IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

OWUSU (MS.) JSC

HONYENUGA JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/09/2020

25TH MAY, 2022

INTERNATIONAL ROM LIMITED …. PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. **VODAFONE GHANA LTD. …. 1ST DEFENDANT/RESPONDENTAPPELLANT**
2. **FIDELITY BANK LIMITED …. 2ND DEFENDANT**

JUDGMENT

PWAMANG JSC:-

My Lords, the ruling of the High Court that has culminated in this appeal was initially in respect of an application to set aside an amended entry of judgment filed by the plaintiff/appellant/respondent (the plaintiff) after winning its case in the Supreme Court.

However, in the determination of the application, the High Court judge went beyond the scope of the application and determined the outstanding judgment debt owed by the defendant/respondent/appellant (the defendant). The judge took this course because the awards made in the substantive judgment of the High Court dated 15th May, 2013 (which was by a different judge) were varied by the decision of the Supreme Court in the final appeal given on 6th June, 2016. The view was therefore that the new entry of judgment must agree with the judgment as varied by the Supreme Court minus what had been paid. In apparent effort to resolve differences between the parties about how much of the judgment debt remained to be paid, for some payments had been made in the course of the appeals, the judge appointed an accountant as a referee and in his work he took into account compromise payments made by the defendant to Fidelity Bank, 2nd defendants in the case, to defray the judgment liability of the plaintiff on a counterclaim. The referee tendered his report and testified, and from his testimony, he carried out his work on the basis of his understanding of what the judgment debts of the plaintiff and the defendant stood at following the variation of the original judgment by the Supreme Court.

But, what constitutes the judgment debt owed by either party, especially as amended by the Supreme Court judgment, is a matter of law to be determined by the court upon an interpretation of the Supreme Court decision and it ought not to have been left to a referee. Though the determination of how much remained to be paid by the defendant was embarked upon by the judge in good faith, it has unfortunately embarrassed the proceedings in her court and made them difficult to understand. The end result is that

we are being called upon by the parties to the appeal herein to enter judgment for amounts in their respective statements of case as if we are determining a substantive appeal which is not the case. Nevertheless, the central question of law emanating from the ruling of the High Court judge dated 24th April, 2018, and of the Court of Appeal dated 21st November, 2019 is, in what manner did the variation by the Supreme Court change the amounts awarded in the substantive original judgment to be paid by the defendant? To answer this question we need to trace the relevant background to the case in brief.

In 2008, differences arose between the defendant and its contractor, the plaintiff, concerning execution and payments for works awarded to the contractor. The plaintiff sued in the High Court for sums due for works executed but unpaid for, and for special and general damages for breach of contract. As part of particulars of damages the plaintiff alleged that the breach of the contract by the defendant caused it to default in the payment of loans it contracted for the works from Fidelity Bank and Prudential Bank. As a result, it was then faced with demands for huge interests payments which would not have been the case if the defendant had discharged its contractual obligations and timely. Fidelity bank joined the case and in their defence and counterclaim stated that some of the loans it extended to the plaintiff were actually given on the back of letters written to it by the defendant undertaking to make payments of monies due to the plaintiff from the contract into a joint account between the bank and the plaintiff so as to enable the bank recover the loans extended to the plaintiff at source. Fidelity bank stated that the defendant honoured the undertakings only partially since it made some payments due the plaintiff through the joint account but some of the payments to the plaintiff went through other accounts controlled by the plaintiff alone. The bank contended that the default by the defendant to make all

payments into the joint account as agreed disabled it from collecting some of its loans from the plaintiff and they were still outstanding.

The plaintiff led evidence on the works executed but not paid for. Evidence was also adduced about the plaintiff's general outstanding indebtedness to Fidelity bank and Prudential Bank. But, from the outset, it must be noted that, from the record before us, it seems that it was not all the loans given by Fidelity Bank to the plaintiff that were 'guaranteed' by the plaintiff through undertakings. The Supreme Court referred to three undertakings. Some of the loans were apparently arranged between the plaintiff and the bank without the involvement of the defendant.

At the close of the trial, the High Court judge made a number of awards in favour of the plaintiff to be paid by the defendant. They were as follows;

(i)The recovery of the sum of US$4,893,057.08 or its cedis equivalent being the adjudged indebtedness of the defendant to Plaintiff for works done under the contracts aforementioned in this judgment with interest at the commercial bank interest rate from January, 2009 till date of final payment.

(ii) USD2,280,000.00 being credit facilities obtained by the plaintiff from the 2nd defendant (Fidelity Bank) for execution of contract works for the 1st defendant with interest at the prevailing commercial bank interest rate from April 2010 to date of final payment.

(iii) The recovery by the plaintiff from the 1st defendant the sums of US$836,375.21 and GHC170,853 with accrued interest from October 2008 till date of final payment being particulars of entry of judgment filed by Prudential Bank Limited and tendered as Exhibit H pursuant to the bills of exchange obtained by the plaintiff from Prudential Bank Limited upon the instructions of the 1st Defendant.

Then, in respect of the case of Fidelity Bank against the plaintiff for various loans outstanding, the High Court judge entered judgment for it to recover the following sums from the plaintiff;

(i) US$370,000.00

(ii) GHC2,365,679.60

(iii) GHC95,479.60

(iv) GHC226,140.70

With interest from April 2010 till date of final payment.

Meanwhile, somewhere before the concluding portion of his judgment where the reliefs stated above were granted, the trial judge awarded the same amounts in the counterclaim to the plaintiff to be paid to it by the defendant. The judge said;

"…I hold therefore that the plaintiff is entitled to recover the following **special damages** from the 1st defendant

(i) US$370,000.00

(ii) GHC2,365,679.60

(iii) GHC95,479.60

(iv) GHC226,140.70

Being credit facilities obtained by the Applicant from the 2nd Defendant for the execution of contract works for the Respondent with interest at the prevailing commercial bank interest rate from April 2010 to date of final payment."

What this meant was, that the defendant was ordered to pay these sums to the defendant who, it would appear, would then pay same to the plaintiff. But, the court had already in relief (ii) above ordered the defendant to pay to the plaintiff the sums of money being loans with interest extended to the plaintiff by the 2nd defendant. The

defendant thus took the view that the judge made a mistake in ordering it to pay the same loans and interests twice. It therefore applied to the trial judge to review his decision and to cancel the 'special damages' held in favour of the plaintiff but the judge in a ruling maintained the awards and dismissed the application. In effect, the two heads of award which the defendant considered to be for the same cause of action stood against the defendant. One would have thought that if the defendant were held liable for causing the plaintiff to default in the payment of its loans, then the component of 'special damages' payable by the defendant to the plaintiff arising from the default by the plaintiff to pay off its loans would be the extra interests the plaintiff was charged and would not extend to the principal amounts of the loans which would have been paid by the plaintiff even if defendant did not breach the contract.

The defendant was obviously dissatisfied and appealed against the judgment to the Court of Appeal but lost. They affirmed the entire judgment of the trial court. The defendant further appealed to the Supreme Court but here, though the appeal was dismissed, there was a variation of the awards. The judgment of the Supreme Court which has been exhibited in these proceedings is reported as **International Rom Ltd (No 1) v Vodafone & Fidelity Bank Ltd (No 1)[2015-2016] 2 SCGLR 1389**. We have compared the two and they are the same so in this opinion we shall use the reported judgment for specificity and ease of reference. The Supreme Court concluded their judgment as follows at page 1423 of the report;

"The payment upon the instructions of the plaintiff of monies which should have been made to the 2nd Defendant, to other banks rather than the 2nd Defendant did not absolve the 1st defendant from its obligations under the undertaking. The 2nd defendant is entitled to the outstanding balance from the undertaking from the plaintiff and the 1st defendant jointly.

In the instant appeal, ***the Court of Appeal had affirmed the trial judges award against the first defendant [the defendant] in the circumstance. We would substitute an award of the outstanding balance under the undertaking from both the plaintiff and the first defendant jointly [the defendant].***

In conclusion, save for the variation above, the appeal is dismissed." (Emphasis supplied).

After their decision, the parties began to dispute about the effect of the variation on the total liability of the defendant to the plaintiff. An application was therefore made to the Supreme Court for clarification of the variation and the court explained, that ordinarily, the defendant was not a party to the loan transactions between the plaintiff and its bankers and would bear no liability for those loans, but since in respect to some of the loans it undertook to pay monies due the plaintiff into a joint account at Fidelity bank but failed to so, on that ground it was partly liable for the amounts on those loans the plaintiff failed to pay with the interests on them. That ruling is also reported as **International Rom Ltd (No 2) v Vodafone & Fidelity Bank Ltd (No 2) [2015-2016] SCGLR 1436**. At p. 1440-1442 the court explained itself as follows;

"It is clear from the record of appeal that three undertakings were tendered in evidence in proof of those transactions. These are exhibits 3 dated 6th June, 2008; exhibit 4 dated 12th August, 2008; and exhibit 10 dated 4th January, 2008. These exhibits together provide the answers to the terms of the undertakings entered into between the applicant herein [the plaintiff] and the second defendant [Fidelity Bank] as a lender for which the respondent [the defendant] provided the undertaking. The three exhibits bear different interest rates…

The import of our order was for the parties to work out the details of payment against the outstanding balances based upon the three undertakings between them."

Plain as the clarification by the Supreme Court appeared to be, the parties still disagreed over the impact of the variation on the amounts adjudged payable by the defendant in the original judgment. Hence, when the plaintiff filed the amended entry of judgment to reflect its understanding of the changes to the liability of the defendant occasioned by the variation, the defendant applied to have it set aside.

The view of the matter the plaintiff took in the High Court, which has been repeated in its written statement of case in the present proceedings is, that the variation related to the amounts it was ordered by the trial judge to pay to Fidelity Bank as loans and interests on the counterclaim and it is those amounts that the Supreme Court said the liability shall be joint. As a result, according to the plaintiff, the defendant, in addition to its initial judgment debt, now had to pay half of those monies to it. These monies are the (i)US$370,000.00, (ii)GHC2,365,679.60, (iii)GHC95,479.60, (iv)GHC226,140.70 with interest from April 2010 till date of final payment. It should be remembered that these are exactly the same as the 'special damages' the trial judge awarded in favour of the plaintiff to be paid by the defendant.

On the other hand, the opinion of the defendant about the amendment arising from the Supreme Court's variation was that its liability to pay the 'special damages' to the plaintiff had been varied and instead of it paying all those amounts to the plaintiff, it was now to pay only half since their liability in respect of the 'special damages' has been made joint.

The High Court judge agreed with the interpretation of the defendant and accepted from the referee a calculation that reduced by half the 'special damages' ordered to be paid by the defendant to the plaintiff. However, she was reversed by the Court of Appeal which opted for the contention of the plaintiff and adopted a calculation by the referee that added half of the counterclaim awarded against it to the earlier liability of the defendant.

But, we are unable to see how this whole dispute about which award the Supreme Court varied came to centre on the 'special damages' and the counterclaim. In the original trial of the substantive case in the High Court, the case made by Fidelity Bank and the evidence led was that it extended some loans to the plaintiff on the basis of stated undertakings given by the defendant. It was those undertakings that were the subject of the variation by the Supreme Court and it did not mention 'special damages' or counterclaim. The Supreme Court stated explicitly "undertakings", and even mentioned them as exhibits 3, 4 and 10, so it is strange that the amounts awarded for the defendant to pay as 'special damages' to the plaintiff or the counterclaim against the plaintiff were substituted for the amount the undertakings covered.

Yes, the undertakings were the reasons for the trial judge holding the defendant liable for loans and interests that were contracted by the plaintiff, but there was nothing on the face of the judgment of the trial judge to show that the value of the undertakings was the amounts stated as 'special damages' or the counterclaim for that matter. In any event, it was not the judgment of the trial judge that was to be interpreted but it was that of the Supreme Court that ought to be the focus. If the Supreme Court had intended to vary the counterclaim or the 'special damages' they would simply have said so straight away, but from their clarification, the value of the undertakings was to be 'worked out' by the parties calculating the figures on exhibits 3,4 and 10.The implication is that they were dealing with a different award other than the 'special damages' or the counterclaim which were already known and did not require calculation. Furthermore, it ought to be noted that it was not the whole amount to be calculated using the exhibits that was to be bourn jointly by the parties, but all payments that the defendant had made into the joint account at Fidelity Bank were to be deducted from the amount arising from the exhibits and the "outstanding balance" was what would be shared between the plaintiff and the defendant to pay.

Clearly, the parties and the lower courts, by refusing to calculate the figure from the exhibits tendered at the trial covering the undertakings and the payments the defendant made into the joint account, side-stepped what the Supreme Court directed in plain words in the clarification ruling and rather engaged in presumptions about what the court must have meant. The Supreme Court provided a formula for calculating the amount to be jointly paid but the parties preferred the easy way out by looking for an already stated sum and carried the courts down that diversion with them which was unfortunate. Sadly, neither presumption of the two parties corresponds with the decision of the Supreme Court.

The question may then be asked, so which award was varied by the Supreme Court? The answer to this question lies in a close reading of the substantive appeal judgment of the court delivered on 6th June, 2016. In discussing the ground of the defendant's appeal against the awards by the trial judge, the Supreme Court said as follows at p.1422 of the report;

"The 1st defendant also expressed dissatisfaction with the Court of Appeal's affirmation of the award entitling plaintiff to recover credit facilities which plaintiff obtained from 2nd defendant to execute construction of cell sites for the 1st defendant when there was no evidence that 1st defendant had guaranteed the repayment of the loan.

To put the issue in context, the trial court made an award of US$2,280,000.00 representing a loan facility which, according to plaintiff, it had contracted from 2nd defendant in order to execute its contracts with the 1st defendant. ***The trial court granted the award in favour of the plaintiff on the basis of an undertaking given by the 1st defendant*** **to pay the proceeds of the exhibit A in the joint names and into the joint accounts of 2nd defendants and the plaintiff. According to the trial court, it was the undertaking to make these payments in the manner promised by the 1st**

defendant that made the 2nd defendant to lend the monies to the plaintiff hence the plaintiff was entitled to claim the sum from 1st defendant as damages for breach of contract. The court rejected the 1st defendant's contention that the undertaking was not in the nature of a guarantee and also that the plaintiff had in fact received payments from the 1st defendant under the contract into other accounts designated by the plaintiff. The Court of Appeal affirmed the finding by the trial judge and dismissed the appeal brought against same." (Emphasis supplied).

From the record that was before the Supreme Court, they understood the trial judge to have ordered the defendant to pay to the plaintiff the loan facility of US$2,280,000.00 together with interest in the relief (ii) aforementioned on the basis of the undertakings it gave to the 2nd defendant bank. It needs to be underscored that in the law of contract, ordinarily the defendant would not be liable to pay the principal amounts of loans contracted by the plaintiff even if they were for works it awarded to the plaintiff. Following upon the observations quoted above the Supreme Court then said as follows;

"*…The 2nd defendant is entitled to the outstanding balance from the undertaking from the plaintiff and the 1st defendant jointly.*

In the instant appeal, the Court of Appeal had affirmed the *trial judges award against the first defendant* **in the circumstance. We would** *substitute an award of the outstanding balance under the undertaking* **from both the plaintiff and the first defendant jointly.** (Emphasis supplied)."

First, it ought to be understood that it was in respect of the award of US$2,280,000.00 that the Supreme Court made its variation order and the variation had nothing to do with the 'special damages' awarded covering the four amounts as contended by the defendant. As explained by the plaintiff in its statement of case, the defendant seems to have abandoned the challenge against the 'special damages' at the Court of Appeal by

failing to argue it in the substantive appeal there. It appears from the judgment of the Supreme Court that the award that the defendant challenged in the substantive appeal in the Supreme Court was the US$2,280,000.00 with interests. Secondly, the variation was not also of the award against the plaintiff under the counterclaim as claimed by the plaintiff. The Supreme Court did not refer to an award made against the plaintiff but it was considering an award **"granted…in favour of the plaintiff on the basis of an undertaking given by the 1st defendant"**. For emphasis the court said;

"…the Court of Appeal had affirmed the *trial judges award against the first defendant* in the circumstance. We would *substitute an award of the outstanding balance under the undertaking* from both the plaintiff and the first defendant jointly." (Emphasis supplied).

Therefore, the defendant seems to be on firm ground when it argues that the Supreme Court was substituting a new award for an award made "against the first defendant" by the trial judge and confirmed by the Court of Appeal. We shall not say more about this aspect of the matter since neither party raised it and we did not afford them an opportunity to address us on it. Suffice it to quote what Wood, JSC (as she then was) explained in **Osei v Ghanaian Australian Goldfields Ltd [2003-2004] 1 SCGLR 69** about the approach to interpretation;

"…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."

The arguments urged on us here by the appellant is that the trial judge was right to have excluded half of the amounts stated as 'special damages' in the calculation of the judgment liability of the defendant. However, as has been pointed out from the words

of the Supreme Court themselves, their order of variation was not targeted at the 'special damages' so the High Court fell into error and to that extent the Court of Appeal was entitled to correct the judge by setting aside her conclusion.

Additionally, the defendant has submitted copiously and forcefully that the awards made against it in this case did not follow the established principles for award of damages and were a travesty of justice. That complaint ought to have been made in the substantive appeals against the judgment of the High Court. If it was not made effectively in those proceedings, as the defendant abandoned its impeachment of the 'special damages', that is a matter for the defendant itself but when the issue of the award of US$2,280,000.00 was raised before the Supreme Court, they responded with a variation and the reasons are a matter of record. It however appears from the judgment that, in the earlier appeals, the defendant concentrated its arguments on overturning the trial judge's decision on its liability and less effort was devoted to challenging the composition and quantum of the awards. The defendant may have been confident in its prospects of success at the appeal on grounds of not being liable at all to the plaintiff but it is always advisable to contest liability and quantum of damages with equal industry and vigour.

On our part here, we are a court of law and have no sympathy jurisdiction but exercise jurisdiction in accordance with statute, the common law and binding decisions of the courts. We are not permitted in these proceedings to review the evidence and the law applicable in the substantive case and react to these grievances of the defendant.

In conclusion, the judge of first instance in these proceeding was wrong in that she accepted a calculation of the outstanding indebtedness of the defendant which excluded part of the 'special damages' awarded in favour of the plaintiff against the defendant. Accordingly, the Court of Appeal was right to have reversed her decision since the variation by the Supreme Court did not cancel the 'special damages' head of award

made in favour of the plaintiff against the defendant. Therefore, much as we do not necessarily like the conclusion the law has led us to in this case, we dismiss the appeal.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

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