. I find that such suspicions raised by the Respondent unfairly impinged on the minds of the Learned Justices of the Court of Appeal in the conclusion they reached having given the ***'watchmen's clause'*** in the insurance contract a construction which the parties, literate, as they were at the time of contract, did not by themselves make a term of their contract. It will therefore be wrong to import any new meaning to the words used by the parties in their own contract when they had the opportunity of doing so expressly. Doing so in my view, will be tantamount to re writing the contract of insurance between the parties. At common law, it is a principle of insurance contracts that, where the answers which the proposer gives are inconsistent or unsatisfactory, and no further inquiries are made by the insurers, and the policy is issued, the insurers cannot repudiate liability on the ground that there has not been a full disclosure, for the insurer will be held to have waived their right to do so. This judicial approach to interpretation of contracts was applied by this court in the case of **P.Y. ATTA & SONS LTD. VS. KINGSMAN ENTERPRISES LTD. [2007-2008] SCGLR 946** where it was held per holding '2'thus:***"In considering every agreement, the paramount consideration was what the parties themselves intended or desired to be contained in the agreement. The intentions should prevail at all times. The general rule was that a document should be given its ordinary meaning if the terms used therein were clear and unambiguous***". See also the case of **KEELING VS. PEARL ASSURANCE CO. LTD. [1923]129 LT.573.**

(19) In the instant case, I do not find from the judgment of the Court of Appeal any justification to set aside the trial court's conclusion for being erroneous on the basis of any inconsistency with incontrovertible and uncontested testimony. Neither did the Court of Appeal find that the conclusion arrived at by the trial court went beyond credibility and indicated a consideration at the trial of irrelevant matters or a failure to ascribe the appropriate probative value to the evidence adduced in order to determine all the relevant issues.

(20) For these, and the fuller reasons advanced by my sister in the lead judgment, I will also allow the appeal and set aside the judgment of the Court of Appeal. Save therefore the order for costs, the judgment of the trial court is hereby restored.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINOIN

PWAMANG JSC:-

INTRODUCTION

My Lords, this is an appeal by the plaintiff/respondent/appellant (the plaintiff) from the judgment of the Court of Appeal dated 15th July, 2015 which reversed the decision of the High Court delivered on 8th January, 2013. In its statement of case, the plaintiff charged the Court of Appeal for grounding their judgment on a contractual term that was not part of the agreement executed by the parties and was not even tendered in evidence to be part of the record of the appeal. This is a serious impeachment of the decision of the Court of Appeal which went in favour ofthe1st defendant/appellant/respondent (the defendant).That notwithstanding, our duty, as an appellate court, is to rehear the case, review all the evidence that was led, apply the relevant law to the evidence and decide for ourselves whether the conclusion the Court of Appeal came to in their judgment was right or wrong. For, it is permissible for an appellate court to disagree with the approach to a case adopted by a lower court but still uphold its conclusion as right and assign the correct reasons for it. In **Abakah v Ambradu [1960] 1 GLR 456, Mills-Odoi, JSC** stated the position at p.464 as follows;

"The judgment of the learned trial judge was based on wrong application of the law in Lartey v. Mensah (supra) which cannot be supported. But a court of appeal is entitled to uphold a judgment, if proper grounds exist on the record to justify the judgment, even though it cannot be supported for the reasons given by the court which gave it."

Therefore, in considering this appeal, we ought not to be constrained by the perceived errors of the Court of Appeal but we are to examine the evidence and the applicable law and decide whether or not the plaintiff was entitled to be granted the reliefs it claimed. From the record, it would be noticed that the defendant resisted the claims of the plaintiff on multiple grounds and the trial judge in his judgment commented that it made "desperate attempts…to wriggle out of liability by every conceivable excuse". It may have appeared so to the judge, but in our adversarial system of adjudication that requires a defendant to plead all defences available to her, that posturing of the

defendant ought be understood in context and each defence dispassionately considered on its merits.

THE FACTS

A summary of the relevant facts of the case are that, the plaintiff was the Ghanaian branch of an Italian company that engaged in tomato paste processing and canning. It imported the tomato concentrates from abroad and then processed and canned at its factory at the Industrial Area, Tema. The products were partly exported and some sold in Ghana. The defendant is an insurance company of note in Ghana from which the plaintiff took a Combined All Risks Insurance Policy. There was a written insurance contract entered into by the parties which was renewed annually. The policy covered fire in addition to other perils. While the agreement was in force, a fire occurred on the factory premises of the plaintiff at about 1.30am on 10th May, 2010. It caused extensive damage to materials, especially imported tomatoes paste that were packed in the open within the factory yard waiting to be processed. A prompt report was made to the Tema Office of the Ghana National Fire Service (Tema Fire Service) who sent personnel to control and extinguish the fire. The Tema police too were called in to assist.

After the fire was put out, the Tema Fire Service conducted investigations into the incident. They interviewed the persons who first saw the fire that night and personally observed the scene in the aftermath of the fire. After this they prepared a report dated 27th May, 2010 stating that a security lighting bulb fell from its holder on a high mast on to wooden boxes parked on the premises. The bulb exploded on falling and caused the fire so they determined the cause of the fire to be electrical. The Tema police also investigated the incident and as part of their investigations they requested the assistance of the Electricity Company of Ghana (ECG), Tema Office to determine the cause of the fire. However, when the Tema district manager of ECG went with his team to the factory premises on 22nd July, 2010 to inspect the scene, the plaintiff stopped them

as the manager started to video record the state of the affected area. It was much later that a different engineer arranged with the plaintiff and got their cooperation before he visited the premises and prepared a report dated 5th August, 2011. This second engineer of the ECG did not see the video that was taken by the first so he based his report substantially on the state of the premises as presented in the Fire Service report of 27th May, 2010 and stated that the fire was electrical in nature. The Tema police report relied on the Tema Fire Service and Tema ECG reports and also concluded that the cause of the fire was by electrical fault.

As was to be expected, when the defendant got information of the fire, it carried out its independent investigations into the incident. From their checks, it emerged that before the fire occurred in the early hours of that 10th May, 2010, the plaintiff's expatriate technician at about 4.30pm of the preceding day, Sunday, 9th May, 2010, dismissed all the 11 security guards contracted from two securities companies who usually guarded the premises at night. He also dismissed their own regular security men. In their place the technician called a carpenter and driver of the plaintiff and stationed them at the main entrance to the premises for that night. The security guards were sent away with the explanation that the technician noticed a theft of money from a cabinet in one of the offices that Sunday afternoon so he suspected their involvement and wanted to discuss the incident with the bosses of the security companies before they resumed their duties. The investigations by the defendant also revealed, that on the fateful night a guard dog that usually patrolled the yard at night was locked up. So, when the fire occurred that night, it was the carpenter, the driver, the technician and two other expatriate top management of the company whose residence is on the factory premises that were present.

From its preliminary findings the defendant suspected foul play and thus rejected the fire report by the Tema Fire Service. It accordingly petitioned the Head Office of the

Ghana National Fire Service to re-investigate the incident. The defendant also made a formal complaint of suspected arson to the Criminal Investigations Department of the Ghana Police (CID) Headquarters in Accra. This led to the arrests of the officials of the plaintiff who were on the premises that night for investigations. Further to that, the defendant engaged a consulting electrical engineer to analyse the report of the Tema Fire Service and to offer them a professional opinion as to how the fire probably started. After the investigations by the headquarters of the Fire Service, they produced a report that disagreed with the conclusion in the earlier reports by Tema Fire Service and Tema ECG. In their opinion, from the facts gathered from the scene and as stated in the report of the Tema Fire Service, the fire could equally have been caused by naked light, while not ruling out electricity. The consultant engaged by the defendant in his opinion discounted the falling lighting bulb as the cause of the fire. His expert opinion was, that given the facts of what was observed immediately after the fire as narrated in the Tema Fire Service report, the fire could not technically have been caused by the falling lighting bulb.

Meanwhile, on receipt of the 27th May, 2010 report of the Tema Fire Service, the plaintiff put in a claim to the defendant on its Combined All Risks Policy. It prepared a statement of the value of its losses from the fire and the cost of clearing the debris from the premises. On account of the information the defendant had gathered, it repudiated the claim for a number of reasons. This led the plaintiffs to file this suit in the High Court, Tema.

THE EARLIER PROCEEDINGS.

The defendant filed defence denying liability and alleging that the fire was deliberately caused by the plaintiff. The defendant further averred that prior to the fire the plaintiff had been having issues with unwholesome imported tomato paste, the raw material for their production, and was investigated by the Food and Drugs Board (FDA) and even

sued in court by one of its customers for supplying it unhygienic canned tomato paste. It was pleaded that around the time the fire happened the plaintiff enquired from the defendant if it could take an insurance policy against unwholesome raw materials but the defendant said it was not possible. The plaintiff contended that the drums of tomato paste that were packed in the open yard instead of in the warehouse were unwholesome, hence the plaintiff intentionally set them ablaze in order to claim their value from insurance and avoid them being a big loss to it.

The case was hotly contested in the High Court and went through a full-blown trial. One Mr Domenico Falcone, the Managing Director of the plaintiff was the first to testify on behalf of the plaintiff. He tendered the Tema Fire Service report and other documents supporting their case that the defendant was liable to indemnify their losses from the fire. He was subjected to lengthy cross examination by defendant's lawyers who sought to prove that the fire was not accidental. The Managing Director agreed that in 2009 the plaintiff had issues with unwholesome tomato paste and was investigated by FDA and some of their products were even destroyed on that account. However, he insisted that that was then but there was no problem with the particular consignment of drums of tomato concentrate that was destroyed in the fire. He stood his ground and denied any complicity of himself or any official of the plaintiff in causing the fire.

The Tema Police investigator was called as a witness for the plaintiff and he testified and tendered their report that stated that there was no foul play. He however admitted that in their investigations they did not consider the possibility of foul play for the reason that the Tema Fire Service had already stated the cause of the fire as electrical. He said he was shown the door that was broken into for which reason the contract security guards were sent away on 9th May, 2010. He said the external security guards were restored to their duties the night following the fire. After him, the Tema Manager

of ECG who prepared their report on the fire testified as a witness for the plaintiff and tendered their report. Under cross examination he admitted that at the time he inspected the scene things had changed so they relied more on the information gathered by the Tema Fire Service and narrated in their report to make his analysis. He said he did not know exactly what combustible material caused the fire and that if there was another possible cause of the fire he would not be able to tell since he did not witness the fire or inspect the immediate aftermath.

Next for the plaintiff was Mr Seth Awule, the carpenter who was called to replace the security guards that faithful night. His evidence was that his attention was drawn to the fire by Zakaria Awudu, the driver with whom he was on duty that night. He explained how the 11 security guards were sent off around 4.30pm of the Sunday, 9th May, 2010 and they took over. After him Zakaria Awudu testified and explained that he was called by the technician to replace the security guards with the explanation that there was a theft of money in an office cabinet that day and the security men on duty were suspected to be involved. He said he saw the damaged cabinet where the money was supposed to be. It was Mr Zakaria who explained how the fire came about. He said, while on duty at the main entrance gate with Awule in the deep night around 1.30am of 10th May, 2010, he heard a blast from the place the drums of tomato puree had been parked and he drew the attention of Awule. When they went in the direction of the blast they saw smoke and then fire on the drums of tomato paste. The fire was intense and they together with their bosses tried to put it out but they couldn't until later they got assistance from Tema Fire Service and managed to douse it.

The final witness of the plaintiff was its procurement manager. Basically, he talked about the quantity and value of the stock of drums of tomato paste that was destroyed in the fire. Under cross examination he was challenged as to the wholesomeness of the drums of tomato paste parked in the open yard and also questioned why the plaintiff,

from the import documents tendered, continued to import large quantities of tomato paste when the rate of processing was so very slow. From February to August 2009, the plaintiff imported 14,288 drums of tomato paste but was able to process only 2,042 drums yet they kept importing more. Meanwhile, some of the paste at the time of the fire had only six months to expire and could not possibly be processed before that time, having regard to the record of the processing capacity of the factory. But the witness denied that the consignments were unwholesome and said that the plaintiff intended to process all the paste that was imported.

For the defendant, one Charles Ansong Dankyi, a manager, testified and after him it called five witnesses. His evidence covered their pleaded case and the grounds on which they repudiated the liability. The defendants called their consultant, Engineer Joseph William Ainguah, Electrical Engineer with Rohi Engineering Ltd. who stated and explained his opinion from the technical point of view. He explained that, having regard to the height of mast holding the security lights, about 35 meters, if it exploded, it would scatter into pieces of glass and could not ignite a fire on falling on the drums of tomatoes. He described what he saw when he visited the factory to assess things for himself and stated that there was no easily combustible material that could have caught fire. He was cross examined by lawyer for the plaintiff who put to him that his opinion was bias in favour of his client. The lawyer pointed out to him that he visited the factory about two years after the incident and a different company had taken over use of the premises so he was not in a position to say how things were at the time of the fire. He conceded that but insisted that, with his vast experience, if the electrical wires connecting the lamps on the mast were changed to new ones he could have detected it.

The defendant called the Registrar of the High Court, Commercial Division, Kumasi to testify about a case; Trusty Foods v Thonket Company, filed on 26th February, 2010. It was the assets and operations of Trusty Foods that the plaintiff acquired in 2009 so it is

the same as the plaintiff. He tendered an application made in the case for the High Court, Kumasi to order inventory to be taken of Trusty Foods products by the FDB. Following that, some tomato puree at the plaintiff's factory and canned tomato paste supplied to Thonket Company were destroyed on 26th November, 2010. In cross examination, the lawyer for the plaintiff indicated that the products in question in the Thonket case were manufactured in 2009 and different from the consignment that was destroyed in the fire.

The defendant next called Police Detective Sgt S.O. Okuampa, the officer from the CID headquarters that investigated the formal complaint of suspected arson lodged by the defendant. He stated in his evidence that he visited the scene on 11th July, 2010 and carried out investigations and also interviewed the police investigator from Tema police who went to the scene immediately after the fire outbreak. He said his investigations did not disclose any evidence of theft in the plaintiff's office on 9th May, 2010 as alleged by the plaintiff. He also described the state of the burnt items and concluded, that before the fire lots of empty wooden pallets had been left at the centre of the drums of tomato concentrates which were parked in the form of a horse shoe around the empty wooden pallets. He tendered some product information stickers he removed from some of the burnt drums of tomato paste which indicated expiry date of September, 2010. He tendered a report on his investigations and he was subjected to cross examination. After him the defendant called the deputy director of operations at the headquarters of the Fire Service to testify and tender a supplementary fire report covering the further investigations carried out on receipt of the petition of the defendant. He said that he and his team visited the scene to see things for themselves but the plaintiff refused to let them talk to the personnel of the company who were on the scene in the night of the fire with the explanation that hearing of the case in court had commenced. Their team was on the premises on 11th to 13th May, 2011 at which time the debris were not yet cleared

so they inspected the scene. Their findings were that there was no evidence of any combustible material found at the scene that could have been set ablaze by the lighting bulb. They thus came to the conclusion that it was probable a naked light was the source of the fire that burnt the drums of tomato pastes. Their report also confirmed the presence of large quantity of empty wooden pallets at the center of the packed drums of tomato paste at the time of the fire and said the fire must have spread from that center outwards. After him came an official from the FDA who testified as to the past challenges the plaintiff had with unhygienic raw materials. He however said the Board did not inspect and test the drums of paste that were destroyed in the fire in question.

Judgment of the High Court.

At the end of the trial, the High Court judge in his judgment reviewed decided cases and other authorities on Insurance Law referred to him by the parties in their written addresses. He also considered the allocations of the burden of proof under Ghanaian law and as it relates to insurance cases. On these principles the judge acquitted himself creditably. However, as will soon be seen, it was in the application of the principles to the evidence on the record that the judge experienced challenges.

When the provisions of sections 10 to 17 of the **Evidence Act, 1975 (NRCD 323)**on allocations of the burdens of adducing evidence and of persuasion are construed in relation to the determination of insurance cases, the correct legal approach, it seems to me is, that in order to establish liability against an insurer, the first duty of the insured is to prove that there was in existence a valid and binding contract of insurance, referred to in insurance industry as a policy, with the insurer at the time of the occurrence of the peril insured against. Secondly, the insured must establish that the damage in respect of which the claim is made was caused by the occurrence of the peril insured against and not by some other factor. If the insurer disputes the existence of both or any of the above facts, then she is required to lead evidence in rebuttal and then

the court would determine whether the insured has proved the liability of the insurer or not. If besides the two grounds above for disputing liability, the insurer alleges a breach of the policy by the insured for which reason she is not liable, then the burden is on the insurer to lead evidence of the breach and also the burden of persuasion is on her to convince the court that there was a breach of a condition in the contract. Similarly, if an insurer alleges as a defence against liability failure by the insured to disclose a material fact in the processes leading to the signing of the insurance contract or absence of good faith on the part of the insured during the contract performance period, she would bear the burden of proof of the facts that amount to failure to disclose a material fact or absence of good faith. This later ground is crucial because insurance contracts are viewed by the law as contracts of utmost good faith. See **SIC v Asamoah [2017-2018] 2 SCLRG (Adaare) 1038.**

Of course, once a party with a burden of adducing evidence has introduced sufficient evidence in discharge of her burden, the burden would shift to the opponent to counter the effect of that evidence. However, the standard of proof in either case would be determined by the nature of the allegations that have been made, and if the insurer alleges an act of bad faith against an insured that amounts to criminal conduct by the insured, the standard would be higher. In addition to all of the above is the principle, that in a claim on indemnity insurance policy, the quantum of damages arising directly from the event giving rise to the claim has to be strictly proved as it is only the actual damage directly attributable to the event insured against that would be payable and not more. See **In re Ashalley Botwe Lands: Adjetey Agbosu & Ors v Kotey & Ors[2003-2004] 1 SCGLR 420, Bullen & Leake & Jacob Precedents of Pleadings, 13th Ed at pp. 523-524 and Callinuaux's Law of Insurance 7th Ed p. 112 para 4-45.**

Basing on the principles explained above, the trial judge found from the evidence that there was a valid and subsisting contract of insurance between the plaintiff and the

defendant at the time of the fire and that the policy covered fire. He also found that the damage suffered by the plaintiff in this case was caused by the fire that occurred on 10th May, 2010 and not otherwise. He then went on to consider whether the defendant succeeded in proving that the plaintiff breached a condition of the insurance agreement and here he held that the defendant was not able to prove any breach of the policy by the plaintiff. Also, in the judgment he stated, and rightly so, that in order for the plaintiff to be entitled to be indemnified for the loss, it did not need to prove the cause of the fire and that it was sufficient to prove that a fire indeed occurred and caused the damage. He held that where the insurer alleged that the insured deliberately caused the fire or was implicated in causing it in order to make a claim, then it was the insurer who bore a duty to prove the cause of a fire. The judge held that since in this case the defendant alleged arson which is a crime, the defendant was required by section 13(1) of the **Evidence Act**, to prove the allegations to the standard of beyond reasonable doubt. He then examined the evidence led at the trial and noted that the defendant relied only on circumstantial evidence. He stated the law as being that where circumstantial evidence was relied on to prove elements of a crime, the circumstantial evidence must point conclusively at the at accused as the one who committed the crime. If the evidence is open to an interpretation consistent with innocence of the accused, then the crime is not sufficiently proved against her. He cited **Duah v The Republic [1987-88] 1 GLR 343.** His view was that the evidence led by the defendant in this case did not meet the test for circumstantial evidence so the allegation that the plaintiff deliberately set the fire was unproven.

He concluded by entering judgment in favour of the plaintiff and, by way of what may be considered his key findings that are in contention in this appeal, the High Court judge delivered himself as follows at page 402 vol 3 of the record;

"With all the facts considered and the evidence examined, I come to the conclusion that the defendant could not establish any breach on the part of the plaintiff which could warrant a repudiation of liability in the policy neither is the contract itself vitiated in any way."

Then at page 399 vol 3 of the record he found as follows;

"I find sufficient evidence on record to attribute the cause of the fire to electrical fault and so is the finding of the court. This position leads me to hold that there was no malice on the part of the plaintiff as far as the burning of the raw material is concerned."

He then considered the evidence as to whether the plaintiff proved the quantum of damage it claimed and upheld the whole amount claimed by the plaintiff as proved. He awarded court costs of Euro500,000.00 in favour of the plaintiff against the defendant.

Appeal to the Court of Appeal.

The defendant was dissatisfied with the judgment of the High Court and appealed from it to the Court of Appeal. The defendant argued the appeal in the Court of Appeal on several fronts and complained fiercely that its defences were not adequately considered by the trial judge. The defendant submitted forcefully that the High Court erred in failing to appreciate that the plaintiff breached the Watchmen's Clause in the insurance contract by sending away the 11 external security guards on the night of the fire. It contended that that breach entitled it to repudiate liability and the whole action ought to have been dismissed. The Watchman's Clause is a term normally spelt out in indemnity insurance agreements whereby the insured undertakes to keep premises guarded and protected to reduce the chances of occurrence of perils insured against. In this case, the insurance contract contained a Watchmen's Clause which required the plaintiff to keep the factory premises continuously guarded from 6.00pm to 6.00am. The

Court of Appeal took the view that a determination of the issue of alleged breach of that term by the plaintiff, if it went in favour of the defendant, could dispose of the whole case. They therefore considered that issue at length in their judgment and came to the conclusion that, the plaintiff was under obligation to provide security guards on the premises at night but that it failed to do so on the fateful night. The court was of the opinion that the driver and carpenter that were made to watch the factory that night could not be considered as satisfying the reference to security personnel in the agreement which clearly provided for security personnel, meaning trained security guards. They held that the breach entitled the defendant to repudiate liability under the policy and proceeded to allow the appeal against the judgment of the High Court and dismissed all the claims of the plaintiff.

THE APPEAL IN THE SUPREME COURT

This time it was the plaintiff who felt aggrieved by the judgment of the Court of Appeal and it has appealed from it to this court on the following three grounds;

a. The Court of Appeal erred in its interpretation of the warranty in the watchman's clause in the insurance contract to mean a detachment of security personnel instead of the ordinary meaning of "security personnel".
b. The Honourable Court's conclusion that there was a breach of warranty of the watchman's clause on the sole grounds that persons who watched the property on the night of the fire had other professions e.g. driver and carpenter is unjustifiable.
c. The judgment is against the weight of evidence.

Erroneous Reliance on Wrong Contract Document.

In arguing this appeal, the plaintiff raised an important point about the correct wording of the Watchman's Clause in the contract of insurance entered into by the parties and

critisised the Court of Appeal for relying on a provision that was not contained in the contract document that was tendered in evidence. In their judgment, the Court of Appeal at page 75 vol 5 of the record interpreted and applied a clause contained in an unsigned and unmarked document found in the record headed "Fire and Allied Perils Insurance" and said that was the clause binding on the parties. However, the wording of the Watchman's Clause found in this unsigned document is different from what is stated in Exhibit "G" that was tendered in evidence by the plaintiff. This other document has the following provision;

"Security personnel warranty

It is warranted during the currency of this policy that security personnel will be on duty continuously at all times between the hours of 6.00pm and 6.00am when the premises are closed to the general public."

But in Exhibit "G" the provision is as follows;

"WATCHMEN'S CLAUSE

It is hereby declared and agreed that this policy is issued on the condition that a Night watchman is continuously on the within mentioned premises at all times between the hours of 6.00 pm and 6.00 am when the premises are closed against customers and/ or callers."

The plaintiff has argued that since the document headed "Fire and Allied Perils Insurance" was not executed by the parties it was not a binding agreement that could be applied by the Court of Appeal in the determination of the case. Secondly, and more importantly, it was never tendered in evidence and was not considered at the trial court so it was smuggled into the record of appeal to mislead the Court of Appeal and ought not to have been taken into account by the Court of Appeal. The defendant's response to these arguments has been to attempt an explanation of the reason the Court of

Appeal made use of the document but its explanation does not change the facts regarding this document as being unexecuted and unmarked as an Exhibit. On that accord, the Court of Appeal were mistaken to have considered that document and it is hereby struck out as part of the record. What this means is that it is the clause that was contained in Exhibit "G" that shall be interpreted by this court and, thankfully, both parties have argued their positions on what ought to be the correct interpretation of the watchmen's clause as contained in Exhibit "G".

The Positions of the Parties.

On grounds A and B of the appeal the plaintiff in its written statement of case refers to us a number of authorities, both local and foreign, on the correct approach to be adopted by the court in interpreting terms of a contract document. The cases include **In re Mireku V Tetteh [2011] 1 SCGLR 520** and **City and Country Waste Ltd v Accra Metropolitan Assembly [2007-2008] SCGLR 409.** The plaintiff also submits as follows;

"Also in the case of GORMAN & GORMAN vrs ALBERT ANSONG [2012] 1 SCGLR 174, the Supreme Court held that ultimate interpretation of contracts or documents must *give effect to the true intent of the parties and that interpretation must always be as near as possible to the mind of or intent of the parties as the law permits."*(Emphasis supplied).

The plaintiff then refers to the case of **Osei v Ghanaian Australian Goldfields Ltd [2003-2004] 1 SCGLR 69** where Wood, JSC (as she then was) explained the right approach to construing non-statutory documents. Reference has also been made to the following statement in **Halsbury's Laws of England, 4th Edition 2003 Reissue Volume 25 para 85 ;**

"in any document the words used must prima facie be construed in their plain, ordinary, popular meaning rather than their strictly precise, etymological, philosophic, or scientific meaning".

In addition to the cases above the plaintiff relies on the parol evidence rule of common law and section 25 of the **Evidence Act** on conclusive presumption of matters stated in written instrument and submits, that no other words ought to be read into the Watchmen's Clause in Exhibit "G" in order to interpret it and that all that the clause required was a single watchman to be at the factory premises at night. In the view of the plaintiff, such watchman does not require any special training as the Court of Appeal intimated in their judgment since the clause does not state any qualification for watchman. The plaintiff disagreed with their interpretation of the clause that entailed maintaining 11 contract external security personnel in addition to the plaintiff's own properly designated security guards. It said that is not stated in the clause and if that was the intention it would have been explicitly stated. It concluded by saying that the driver and carpenter who guarded the premises at the time of the fire incident were watchmen for the purpose of the clause so there was no breach.

As regards the evidence that was led in proof of the allegation of the plaintiff deliberately causing the fire, the plaintiff submits that the defendant failed in the discharge of the burden of proof which was on it. It stated that the trial judge who heard the evidence came to the right conclusion when he dismissed those allegations by the defendant.

For its part, the defendant argues, that in interpreting terms of a contract the words in the document as well as the conduct of the parties in implementing the terms must be considered. The defendant referred to the common law rule on estoppel by conduct stated under section 26 of the **Evidence Act**, and submits that where a certain pattern of conduct has been embarked on by parties to a contract, it was not permissible for one of the parties to change that pattern when the other party has been led to rely on that conduct in directing its affairs. The defended argued that the Watchmen's clause must be interpreted as a whole and within the context of the insurance policy to mean trained

security personnel and that the court has jurisdiction to even imply a term into the contract that required the plaintiff to maintain professional trained security in the night. The cases the defendant refers to include **Biney v Biney [1974] 1 GLR 313, Boateng v Volta Aluminum Co. Ltd [1984-86] 1 GLR 733** and **Daniel Ofori v Ecobank Ghana Ltd &Ors [2020] DLSC 9328.**

It then submits that in implementing the insurance contract in this case, the parties here conducted themselves in a manner that showed that the Watchmen's Clause required of the plaintiff to maintain hired professional security personnel on the premises in the night and they did this continuously. So, when they withdrew those professional security and replaced them with their own carpenter and driver, they were in breach of the watchmen's clause.

The defendant next refers copiously to the evidence led and stated that it pointed conclusively at the plaintiff deliberately setting the fire. It stated that the evidence showed that the plaintiff knew it had no capacity to process the quantity of tomato paste it imported so those drums were spoilt paste that were brought into the country. They were thus parked in the yard and not inside the warehouse in order that they could be disposed off. The plaintiff initially tried to take an insurance policy to cover them but when the defendant declined to provide such cover they deliberately set them ablaze. The defendant pointed to technical evidence it called that proved that the reference to the fire being caused by electric fault was incorrect. It insisted that the fire was deliberately caused so the claim of the plaintiff ought to be dismissed on that ground too.

Interpretation of the Watchmen's Clause.

In analysing the respective interpretations of the Watchmen's Clause in Exhibit "G" proffered by the parties, it must be underscored that the words used in the clause ought

to be interpreted within the context in which they are used. The clause appears in a contract of insurance and that obviously has to be taken into account in interpreting the clause. As the plaintiff itself submitted by reference to Wood, JSC's dictum in **Osei v Ghanaian Australian Goldfields Ltd (supra),** she explained the approach to interpretation as follows;

"…the interpretation or construction must be nearly as close to the mind and intention of the maker as is possible and the intention must be ascertained from the document as a whole, with the words being given their plain and natural meaning within the context in which they are used."

Furthermore, in interpreting the provision here, the court needs to pay attention to the modern trend in interpretation where the purpose for a provision has to be considered in order to ascertain the actual intention of the of the author. In **British Actors' Equity Association v Goring &Ors [1977] ICR 393** Lord Denning, M.R. at p. 396 said as follows;

"They should be construed, not literally according to the very letter but according to the spirit, the purpose, the intendment, which lies behind them, so as to ensure-especially in a matter affecting the constitution- that they should be interpreted fairly, having regard to the many interests which its constitutional code is designed to serve".

So, though the specific words used in the clause in contention are "**a Night watchman** is continuously on the within mentioned premises at all times between the hours of 6.00 pm and 6.00 am…", it does not necessarily mean that the parties intended that only one person was to be maintained from 6.00pm to 6.00am to guard all facilities on the whole factory premises and the large quantity of materials as the evidence shows. The watchman clause is a normal provision in indemnity insurance contracts so the question is, what are the apparent purposes for which they are usually inserted? The insurer

usually undertakes to protect the plaintiff against perils such as fire and burglary, nevertheless, there are in most insurance contracts, including Exhibit "G" (page 120 vol 4 of the record), covenants on the part of the insured to prevent smoking on the premises, to maintain serviced fire fighting appliances and guards to protect premises. These terms are usually targeted at dealing with what is referred to as the moral hazards associated with situations where the possible liabilities of one person are absorbed by an agency of the state or another business. The knowledge that someone else would bear any liability could lead to relaxation of standards of care by the person who would have borne any loss in the absence of a cover. We find this situations in finance and insurance and it appears to me that the purpose of the watchmen clause in Exhibit "G" was to ensure that notwithstanding the insurance cover, the plaintiff would observe a reasonable standard of protection of the facilities and materials that have been insured. That being the purpose, it could not have been intended that only one person was required to watch over the assets and materials and the premises involved in this case. Therefore, the interpretation suggested by the plaintiff that only one person, no matter his training and skill, was what was intended by the clause sounds unreasonable, and as Lord Reid observed in **Schuler A.G. v Wickman Machine Tools Sales Ltd [1974] A.C. 235 (H.L.)**, at p. 251, *"[t]he more unreasonable the result the more unlikely it is that the parties can have intended it."*

As the defendant contended, there are contract situations where the actual intention of parties behind a clause can be discovered from the manner the parties themselves, prior to a dispute, interpreted and consistently implemented the clause. If before a dispute arose, parties had by a course of performance or of dealing placed a certain interpretation on a particular clause of their contract, then they would be bound by that interpretation and would not be allowed to resile from it when a dispute has arisen as to the meaning of the clause. In the case of **Amalgamated Investment and Properties**

Co. Ltd (In Liquidation) v Texas Commerce International Bank Ltd (1981) CA, 3 All ER 577 at 581, Denning M.R succinctly stated the principle thus:

"…if parties to a contract by their course of dealing, put a particular interpretation on the terms of it on the faith of which each of them, to the knowledge of the other acts and conducts their mutual affairs, ***they are bound by that interpretation just as much as if they had written it down as being a variation of the contract.*** *There is no need to inquire whether their particular interpretation is correct or not or whether they were mistaken or not or whether they had in mind the original terms or not. Suffice it that they have by their course of dealing put their own interpretation on their contract, and cannot be allowed to go back on it."*(Emphasis supplied).

Also, in **International Rom Ltd (No. 1) v Vodafone & Fidelity Bank Ltd (No.1) [2015-2016] 2 SCGLR 1389** , the Supreme Court per Akamba, JSC said as follows at p. 1417;

"Thus, when the parties to a contract are both under a common mistake (even if there was a mistake) as to the meaning or effect of it and thereafter embark on a cause of dealing on the footing of that mistake thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis and either party can sue or be sued just as if it had been expressly agreed by them."

The plaintiff's argument that where there is a written instrument the parol evidence rule does not permit the leading of extrinsic evidence of what the parties intention was would not hold in this case. There are exceptions to the parol evidence rule provided for under section 177of the **Evidence Act**, and subsections (1)(b) & (2) and (3)(a) of it are applicable in the circumstances of this case. The provisions are as follows;

"Section 177—Extrinsic Evidence Affecting the Contents of a Writing.

(1) Except as otherwise provided by the rules of equity, terms set forth in a writing intended by the party or parties to the writing as a final expression of intention or agreement with respect to such terms as are included in the writing may not be contradicted by evidence of any prior declaration of intention, of any prior agreement or of a contemporaneous oral agreement or declaration of intention, ***but may be explained or supplemented—***

… (b) by a course of dealing or usage of trade or by course of performance.

(2) Nothing in this section precludes the admission of evidence relevant to the interpretation of terms in a writing.

(3) For the purpose of this section—

(a) "a course of dealing" means a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;" (Emphasis supplied).

From the evidence in this case, the parties conducted themselves in a manner whereby those whom the plaintiff engaged to regularly watched over the factory premises at night were eleven professional security guards from K-9 and Exforce, in addition to the company's own security personnel. From the evidence, it is beyond debate that there was an accepted and established security arrangement for the protection of the premises of the plaintiff at night. After the fire on 10th May, 2010, the eleven security guards from K-9 and Exforce were brought back to guard the factory premises, confirming that this was the security arrangement agreed to between the plaintiff and the defendant. This established course of dealing and performance has to be applied in interpreting the Watchmen's Clause in Exhibit "G" and the result is that the term required the plaintiff to have on the factory premises eleven professional security

guards from expert security providers watching the premises in addition to the company's own security personnel. When the plaintiff unilaterally cancelled this established security arrangement, it thereby breached the watchmen's clause in the contract and the explanation that there was a theft for which reason they were sent away, even if that were so, does not change the fact that the plaintiff failed to observe its undertaking in the contract of insurance.

It is difficult to understand why when the plaintiff discovered the theft as it claimed around 4.30pm of 9th May, 2010, it did not call the companies that sent those security men to arrange replacement that very afternoon but rather stationed only two of its own staff at only the main entrance gate. The insurance policy involved in this case covered burglary (page 111 vol 4 of the record) so what was so grievous about the alleged theft to warrant the sacking of all security men on duty and to put greater part of the assets and materials of the company at risk? It was unreasonable for the plaintiff to expect the carpenter and driver to provide the security cover that eleven trained security guards and the others usually performed, especially that they were stationed at only the main gate with the guard dog locked up. If, for the purpose of the discussion, on the night of the fire all the 11 security guards and the plaintiff's own security person were on the premises, there is no doubt that the chances of quicker and effective control of the fire would have been higher. It is even possible that a security guard or two would have been placed close by where the fire is said to have started and could have acted fast to kill it before it spread.

It ought to be noted, that besides any other considerations of the plaintiff in making such elaborate security arrangements at night, the stationing of the night security personnel was in discharge of an undertaking in the insurance contract so it had to act with utmost good faith at all times. The law is that parties to an insurance contract

impliedly mutually undertake to act with utmost good faith towards each other from the pre-contract period and throughout the currency of the contract.

Hobhouse L.J. in **Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others [2001] UKHL 1** at para 48 said as follows;

'There are many judicial statements that the duty of good faith can continue after the contract has been entered into. The citations which I make during the course of this speech will demonstrate this. To take just one example for the moment, in Overseas Commodities v Style [1958] 1 Lloyd's Rep 546 at 559, McNair J referred to the obligation of good faith towards underwriters being an obligation which rests upon the assured "throughout the currency of the policy"'.

Utmost good faith required that the plaintiff acted reasonably in the discharge of its obligations under the insurance policy but it did not. The question then is, what are the legal consequences of the breach of the Watchmen's Clause by the plaintiff? The Court of Appeal and the parties in their statements of case spilled a lot of ink on the general common law classification of terms of contract into conditions and warranties, the grounds for the classification and the different legal consequences that flow from a breach of either of them. However, a close reading of the contract in question would reveal that the extensive discussion of general common law principles in this case is not necessary. The basic general rule of the common law on terms of any contract is that they are divided into two major categories; conditions and warranties, conditions beings important terms that go to the root of the contract and warranties as terms that are less central to the main purpose of the contract. Where there is a breach of a condition, the innocent party is at liberty to terminate the contract and sue for damages but if the term breached is considered to a warranty, the innocent party is not entitled to terminate the contract but may only sue for damages. See **Social Security Bank Ltd v CBAM Services Inc [2007-2008] 2 SCGLR 894.**

At common law, this classification is done by the courts considering the main purpose of the contract and deciding whether a particular term went to the foundation of the contract or was only collateral. The court usually looked at what the parties intended as at the time the contract was entered into in determining whether a particular term went to the root and so is a condition or the term was collateral therefore a warranty. However, this approach of the common law had not always led to the just and fair resolution of trade disputes as some terms do not fit strictly in either category and also there are instances where the effect of a breach of a condition may be inconsequential to the further performance of contract yet the innocent party is permitted to terminate the whole contract because the infraction is of a condition. In response to these inequities, modifications have come about through statutory interventions, express provisions by parties in written contracts, usages of trade and changed judicial interpretations approaches. For instance, in Ghana, our **Sale of Goods Act, 1962(Act 137)** classifies the normal terms of a contract for Sale of Goods into three groups; Fundamental Obligations, Conditions and Warranties, and the effect a breach of any class of terms has on the rights of the parties is provided for under section 49 of the Act. Another example is the **Marine Insurance Act, 2013** of the United Kingdom (now repealed) which specifically made some terms of an insurance contract conditions, irrespective of the name used to refer to them in a contract of insurance, and a breach of them entitles the innocent party to terminate the contract. Similarly, by usage of trade the insurance industry has developed their own nomenclature for terms in an insurance policy. To avoid misinterpretation by court, the modern practice has been for parties to expressly state in their written contract which terms are conditions and which are warranties and even go further to provide for the effect of a breach of particular terms on the rights of the parties.

Thus, where there is a written contract, such as in this case, the court in the determination of whether a particular term of a contract is a condition or warranty and the legal consequences of a breach of it on the rights of the parties, is first to have recourse to the written agreement itself. The written agreement may expressly state whether a particular term was intended by the parties to be a condition or a warranty and it may even spell out the effect of a breach. Where the contract is regulated by statute, then the court is bound to read the written terms alongside the statute as the statue may provide for overriding implied terms and dictate the legal consequences of a breach. It should only be where the written terms offer no guide that general common law rules or usage of trade may be resorted to by the court.

I have read closely our **Insurance Act, 2006 (Act 724)** and it does not contain any minimum conditions that must be inserted in an insurance contract or implied terms with the legal consequences of breach of any terms. So, we have to refer to Exhibit "G" to ascertain what the parties themselves stated. The provision in issue reads as follows;

"WATCHMEN'S CLAUSE

It is hereby declared and agreed that this policy is issued ***on the condition*** that a Night watchman is continuously on the within mentioned premises at all times between the hours of 6.00 pm and 6.00 am when the premises are closed against customers and/ or callers." (emphasis supplied)."

Clearly, from the words used in the clause, the term is a condition. So, if we interpret it using the common law classification of conditions as against warranties, then the breach of it entitles the innocent party to repudiate liability. This would be the classification of the term not withstanding that it comes under the sub-title of "Warranties", because the canon of interpretation is, *generaliaspecialibus non derogant* (specific words are not to be overridden by general words). The words of this particular

clause on watchmen are plain as to its classification and cannot be affected by the fact that it comes under the general name, warranties.

Furthermore, it was agreed by the parties in the very first page of Exhibit "G" at page 108 vol 4 of the record as follows;

"Provided always that the due observance and fulfilment of the terms, conditions, provisions, exclusions and endorsements of this policy in ***so far as they relate to anything to be done or complied with by the insured shall be condition precedent to the right of the insured to recover hereunder."*** (Emphasis supplied).

This provision of the contract states the effect of a breach of any term of the contract, whether warranty, condition or howsoever described, which imposes obligation on the insured, on the right of the plaintiff to recover under the policy. If there is a breach, then the plaintiff cannot recover indemnity under the policy since the due observance of every obligations cast on the plaintiff is a condition precedent to it making a claim. Therefore, irrespective of what the general principles of insurance law and the law of contract dictate, the parties themselves agreed expressly on the effect of the breach of the Watchmen's Clause in exhibit "G" and it was an unnecessary diversion for the Court of Appeal to embark on detailed consideration of the English cases, some of which were decided on the basis of provisions in the Marine Insurance Act of the UK which is not applicable in Ghana.

Consequently, the failure by the plaintiff to comply with the condition to have the agreed security men continuously on the premises in the night of the fire disentitled it to claim under the policy. This conclusion I come to allows the defendant to avoid liability after receiving premium of E50,000.00 from the plaintiff and it may sound unfair. However, on the facts in this case, the plaintiff has itself to blame since it could

have conducted itself diligently in meeting its obligations under the insurance contract and possibly prevented this whole loss, if even the lighting bulb fell.

In the case of **Salami v State Insurance Corporation [1967] GLR 442**, the appellant insured his trading stock in his store against burglary and undertook to provide a night watchman to watch the shop. About three months after taking the policy he reported that his shop was broken into and all his stock carted away. It came out that though the shop was part of a residential house with persons living there and it must have taken about five hours to remove all the stock, no one heard or saw the break in nor heard the noise of the vehicle which apparently carted the goods away. Nevertheless, the respondent's investigations disclosed that the appellant did not provide a watchman to guard the premises as he had undertaken to do in the insurance proposal form. Sowah J (as he then was) upheld the right of the insurer to repudiate liability and an appeal to the Court of Appeal was unanimously dismissed.

Accordingly, the plaintiff in this case was not entitled to its claim for indemnity and the defendant rightly repudiated liability on the ground a breach of a condition precedent in the agreement. The appeal therefore fails on grounds A and B.

The judgment is against the Weight of the evidence.

My Lords, although the above discussion sufficiently disposes of this appeal, I wish to comment on the third ground of the appeal which states that the judgment is against the weight of the evidence. Of course, in considering the first two grounds the evidence was examined and it is the effect of the evidence that resulted in my conclusion that the plaintiff breached the condition precedent in the agreement to maintain watchmen on the factory premises in the night. But the drift of the plaintiff's arguments under this ground has been to justify the finding by the trial judge that the fire was caused by electric fault and that the plaintiff had no hand in bringing about the fire. As has

already been stated above, the trial judge took the view that the cause of the fire was irrelevant to the plaintiff's claim but since the defendant alleged that it was deliberately caused, it needed to adduce evidence in proof of that allegation. In assessing the evidence on this issue, whereas the trial judge critically analysed the defendant's evidence, he unfortunately failed to review and analyse the evidence of the plaintiff about how the fire started. He needed to do this because his duty in the determination of whether the defendant discharge the burden of proof in the case required considering all the evidence led, both for the defendant and the plaintiff, and not only the evidence of the defendant. Section 11(2) of the **Evidence Act** which relates to proof beyond reasonable doubt, the standard applicable on the issue here, is as follows;

"(2) In a criminal action the burden of producing evidence, when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence *so that on all the evidence* a reasonable mind could find the existence of the fact beyond a reasonable doubt."(Emphasis supplied).

So, in examining the evidence on the cause of the fire the trial judge ought to have critically reviewed the evidence of the plaintiff as well. The only reference the judge made in his judgment to the evidence by the plaintiff on the cause of the fire is at page 398vol 3 of the record where we find the following very brief statement;

"Even if the question still fell for determination as to whether the plaintiff adduced evidence to prove the electrical fault, I answer in the affirmative. The plaintiff tendered two reports from the Ghana Police Service and the Ghana National Fire Service which were received in evidence as Exhibits K and L respectively. Both reports indicated that the cause of the fire was electrical. Also tendered by the plaintiff was Exhibit V which confirms the cause of the fire to be electrical."

The references above were subsequently in the judgment described as "overwhelming evidence that the cause of the fire was electrical…"

But, it is important to point out that though the cause of the fire is not relevant in determining whether the plaintiff has discharged his proof of liability against the defendant, the cause is relevant in the determination of the allegation that the plaintiff deliberately set the drums of tomato paste on fire. In that context, this case definitely called for a determination of the cause of the fire and that determination is one of fact which lies squarely within the province of the judge in this case. If the trial were by a jury it would have been the for the jury to determine the cause of the fire. It is a well-established practice, that where the understanding of a particular issue lies outside the ordinary knowledge and experience of the trier of fact, someone with special skill, experience and training in relation to the issue may be called as an expert for him to give his opinion to assist the trier of fact to decide the existence or non-existence of a fact. It is also well-settled that such expert opinion does not relieve the trier of fact of her primary duty to make a determination of the existence or non-existence of the fact in issue and that the trier of fact is not bound by the expert opinion but may reject it for reasons that ought to be articulated. **Fenuku v John Teye [2001-2002] 1 SCGLR 98.**

In this case, there were about four expert reports that were tendered and three experts testified concerning the probable cause of the fire. By experts here I am referring to the Tema Fire Service and the Tema ECG called by the plaintiff, and the Fire Service Headquarters and Eng Ainguah called by the defendant. The Tema Fire Service did not testify, meanwhile it was their personnel who were on the scene, they observed the fire and inspected the immediate aftermath. None of the other experts had this advantage and their reports left critically important questions unanswered which if the Tema Fire Service personnel had testified they could have thrown more light on. In the testimony of the engineer from Tema ECG, he explained that for a fire to occur, there must be

three elements; the fuel, the heat and the oxygen. Now he made his analysis from information contained in the Tema Fire Service report at page 134 vol 4 of the record which stated that immediately after putting off the fire they observed that;

"1.One of the bulbs was found exploded and had fallen on the wooden boxes. 2. The wiring connected to the bulb were severely burnt and frayed with several breaks. 3. The wires from other security bulbs over the boxes/drums of tomato paste were also burnt, some with sharp-pointed tips indicating electrical fault."

The opinion of the Tema Fire Service about how the fire was caused, which I want to believe was based on their analysis of the above factual observations, was that;

"The fire started from the wooden boxes containing tomato paste parked close to one of the security lights and spread to other wooden boxes and plastic drums all full of tomato paste."

Now, the Tema Fire Service prepared this report as part of the statutory duty of the service to investigate every incident of fire and prepare a report. But such report would only constitute prima facie evidence of the facts stated in it and if the content is challenged, as in this case, the author of the report must testify and be cross examined on it. Since that was not done in this case the report only amounts to hearsay evidence, which though admissible since notice of it was given by the plaintiff, the weight to be accorded it must necessarily be less. Secondly, the observations of facts in the report ought to be separated from the opinion about what caused the fire and the court must treat the two differently.

The Tema ECG engineer also was able to observe the scene after the fire, but not the immediate aftermath, and noted under cross examination at page 397 vol 2 that it was not possible that the bulb in question here could have fallen on the boxes of tomato paste having regard to the distance between the security mast carrying the lights and

the drums of tomatoes. His technical opinion was simply that, the kind of security bulb involved could carry very high temperature which can provide the heat that can set off a fire. However, he said he could not tell what combustible material was ignited by the heat to cause the fire in this case. At page 400 vol 2 of the record the witness said as follows;

"I am not a fire expert, I think the fire service people went to the scene and gave their expert advice about the fire."

Therefore, the opinion of the Tema ECG that the fire was electrical went with the caveat that it was the Tema Fire Service report that said so and the explanation that it is scientifically possible, provided the bulb came into contact with combustible material. But when the trial judge asked a question to that witness at page 398 vol 2 of the record this is what transpired;

Judge: He is saying that by what you said if anything might have caused the fire you wouldn't know.

A. Yes basically I wouldn't know.

The defendant called two experts but the reason the judge discounted their opinions was that they did not visit the scene in the immediate aftermath of the fire. But neither did the plaintiff call a witness who visited the scene in the immediate aftermath. What the plaintiff's engineer witness did was to give his opinion from the facts stated in the fire report and that was exactly what the defendant's engineer also did. The plaintiff's engineer did not even view the video of his colleague taken when matters were fresh. The plaintiff stopped that first engineer for reasons best known to its directors. The plaintiff's electrical engineer's opinion was that the fallen bulb could provide heat that could ignite the fire but the defendant's engineer's opinion was that an exploded fallen bulb could not still have heat high enough to ignite the fire, considering the height of

the mast, about 35 meters. The judge was required to choose which of these expert opinions to accept and it is clear from their level of experience in relation to fires that the defendant's witness demonstrated higher knowledge about the subject than the ECG engineer and his opinion ought to have weighed more on the judge who acknowledged his considerable experience.

The other critical fact in contention was whether the wooden boxes could be the combustible material that was ignited. All three experts who testified could not readily identify any combustible material hence the opinions of Eng Aingua and the Fire personnel from the headquarters that naked flame was introduced to the wooden pallets parked in the middle of a pile of drums of tomato paste. If naked light was introduced at that hour, then from the evidence, it could only be by the persons present on the premises at the time, and all of whom were officials of the plaintiff. This, for me, is not suspicion but reasonable inferences drawn from facts that were proved by evidence. Therefore, it is not correct for the trial judge to have said that the defendant did not adduce evidence to prove its allegation but only relied on multiple suspicions.

CONCLUSION

We have demonstrated from the evidence that the conduct of the plaintiff in the whole drama showed that it did not discharge its undertaking regarding the watchman's clause with utmost good faith and it was in breach of a condition precedent in the contract. Accordingly, the plaintiff lost its right to claim for indemnity under the policy and the defendant was entitled to repudiate liability. Therefore, the conclusion the Court of Appeal came to in this case was the right one except that its reasons that were premised on the untendered Fire and Allied Perils Policy were wrong. In the circumstances, we shall replace the reasons explained in this opinion as justification for dismissing the case of the plaintiff. The appeal accordingly fails in its entirety and is dismissed.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

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