IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: BAFFOE-BONNIE (PRESIDING)

PWAMANG JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

ASIEDU JSC

CRIMINAL APPEAL

NO. J3/05/2023

3RD MAY, 2023

1. KWABENA DUFFOUR
2. HODA HOLDINGS LIMITED ..... **APPELLANTS**
3. KWABENA DUFFOUR II

VS

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

MAJORITY DECISION

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

This is an appeal from judgment of the Court of Appeal dated 17th February 2022, occasioned by a Ruling of the High Court in a criminal prosecution currently underway.

Facts and Background

The appellant and 6 others have been arraigned before the High Court, Accra since 12th February, 2020, for the alleged roles they played leading to the collapse of UniBank, a Bank licenced to operate under the Banking and Deposit-taking Act, 2016 (Act 930). They have been charged with 68 counts of the following offences: (i) conspiracy to commit fraudulent breach of trust; (ii) fraudulent breach of trust; (iii) Money laundering; (iv) dishonesty receiving; (v) contravention of the Bank of Ghana Act, 2002 (Act 612); (vi) wilfully causing financial loss to the state; (vii) conspiracy to falsify accounts; and (viii) falsification of accounts.

When, in the course of its operations, UniBank began to show signs of distress, the Bank of Ghana stepped in , and in exercise of its powers of supervision over banks and deposit-taking institutions, appointed an official administrator to reorganize the affairs of the bank. KPMG, an audit firm, was appointed Administrator of Unibank by Bank of Ghana from 20th March 2018 – 31st July 2018. At the end of the Official Administration, the Bank of Ghana revoked the banking licence of UniBank and appointed Nii Amanor Dodoo, a Senior Partner of KPMG, as the Official Receiver of UniBank pursuant to the provisions of Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The effective date of the appointment was 1st August 2018, that is one day after the mandate of the Official Administrator ended.

At the close of Management Conference on 22nd February, 2021, the prosecution opened its case by calling its first witness (PW1), Nii Amanor Dodoo, the receiver of UniBank. On 26th April, 2021, the appellants raised objection to him testifying and challenged the

status of PW1 as a competent witness. Their objection was based on the fact that being a senior partner of KPMG, the Official Administrator of UniBank, he had taken an active part in the management and operation of UniBank as Official Administrator. Since one who had acted as Official Administrator was prohibited under 122 (8) of the Act 930 from taking any position as "*shareholder, director, key management personnel in a bank*", his appointment as receiver was null and void. Consequent upon his appointment as receiver being a nullity, he was not competent to testify in that capacity on any matter concerning the affairs of UniBank.

The High Court overruled the objection on 22nd June, 2021, and the appellants took the interlocutory appeal to Court of Appeal. The Court Appeal affirmed the decision of the trial Court and dismissed the appeal on 17th February, 2022. Appellants have filed the instant appeal to this honourable Court.

Case for Appellant

Appellants contend that PW1 had filed a Witness Statement which had been adopted at the trial Court as his evidence –in-chief. In paragraphs 4-6 of the said Witness Statement, PW1 had stated as follows:

> *4. "Following the revocation of Unibank's operating License and my appointment as receiver of the bank, I assembled a team to perform various reviews of the financial records of the Bank. My team also carried out reviews of the report of the Official Administrator.*
>
> *5. That the reviews conducted by my team identified a number of transactions that were suspicious and unusual in nature*
>
> *6. In February 2020, based on a request from the office of Attorney-General, I compiled a report on the above listed suspicious*

transactions from the 'Report on Financial Condition and Future prospects Updated.' – submitted to the Bank of Ghana as well as schedules and documents relevant to these matters for submission to the Attorney-General. I shall tender in evidence the Report submitted to the Attorney-General…"

Appellants contend that his appointment as Receiver, being void *ab initio*, anything he purported to do in that capacity flowed from the illegality and should not be countenanced. Further that all he knew about Unibank had been acquired in the course of his receivership and therefore, stripped of that position, he had no knowledge with which to testify.

Case for respondent

The respondents do not dispute the general facts of the case. The only contention is that there was nothing wrong with the appointment of the PWI as receiver, since it was the Firm that had been appointed as official Administrator. The Firm had legal personality separate and distinct from the partners of the Firm, therefore the appointment was not in violation of section 122(8) of Act 930. Further, that it was because the appellants had put an absurd and unreasonable interpretation on a provision that was clear on its face and required no interpretation at all, that they could take issue with it. In the Statement of Case the respondents maintained that PW1 had been appointed in compliance with the provision in section 122(8). The respondent also maintained that PWI was a competent witness under sections 58-60 of the Evidence Act, 1975 (NRCD 323), and so his testimony could not be impugned on grounds of non-competence as a witness.

The appellants have filed two grounds of Appeal.

Grounds

(i) The learned Justices of Court of Appeal erred in law ruling that Nii Amanor Dodoo's (PWI) position as a Receiver of Unibank did not flout Section 122 (8) of the Banks and Specialised Deposit Taking Institutions Act 2016 (Act 930) thereby occasioning a grave miscarriage of justice.

(ii) The learned Justices of the Court of Appeal erred in finding that PW1 is a competent witness to testify in the substantive criminal trial thereby occasioning a grave miscarriage of justice.

There being only two grounds of appeal, we shall proceed to deal with them accordingly.

Ground (i)

(i) The learned Justices of Court of Appeal erred in law ruling that Nii Amanor Dodoo's (PWI) position as a Receiver of Unibank did not flout Section 122 (8) of the Banks and Specialised Deposit Taking Institutions Act 2016 (Act 930) thereby occasioning a grave miscarriage of justice.

The issues that arise on this ground of appeal are:

1. Whether Nii Amanor Dodoo was qualified to be appointed as Receiver of UniBank in the face of section 122 (8), which prohibited the appointment into specified offices in the bank within two years after a period of official administration had ended?
2. Whether the appointment was, consequently, null and void in view of the prohibition in section 122(8)?
3. Whether Nii Amanor Dodoo having taken an active part in the business of acting as Official Administrator of UniBank from 20th March, 2018-31st July, 2018, as

Senior Partner in KPMG, was not caught in a conflict of interest by accepting appointment as Receiver of UniBank immediately thereafter?

4. Whether Nii Amanor Dodoo, as a receiver whose appointment was null and void, was competent to testify in the capacity of receiver?
5. Whether he ought to be allowed to proceed to testify when the capacity in which he acquired the information was null and void?

In order to do justice to the respective positions taken by appellants and respondent, it would be necessary to discuss the position of PW1, prior to being appointed as receiver of UniBank, with effect from 1st August, 2018.

There is no dispute as to the status of Nii Amanor Dodoo (PW1) as a Senior partner of the firm KPMG which had been appointed official Administrator of UniBank. There is also no doubt that as a Senior Partner of KPMG, he was actively involved in executing the mandate of official administration of UniBank. Was he trying "to run with the hare and hunt with the hounds"? It is trite law that a company or registered partnership has legal personality, separate and distinct from that of the members or partners. Section 12 (1) of the Incorporated Private Partnership Act, 1963 (Act 152) as amended provides as follows:

> *Section 12—Corporate Personality of the Firm.*
>
> *(1) From the date of registration mentioned in the certificate of registration issued in accordance with section 6 of this Act, the firm shall be a body corporate under the firm name, distinct from the partners of whom it is composed, and capable forthwith of exercising all the powers of a natural person of full capacity in so far as such powers can be exercised by a body corporate*

Thus with the appointment of KPMG as Official Administrator, it was the Firm that had responsibility for executing the mandate as Official Administrator, and for any acts done

in its name. Had there been any wrongdoing during that period, it was the Firm that would have had to answer for it and not any of the individual partners. However, in paragraph 21 of appellants' Reply to the Statement of Case of respondents, the appellants contest the effect of this legal principle and submit that

> *"In this particular instance, KPMG as official administrator of Unibank would be construed as including its partners and officers. Let alone those like PW1 who recommended the revocation of the banking license of Unibank and subsequently prepared the statutory report justifying why the operating licence of Unibank had to be revoked, for Bank of Ghana only to jump into the saddle again a day after termination, albeit this time as a Receiver*."

Having thus submitted, appellants do not contest the legal stature of the Firm KPMG, but believe that it is a proper occasion for the courts to go behind the veil of incorporation to rope in the Partners in their individual capacities.

It is true that under the law of corporate personality, acts done by such high level personnel are binding on the corporate body or Partnership. Section 14 of the Incorporated Private Partnerships Act 1963 (Act 152) is titled "*Power of Partners to Bind the Firm*", and the following provisions defining the scope of the power to bind have been made thereunder as follows:

> *(1) Every partner shall be an agent of the firm for the purpose of the business of the firm.*
>
> *(2) The acts of every partner shall bind the firm if,*
>
> *(a) such acts were authorised, expressly or impliedly, by his other partners or were subsequently ratified by them;*

(b) such acts were done for carrying on in the usual way business of the kind carried on by the firm, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing knows that he has no authority.

(3) Where the acts of a partner are for a purpose apparently not connected with the firm's ordinary course of business, the firm shall not be bound unless he is in fact authorised by his other partners or his act is subsequently ratified by them.

(4) If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement shall be binding on the firm with respect to persons having notice of the agreement."

Therefore, arguments tending to show that the acts of the Senior Partner should be binding on the Firm would arise only if KPMG were repudiating any acts done in its name by its Senior Partner, Nii Amanor Dodoo. There is no circumstance of that sort at play here. The question, then, is why any court would pierce the veil of incorporation when no wrong has been done by the Firm? Consequently, the acts set out by the appellants do, in fact, support the fact that Nii Amanor Dodoo was involved in the official administration and therefore has the requisite personal knowledge to testify on those matters.

A question of interpretation?

The appellants pin their case on the prohibitions in section 122(8) to seek to nullify the appointment of the receiver. However, when seeking to apply the provisions of a statute, there is no need for interpretation when the statute is clear on its face. Again, it is not helpful to pick out one sub-section and seek to determine its meaning to the exclusion of

other provisions because of the danger of fixing a meaning out of context. In this instance, to appreciate the scope of the prohibition in section 122(8), it would be necessary to reproduce the provisions of the whole of section 122 of Act 930 in order to provide sufficient context of meaning. First, it would be necessary to examine the provisions in section 107 on the appointment of Official Administrator. When does an official administrator get appointed by the Bank of Ghana? It is the case that in the normal run of things, the Bank of Ghana would take a decision to appoint an Official Administrator, when it was clear that there were serious issues with the operations or financial standing of a Bank or Deposit-Taking Institution. Section 107 (1) (a-g) provide the grounds for appointing an official administrator as follows:

> *"(1)…(a) the Bank: of Ghana determines that that bank: or specialised deposit-taking institution has*
>
> *(i) contravened a provision of this Act, the Regulations, directives or orders issued under this Act;*
>
> *(ii) engaged in any unsafe or unsound practice, in a manner as to weaken the condition of the bank: or specialised deposit-taking institution; or*
>
> *(iii) seriously jeopardised the interest of depositors or dissipated assets of the bank or specialised deposit- taking institution;*
>
> *(b) the capital adequacy ratio of that bank or specialised deposit-taking institution falls below fifty percent of the minimum required under section 29 or its unimpaired paid up capital falls below fifty percent of the minimum required under section 28;*
>
> *(c) the Bank of Ghana has reasonable cause to believe that that bank or specialised deposit-taking institution or its directors, key*

management personnel, or significant shareholders have engaged in or are engaging in illegal activities in a manner likely to jeopardise the interest of depositors;

(d) the Bank of Ghana determines that that bank or specialised deposit-taking institution is in an unsafe or unsound condition to transact business and the bank or specialized deposit-taking institution or its directors or key management personnel are unable to promptly improve the condition;

(e) that bank or specialised deposit-taking institution fails in any manner to cooperate with the Bank of Ghana or its examiners to enable the Bank of Ghana perform its supervisory responsibilities, including through concealment or failure to submit for inspection any of the books, documents or records of the bank or specia1ised deposit taking institution;

(f) that bank or specialised deposit-taking institution or the directors of that bank, specialised deposit-taking institution, key management personnel, employees, or significant share- holders fail to comply with an order of the Bank of Ghana under sections 102 to 106; or

(g) that bank or specialised deposit-taking institution by a resolution of the directors or shareholders, requests the appointment of an official administrator."

The grounds mean that the Bank may be put under official administration by the determination of the Bank of Ghana, or at the request of the institution concerned. This point about official administration sometimes being the result of a voluntary request for assistance is important, in order to dispel the impression created that the concept of

official administration is akin to a witch hunt that is contrary to the interests of the institution concerned. Far from being that, for it can give an ailing company the respite it needs to restructure, reorganize and return to its operations.

When the period of official administration comes to an end, provision is made for next steps in the process: Section 122 which covers what should happen after the mandate of the official administrator has come to an end, is titled "*"Termination of official administration"*, and its provisions are as follows:

> *122. (1) An official administration shall terminate at the expiry of the period specified in the decision appointing the official administrator or any extension of the period of the appointment.*
>
> *(2) An official administration shall be terminated before the expiry of the period referred to in subsection (1) if the Bank of Ghana determines that:*
>
> *(a) the official administration is not required due to the fact that the grounds on which the appointment of the official administrator was made no longer justify the continuance of the official administrator in office; or*
>
> *(b) the bank or specialised deposit-taking institution cannot be rehabilitated,*
>
> *(c) circumstances require that the licence of the bank or specialised deposit-taking institution be revoked under section 16; and*
>
> *(d) circumstances require the liquidation of the bank or specialised deposit-taking institution commence in accordance with sections 123 to 139.*

(3) ***Subject to subsection (4), where the termination of an official administration does not involve a closure of the bank or specialised deposit-taking institution****, the official administrator concerned shall carry out the duties of the bank or of the directors and key management personnel of the bank or specialised deposit-taking institution, until the nomination and election of new directors and the appointment of key management personnel.* (emphasis supplied).

(4) The official administrator shall take the actions required under subsection (3) during the tenure specified under subsection (3) of section 107.

(5) ***Pursuant to subsections (3) and (4), the official administrator shall return the properties, offices, assets, books and records of the bank or specialised deposit-taking institution to the newly constituted board of directors of the bank or specialised deposit-taking institution****.*(emphasis supplied).

(6) The decision of the Bank of Ghana to terminate official administration may be based on

(a) a recommendation by the official administrator, and

(b) a detailed report prepared by the official administrator supporting the recommendation.

(7) The official administrator shall within fourteen days of the termination of the appointment, prepare and submit to the Bank of Ghana a final report and accounting of the official administration.

> *(8) The official administrator shall not acquire significant shares or accept appointment* ***as a director, key management personnel or to any other office or position in the bank or specialised deposit-taking institution which was the subject of the administration*** *for a minimum period of two years after the end of official administration.* (emphasis supplied).

The provisions highlighted in section 122 (3) and (4) clearly anticipate that it is possible for an organization to recover and remain a going concern after the period of official administration, that is why provision is made for when post official administration "*does not involve a closure of the bank or specialised deposit-taking institution*". This also means that there may be occasions when the problems are impossible of correction and the institution must close shop. But more of this anon.

Section 108 (1) provides that "*The powers, functions and responsibilities of the shareholders, directors, and key management personnel of a bank or specialised deposit-taking institution shall be vested in the official administrator*." Therefore, when the official administrator's job is done and the institution can take charge of itself once more, section 122(5) gives instructions as to what should happen. In that event, *"the official administrator shall return the properties, offices, assets, books and records of the bank or specialised deposit-taking institution to* ***the newly constituted board of directors*** *of the bank or specialised deposit-taking institution."*. The "*newly-constituted board of directors*" obviously has reference to the board that would be put in place after the period of official administration, to take over the institution and ensure its prudent running as a going concern. Section 122 (6) and (7) provide for administrative steps that must be taken at the conclusion of the process of official administration. A report must be submitted within 14 days, giving final accounting of the official administration process. Thereafter, the Official Administrator is prohibited under section 122(8) from seeking association with the institution as

significant shareholder, or appointment within the institution until after two years. This means that in the instant case, KPMG could not legally seek appointment as auditor or manager or some other office within the institution it has worked on to bring it back on its feet.

In respect of section 122(8), the trial court stated the rationale that

> *"In carrying out the duties of the bank, the official administrator is presumed to have the benefit of inside information and workings of the bank. The mischief that the law seeks to achieve is to avoid any conflict of interest."*

This means that the prohibition on the official administrator in 122(8) not to go anywhere near the newly re-organized body to take up "*significant shares*" or "*accept appointment as a director, key management personnel or to any other office or position in the bank or specialised deposit-taking institution which was the subject of the administration for a minimum period of two years after the end of official administration*" is to reduce the temptation to use any relevant or privileged information acquired in the course of the official administration, for personal profit or for purposes of insider trading. A reading of section 122(8) as one whole supports the contention of the respondent.

When the scenario changes, and a decision to take the organization out of business or to close it is made, the issues arising would be different. There would be no need to appoint a new board, or any new officers. Therefore, a provision that directs the official administrator to hand over relevant documentation to the new board would obviously not be applicable to one which is going out of business. It is in that eventuality that a Receiver is appointed to chase all debtors and see to the performance of all obligations and for solving related problems before the dying institution can be finally laid to rest.

The Court of Appeal applied the *ejusdem generis* rule in interpreting the scope of the prohibition in section 122(8) on accepting "*appointment as a director, key management personnel or to any other office or position in the bank or specialised deposit-taking institution which was the subject of the administration*" to exclude 'Receiver' and the court was right and it is my considered opinion that the whole of section 122 if read as a whole, applies to the official administrator when the institution has been put back on its feet.

There is a different regime when it is found that after termination of official administration there would be no institution capable of being restored as a going concern. Remembering all the while that in the world of banking, the protection of the interests of depositors and creditors is critical, an institution that is either insolvent, or teetering on the edge of insolvency, would be a danger to the financial health of the public, and must be taken out with speed and minimum fuss. Consequently, under its powers of supervision over Banks and Deposit-taking institutions in Section 16 of Act 930, it is provided, inter alia, that Bank of Ghana could revoke a licence under a number of specified grounds, some pertaining to the grounds upon which the licence was granted; others pertaining to the conduct of business by the institution concerned; or the need, in the public interest, to protect depositors. Clearly, with the information provided by the official Administrator, the Bank of Ghana found that grounds for revocation existed and duly exercised its powers to revoke the licence. Section 16(8) made provision for what should happen under such revocation that, "*Where a licence is revoked under this section, the Bank of Ghana shall immediately initiate a receivership as provided in sections 123 to 139 and notify the institution responsible for deposit protection.*"

Therefore, in appointing a receiver immediately after the termination of official administration, the Bank of Ghana did not err. The crux of the plaint of the appellants is that the person appointed into the capacity of receiver, Nii Amanor Dodoo, had played such an active part in the KPMG Firm's official Administration of UniBank that as Senior

Partner of KPMG, he ought to be covered by the prohibitions placed upon an official Administrator upon termination of official administration. On their part, the respondents' contention is that the official Administrator was KPMG, and as its status as a registered partnership was separate and distinct from the personalities who formed the partnership, the prohibitions on KPMG did not apply to any of them in their personal capacity. Again, that Nii Amanor Dodoo's appointment as receiver did not breach section 122(8) since a receiver was not employed by the institution which, for all practical purposes, would have ceased to exist.

The legal effect of corporate personality under classical principles of *Salomon* v. *Salomon* support the respondents' contention, that even if the institution remained a going concern, it was the Firm KPMG rather than the Senior Partner, Nii Amanor Dodoo, that would be under the statutory prohibition in section 122(8). See ***Morkor*** v ***Kuma*** [1999-2000] 1 GLR 721.

The appellants contend that despite the legal effect of corporate personality, Nii Amanor Dodoo as the Senior partner of the Firm KPMG was, as Senior Partner, its alter ego, and therefore, not different from the Firm. Consequently, he in his personal capacity, ought to be covered the same prohibitions. The Court of Appeal stated in its judgment:

> *"Section 122(8) of Act 930 places a limitation on KPMG from acquiring significant shares or accepting appointment as a director key management personnel or to any other position in Unibank for a minimum period of two years from 31st July 2021. The positions and rights cannot be held by KPMG within two years after the expiry of its position as the official administrator of UniBank are basically positions offered by UniBank to its shareholders. … The trial High Court failed to construe section 122(8) of Act 30 ejusdem generis to disclose the purpose of the Act… The specific words …*

precede the general words or phrase "or to any other office or position in the bank."

Continuing, the Court of Appeal said that the categories listed, when construed *ejusdem generis*,

> *"disclose that they are shares and positions offered by UniBank in the exercise of its internal powers to its shareholders and employees,… The official administrator is appointed by the bank of Ghana and does not come within the powers of the bank or specialized deposit-taking institution. The appointment of receivership is also within the excusive powers of Bank of Ghana under section 123(2) of Act 930 and it appoints a receiver whenever it revokes the licence of that institution in accordance with the law."*

The Court of Appeal is right in its analysis, and we are in agreement.

First, it is important to clarify whether an Official Receiver is a "*director, key management personnel or any other officer*"? The Act provides the class of persons referred to as "*directors, key management personnel, and significant shareholders*" in other provisions of Act 930. For instance, section 103 of Act 930 is titled:

"*Remedial measures for directors, key management personnel, and significant shareholders*".

Under that section, copious provisions are made in respect of who is meant by "*directors, key management personnel, and significant shareholders of a bank [or in a bank'*" as follows:

> *"103. (1) Where the Bank of Ghana determines that a relevant person has*
>
> *(a) contravened a provision of this Act, the Regulations or directives issued under this Act;*

(b) contravened any condition or restriction attached to a licence issued by the Bank of Ghana …

(7) For the purpose of this section, "relevant person" means a director, key management personnel or employee or significant share-holder of a bank, specia1ised deposit-taking institution or financial holding company.

A 'receiver' being none of these officials in, or shareholders of, a bank, it cannot be that the office of a 'Receiver' was within the contemplated class of offices.

In paragraph 29, the appellants state that both offices, official administrator and receiver, are appointed by the Bank of Ghana and so on what basis can one be put under a prohibition whilst the other is exempt therefrom? The short answer is that as already demonstrated, they are different offices, and operate under different circumstances. In the one case, the institution could resume business after undergoing re-organisation, whilst in the other, it is only when the institution is being put out of business by the revocation of its licence, that the powers of receiver kick in, and therefore there would be no opportunity to seek or obtain employment from the institution, or acquire significant shares therein.

In the instant case, the condition precedent for 122(8) has not been met since official administration did not terminate with a restructured going concern, but with a revocation of its licence. The situation is provided for under section 123 in the part titled "*Receivership and Liquidation*". It goes as follows:

123. (1) Where the ***Bank of Ghana determines that the bank or specialised deposit-taking institution is insolvent or is likely to become insolvent within the next sixty days, the Bank of***

Ghana shall revoke the licence *of that bank or specialised deposit-taking institution.*

(2) The Bank of Ghana ***shall appoint a receiver at the effective time of revocation of the licence*** *under subsection (1).*

(3) The receiver appointed under subsection (2), shall take possession and control of the assets and liabilities of the bank or specialised deposit-taking institution.

(4) For the purpose of this section, "insolvent" means the inability of a bank or specialised deposit-taking institution to pay its obligations as they fall due or the circumstance where the value of the liabilities of a bank or specialised deposit-taking institution exceeds the value of its assets.

(5) The value of the assets, liabilities and regulatory capital of a bank or specialised deposit-taking institution shall be determined in accordance with valuation standards and procedures prescribed by the Bank of Ghana.

(6) In determining the value of the assets and liabilities of a bank or specialised deposit-taking institution for a future date, the anticipated future income and expenses of the bank or specialised deposit-taking institution until that date shall be taken into account.

(7) The Bank of Ghana shall immediately notify the institution responsible for deposit protection of a decision made under this section."

The Bank of Ghana is, thus, the one that makes a decision whether or not to revoke a licence, and when to do so. Even so, the Bank of Ghana has no option in certain circumstances, as the statute makes it mandatory where the institution is insolvent, or due to so become within sixty days. Nothing could be clearer than these provisions. Again, when a licence is revoked a receiver must be appointed immediately so that there would be no gap in terms of who is in charge. Bank of Ghana revoked the licence of UniBank on 1st August, 2018, and appointed a receiver with effect from that date. The immediacy of the appointment was thaus not one done in indecent haste, but one dictated by commercial prudence and statutory necessity.

Was the person appointed the proper one to be so appointed? The appellants think not. In paragraph 20 of their Reply, they contend in that

> *"A firm of Partners such as KPMG acts through its Partners and other officers of the firm….it would sound preposterous at this stage to create an imaginary dichotomy between the firm KPMG and its partners to the effect that they are separate and distinct. A Senior Partner of as Firm, just like the director of a limited liability company, is one of the directing minds of the firm or company and in such instances, cannot navigate around an express statutory prohibition placed on the firm or company in performing statutory functions*."

Relying on the same analogy by the appellants, it is certain that the appellants would appreciate that the property of a director of a limited liability company could not be lawfully seized and sold to pay off debts owed by that company. Therefore, a statutory prohibition that properly belongs to a Partnership cannot be carried by a Partner, however senior, in a personal capacity.

The submissions being urged on the Court by the appellants hereunder, raise issues pertaining to when the veil of incorporation may be lifted to reveal those who are behind the cloak of incorporation; when the acts of directors and partners bind a company or partnership and whether there is apparent conflict of interest in PW1's roles, rendering his appointment a breach of the section 122(8) of Act 930.

Is this an appropriate occasion to lift the veil?

It is trite law that despite the strong texture of the veil of incorporation, a court may, in appropriate circumstances, tear it off or pierce it. The law is forcefully restated by the Supreme Court in ***Morkor v. Kuma (No.1)*** supra, per Ms Akuffo JSC (as she then was). She stated at p. 733. that:

> *"The corporate barrier between a company and the persons who constitute or run it may be breached only under certain circumstances. These circumstances may be generally characterized as those situations where in the light of the evidence, the dictates of justice, public policy or Act 179 [now Act 992] so require. It is impossible to formulate an exhaustive list of circumstances that would justify the lifting of the corporate veil. However, the authorities indicate that such circumstances include where it is shown that the company was established to further fraudulent activities, or to avoid contractual liability."*

At p. 735, she continued with some indications of the circumstances that would cause a Court to breach the protection around incorporation thus:

> *"Nevertheless were there any proven factors driving the case, such as fraud, improper business conduct, deliberate attempts at evasion of legal obligations, or other devises or willful misdeeds on the part*

of the appellant, which would have justified the lifting of the veil in order to reach the appellant for redress?"

This means that there has to be evidence that the partnership was being used to perpetrate fraud or for some anti-social ends, to warrant piercing the veil to deal directly with those behind the veil. There being no such evidence in this particular instance, there is no basis to go behind the veil of incorporation and hold the senior partner personally liable for any work that the Firm had executed. Were this not the case, the concept of corporate personality would be meaningless as every corporate body does its work through, and by, its human employees.

Again, respondents rightly submit that, in the instant case, with the revocation of license, the bank or deposit-taking institution could no longer carry on the business for which the licence was obtained. Thus, for all practical purposes a resort to the provisions of section 123 as prescribed in section 16 would mean that there would be no company with which to associate in an improper relationship by KPMG, if it was desirous of doing so upon the termination of the mandate of the official administrator as provided under section 123.

The respondent further submitted that the interpretation being put on Section 123 by the appellants was absurd and unreasonable:

"In other words, when the official administration ends with the closure of the bank it is not possible for the official administrator to acquire significant shares or accept any appointment or position in the bank because there are no appointments, positions or shares still existing that can be taken in the first place. It is very clear therefore that Section 122 (8) could not have been intended to apply to a situation other than the second situation where official

administration does not end with the closure of the bank. This meaning makes the provision absurd.

Not giving up on the contention that Nii Amanor Dodoo ought not to have been appointed receiver, the appellants raise an issue of conflict of interest arising on his part, given the role he played as Senior Partner of KPMG during the period of official administration. Is there a conflict of interest in the two roles played by Nii Amanor Dodoo?

What is a Conflict of Interest?

A conflict of interest is said to exist when a person holds or is perceived to hold two conflicting interests, ie a personal interest and an interest pertaining to the person's office, at one and the same time and in the same transaction. Arising out of the principles of the law of agency, the position is that one who represents another must not put himself or herself in a position which would necessitate a clash in the two interests present. This is on account of the fact that it is entirely consistent with human nature that one whose personal interests clash with those of another, particularly one who is not available to protect those interests, is likely to protect personal interests more than the other's interests. This principle of ethics was laid down in ***Aberdeen Ry*** v. ***Blaikie*** (1854) 1 Macq HL 461 by Lord Cranworth. He stated the principle thus:

"it is a rule of universal application that no one, having such [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect

Basically, a conflict of interest can be of two (2) main types: 1. pecuniary interest that is, "an interest that a person has in a matter because of a reasonable likelihood or

expectation of appreciable financial gain or loss to the person or another person with whom the person is associated" and 2. Non-pecuniary (non-monetary) gain.

The idea is that one who, in a position of trust, stands to make personal gain either in money terms or otherwise from a transaction, is unlikely to look out for the interests of the one for whom he or she is responsible. In many jurisdictions, particularly in the United States of America, there are copious ethical rules by officials and corporate leaders on what one can, or cannot, do while in the service of the particular organization.

In this jurisdiction also, matters of conflict of interest are viewed with seriousness In ***The Republic*** v ***High Court (Commercial Division), Accra ex parte: Charles Zwennes And Philip Addison, Merlin Gaming Ghana Limited Eric Gbeho*** Civil Motion NO. J5/24/2020 dated 28th July, 2020; (Unreported).

The Supreme Court, per Dotse JSC, had cause to counsel a senior lawyer thus:

> *Even though we are not concerned with the merits of the substantive case at this stage, the issue of conflict of interest levelled against the Applicant is a formidable one, considering the status of the Applicant as a shareholder, Director and his Law Firm acting against the company for which he is a part owner and secretary. These are serious matters for consideration and what we think the Applicant needs to do at this stage is to step back and re-consider his entire role as a Lawyer in the dispute vis-à-vis the positions he claims to hold in the Interested Party Company*

Therefore, in the instant case, we have reviewed the evidence with care. Is there a conflict of interest, real or perceived, on the part of one who works for an official administrator and that of one who gets appointed subsequently as a receiver? There does not appear to be. First, decisions as to appointment were made by Bank of Ghana, and even if that

decision was made based on the reports of the official administrator, the appointment would not be so tainted. Again, if there were reasonable expectation of that person being appointed to that position if so recommended, it might create the impression that there was some personal interest at stake. However, since the Bank of Ghana was not obliged to appoint the one who made the recommendation, such a suspicion would be somewhat far-fetched, and without reasonable basis.

Again, the task of an official administrator and that of a receiver are not so different as to be said to be in conflict. Each has the responsibility to reorganize the affairs of an ailing bank or deposit-taking institution, and while they remain in office they represent the interests of the same institution. Section 108 spells out the powers of the official administrator as encompassing the "*powers, functions and responsibilities of the shareholders, directors, and key management personnel of a bank or specialised deposit-taking institution.*" On its part, the nature of a receiver is as spelt out in section 127 which prescribes a long list of functions and powers of the receiver beginning with 127(1) which provides that

"(1). On the appointment of the receiver, the receiver shall be the sole legal representative of the bank or specialised deposit-taking institution, and shall succeed the rights and powers of the shareholders, the directors and the key management personnel of the bank or specialised deposit-taking institution.

S127(2)-(13) prescribe in detail what acts a receiver can do on behalf of the institution in receivership.

Further, in order not to leave any doubt as to whose appointee the receiver is, the receiver works under the supervision of the Bank of Ghana, and takes instructions from the Bank of Ghana as provided under section 126 of Act 930. In line with these principles, the receiver does not have power to fix his own remuneration, it being in the power of the Bank of Ghana to determine same, under section 124(3). In the same vein, even any

reimbursements of expenses to, and the cost of any experts engaged by, the receiver, would be charged to the body in receivership under section 124(4) by the Bank of Ghana, and not by the receiver. Therefore, no decision that carries the risk of a conflict of interest has been left to the receiver alone to make.

Paragraph 3 of the respondent's Statement of Case points out that it is not the official administrator who decides whether or not an institution should go into receivership and *so "it is unwarranted to assume than an Official Administrator can get away with false claims just to create the false impression that a bank ought to go into receivership.*" On the opposing side, paragraph 30 of appellants' Statement of Case state that "*It is obvious that the intention of Parliament in inserting S. 122 (8) is to prevent collusion, fraud, conflict of interest, cronyism and any other under hand dealings*", thus repeating the submission to the effect that a move from the position of 'Official Administrator' to 'Receiver', involves a conflict of interest. As already indicated, those two officials do not operate in the same circumstances, and are not on different sides of the divide, such as the principles on conflict of interest deprecate.

This ground of appeal fails.

Ground ii

> *(ii) The learned Justices of the Court of Appeal erred in finding that PW1 is a competent witness to testify in the substantive criminal trial thereby occasioning a grave miscarriage of justice.*

Is the PW1 competent to testify as receiver?

That is clearly the case as sections 58- 60 of the Evidence Act 1975 (NRCD 323) set out. It is clear that he had personal knowledge of the infractions that were unearthed by the Official Administrator. It is clear from paragraph 3 of the Witness Statement of PW1 that he it was, who supplied the office of Attorney-General on 3rd February, 2020, with

excerpts of the report of the official administrator, titled the "*Financial Conditions and Future prospects of the Bank*" (90 day report) which was submitted to Bank of Ghana in accordance with the requirements of Act 930 during the time when UniBank was in official administration. The cover letter of the report stated

> "*The specific matters to which information is requested by your office as follows:*
>
> - *Fraudulent payments made by UniBank using pay-in slips and petty cash vouchers.*
> - *The creation of fictitious accounts and lo0ans by UniBank*
> - *Payment by UniBank for the acquisition of properties registered in the name of HODA properties*
> - *Payment to Goil*
> - *Purchase of ADB shares by UniBaqnk for related and connected parties.*
> - *Payments by "UniBank for shares in WAICA Re for related and connected parties; and*
> - *Payments made by UniBank to subsidiaries of HODA Holdings for the benefit of the ultimate beneficial owner*."

In addition, appellants point out that Nii Amanor Dodoo signed letters on behalf of KPMG during the period of official administration making a demand of the ultimate beneficiary, that the debts to UniBank be repaid. These letters are ExH J5, ExH J6; ExH J7; ExH J8, etc . Having authored these letters, he had personal knowledge of the report and the attached documents to the Attorney-General, which formed the basis of most of the charges preferred against the accused persons. In ***Agyei Osae*** v ***Adjeifio & Ors*** [2007-2008]1 SCGLR 499 at t p 510, the Supreme Court, per Brobbey JSC stated,

> *"Section 60 makes personal knowledge a requirement for qualification as a witness. In the instant case, all the witnesses were capable of expressing themselves and communicating with the court and fully gave evidence on matters within their personal knowledge. The revocation of a power of attorney did not in itself disqualify him as a witness if he met the standards set by the Evidence Decree 1975 on admissibility of evidence."*

Having personal knowledge of the matters in his witness statement, he is a competent witness. This ground of appeal also fails.

Conclusion

It has been clearly established that the appointment of Nii Amanor Dodoo as receiver after the Firm in which he was Senior Partner had served as official administrator, does not sin against section 122(8). There is no conflict of interest in moving from one position to the other. He is a competent witness as he has first hand knowledge of the matters before the court.

The appeal is without merit and fails in its entirety. It is hereby dismissed.

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

(JUSTICE OF THE SUPREME COURT)

CONCURRING MAJORITY OPINION

BAFFOE-BONNIE (JSC):-

I have read the lucid opinion written by my esteemed sister Prof. Mensah-Bonsu (JSC) and I am in total agreement with her reasoning and conclusion that the appeal is without merit and so same should be dismissed. However, I wish to add a few words of my own.

The facts and the background of this case have been very well articulated in my sister's opinion and I do not intend to repeat same except where necessary. This appeal hinges on only one principal issue, whether or not NII AMANOR-DODOO(hereafter PW1), was or is a competent witness.

It is the case of the appellants that the appointment of PW1, as RECEIVER by the Bank of Ghana, when he is a partner and active member of KPMG, a company that acted as official administrators, sins against Sec 122(8) of the Banks and Specialised Deposit-Taking Institutions Act(Act 930) and therefore null and void. By extension, since the evidence he is going to give will be based on information that he gathered by virtue of his position as the said receiver, PW1 is not a competent witness. The respondent naturally disagrees with this stance. The high Court ruled against the appellant and the Court of Appeal affirmed the High Court. Hence the appeal before us.

Is PWI a competent witness? To answer this question though, one has to necessarily answer the question whether the appointment of PW1, a partner of KPMG who were the official administrators, as receiver was or is regular or it sins against the law.

ISSUE

WHETHER OR NOT THE APPOINTMENT OF NII AMANOR-DODOO(PW1), AS RECEIVER OF UNIBANK LIMITED CONTRAVENES SECTION 122(8) OF THE BANKS AND SPECIALISED DEPOSIT-TAKING INSTITUTIONS ACT, 2018 (ACT 930)?

Who is the official administrator of a bank?

Administration is a procedure which allows for the reorganisation of a company or the realisation of its assets under the protection of a statutory moratorium, which prevents creditors from taking action to enforce their claims against the company during the administration process and so hamper the implementation of a strategy for the company's rescue or asset realisation.

Sections 107 and 108 provide for the appointment of an official administrator in respect of a bank or SDI.

Section 108 provides that upon the appointment of the official administrator in respect of a bank or SDI, the powers, functions and responsibilities of the shareholders, directors, and key management personnel of a bank or specialised deposit-taking institution shall be vested in the official administrator.

Section 109 also of the Banks and SDI Act provides that in the performance of his duties the official administrator shall only act in accordance with the instructions and guidance given by the Bank of Ghana at any time and shall be accountable only to the Bank of Ghana.

The Official Administrator is permitted by section 108 of the Banks and SDI Act to take any action necessary or appropriate to

a) carry on the business of a bank or specialised deposit-taking institution;

b) preserve and safeguard the assets and property of a bank or specialised deposit-taking institution; or

c) Implement a plan of action that has been approved by the Bank of Ghana with respect to that bank or specialised deposit-taking institution.

With the approval of the Bank of Ghana and following the submission of various reports on the assets and plan of action for resolving the bank or SDI, the official Administrator

is vested with authority, to implement various resolution options on the institution under administration.

It is important from a reading of sections 113 and 114 of the Banks and SDI Act that gathering as much information on the institution in order to determine the best method of resolving the institution or making it viable, is a key part of the duties of the official administrator and having the right access to all the necessary information on the assets and liabilities of the institution under administration is key to the success of the administration process and the resolution of the institution.

Section 122 of the Banks and SDI Act on the termination of the official administration process indicate that, the official administration may result in a healthy institution which shall be returned to shareholders subject to whatever restructuring which may have been carried out. When this is done a newly constituted Board shall be put in place for the financial institution and the Official Administrator shall hand over to this Board and the Official Administration process shall terminate.

On the other hand, Official administration may also terminate when an institution cannot be rehabilitated. Where an institution cannot be rehabilitated or any circumstances require that the licence of the Bank be revoked, the Bank of Ghana is mandated to revoke the licence of the Bank or SDI and put it into receivership. The Receiver is then authorised to take over all assets of the bank or SDI and commence the process of insolvency resolution.

The key issue to be determined by this court in this case is in relation to section 122 (8) of the banks and SDI Act which provides as follows:

The official administrator shall not acquire significant shares or accept appointment as a director, key management personnel or to any other office or position in the bank or

specialised deposit-taking institution which was the subject of the administration for a minimum period of two years after the end of official administration.

The Contention of the Appellants in this case is that upon the termination of official administration, the Appellant, being a partner of the KPMG previously appointed official administrators of Unibank, did not qualify to be appointed as Receiver of Unibank following the revocation of the institution's licence. The key reason for this submission, according to the appellants, is contained in section 127(1) of the Banks and SDI Act which provides as follows:

Section 127(1)

"On the appointment of the receiver, the receiver shall be the sole legal representative of the bank or specialised deposit-taking institution, and shall succeed the rights and powers of the shareholders, the directors and the key management personnel of the bank or specialised deposit-taking institution."

In that regard it would be a conflict of interest for the Receiver who is clothed with all the powers of shareholders, directors etc. to be appointed as a receiver if he has previously acted as official administrator. So even though section 122(8) does not specifically mention Receiver, the phrase ''any other office or position", can be construed to cover them.

I will disagree with this submission by the Appellants, I think this stance of the appellant, with all due respect to counsel, stems from a narrow reading and misappreciation of the real intent of the law which is a result of a misunderstanding of the functions of Official Administrator and Receiver. I wish to support this by considering two principles: Conflict of Interest and the contractual principle of Agency.

As stated earlier, when a company goes into Administration, the official Administrator is empowered to manage the company as best as possible till it becomes healthy again as

a going concern and same is handed back with the necessary recommendations. On the other hand after the period of administration, if the company cannot be salvaged, the administrator reports back to the appointee Bank of Ghana on the state of affairs and the recommendation that the company should be liquidated or placed under Receivership.

From the functions of administrator and the role he plays in resuscitating a dying company the administrator naturally comes into possession of a lot of business information which can be used for his personal gain. It is to avoid the use of such information for the administrator's benefit, and also avoid any insider trading, that Section 122(8) of the law was put there. Looking at the positions which the Administrator is precluded by law from holding, i.e. Significant Shareholder, A Director, Key Management Personnel or to Any other Office or Position, that section of the law becomes operational when the ailing company survives the administration and becomes a going concern again. It is only when the company survives that the information that the official administrator has acquired in the course of his duties becomes relevant and can be used to his advantage. A conflict of interest can be inferred here.

On the other hand the function and role of the receiver comes after the official administration and the bank of Ghana has determined that the company should be liquidated, albeit, on the advice of the official administrator. The Receiver becomes the agent of the Bank of Ghana and any prior information he has cannot be used for his personal gain or put him in any conflict of interest situation. He acts on the instructions of the Principal and he is remunerated by the principal.

Now let me deal with the two principles of law, Conflict of Interest, of which the appellants seems to be so enamoured, and the Principle of Agency.

Conflict of Interest

A conflict of interest is a situation that arises where a person has two (or more) competing interests and serving one of those interests could damage or harm the other interest. An interest has quite a broad meaning, but is generally something that benefits you, or a duty you have taken on. In a business context this is typically a situation where a director or employee has an interest outside their role with the company which could compete with their duties to the company. Conflict of interest could be actual potential or even just perceptive.

Not every interest automatically generates a conflict. However, the line between a potential conflict of interest and an actual conflict of interest is both a fine distinction and a blurred one,

Section 122(8) of the Banks and SDI Act seeks to address situations where a person appointed as an official administrator and an agent of the Bank of Ghana for the purposes of putting an institution into administration does not take advantage of, or is not perceived to take advantage of, his position for personal gain. It is my view that the drafters of the law put in Section 122(8) to ensure that the powers of Bank of Ghana to resolve a bank or SDI as a going concern through the official administration process is not tainted by the official administrator subsequently, presumably using information gained as part of the administration process for his personal gain.

The question I will ask at this point is, could a Receiver use information received in the course of his duties as receiver for his personal gain whether or not he was part of the Official Administration? My answer is in the negative.

This brings me to the next principle of agency.

Agency is a fiduciary relationship whereby one party expressly or impliedly authorizes another to act under his or her control and on his or her behalf. The party for whom another acts and from whom such authority derives is a "principal." The one who acts

for and represents the principal and acquires his or her authority from the principal is an "agent." Pursuant to the grant of authority by the principal, the agent is the representative of the principal and acts for and in the stead of, the principal.

A receiver of a Bank or SDI is appointed by the Bank of Ghana following the revocation of the licence of the bank or SDI. Section 127 of the Banks and SDI Act provides that in the performance of his duties:

1) ***The receiver shall act in accordance with the directives, instructions, and guidelines given by the Bank of Ghana in the course of the liquidation.***
2) ***The receiver shall be accountable only to the Bank of Ghana for the performance of duties and the exercise of powers as a receiver.***
3) ***The receiver shall at the end of each month—***
    a. ***report to the Bank of Ghana on the progress of the receivership in the form that the Bank of Ghana may prescribe; and***
    b. ***Provide any other information on request of the Bank of Ghana.***

The Receiver is in a relationship which is in the nature of an agency relationship with the Bank of Ghana. The Receiver operates entirely under the supervision of the Central Bank and reports to the Central Bank throughout the resolution process. The Receiver is thus in a position of trust and owes fiduciary duties to the Central Bank. These include the duty to act with utmost good faith, to act in the interests of the Central Bank. In doing, this the receiver must perform his functions with the mandate of the Central Bank in mind which includes the mandate to preserve financial stability. The terms of the remuneration of the Receiver are determined by the Central Bank and paid from the assets of the institution under receivership. The Receiver cannot therefore seek to make a profit from the Receivership process.

From the above analysis it is clear and I so hold that, section 122(8) is not intended to, in any way, prevent persons related to an official administrator or officials of the official administrator of a bank or SDI, from acting as Receivers of the same bank or SDI if its licence is subsequently revoked by the Central Bank. There is no conflict of interest when a past official administrator acts as Receiver since a Receiver acts not for himself but acts on behalf of the Central Bank.

Another compelling reason for me in arriving at the above conclusion is the special nature of the bank resolution regime.

To explain why the insolvency of banks is different from the insolvency of normal companies I would like to borrow from the words John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne (2016). *Principles of financial regulation* (1st ed.). Oxford University Press. They wrote at pg. 519:

"It is commonly thought that bank bankruptcy is different from that of other companies, for three reasons. First, the prospect of bankruptcy is very damaging to a bank, since the value of the bank's franchise dissipates very rapidly once doubts are raised about its financial viability. Second, the typical mechanics of bankruptcy are not well suited to a bank. In the bankruptcy of a non-financial firm, value is conserved by the imposition of an 'automatic stay' that limits creditors' rights to obtain payment of their claims. Since a core business of the bank is honouring depositors' cheques, this would put the bank out of business. Third, the negative externalities of bank failure can be very significant, depending on the size of the bank and the number of banks that simultaneously fail….. However, by itself this is not a compelling reason for taking banks out of the standard bankruptcy procedures. One might even argue that the costs to shareholders and creditors of bankruptcy will lead bank managers to be careful to avoid this state. A stronger argument for separate resolution procedures for banks (and other similar financial institutions) rests on the contagion effects of bank failure….these include not

simply the 'domino' impact of the failure of one bank upon the solvency of other banks but also, and more important, the potential loss of access to the payments system and of lending capacity to households and businesses through a contraction of the banking system, as confidence evaporates. The 'real' economy may suffer significantly if banks go down, but those costs are not usually borne by the bank's shareholders, managers, and creditors."

It is in the light of this that insolvency regime has been created for Banks and SDIs in the Banks and SDI Act, and this accords with International Practice.

If one is to take a critical look at the section 127 of the Banks and SDI Act he would inevitably conclude that for a Receiver to successfully resolve a financial institution he will need access to all the right information timeously. Section 127 (3) provides as follows:

Section 127(3) The rights and powers of the receiver include—

(a) taking possession of the books, records, and assets of the bank or specialised deposit-taking institution;

(b) managing, operating and representing the bank or specialised deposit-taking institution;

(c) marshalling assets and claims;

(d) transferring or disposing of assets;

(e) continuing or interrupting any operation of the bank or specialised deposit-taking institution;

(f) borrowing money on a secured or unsecured basis with the approval of the Bank of Ghana;

(g) suspending or limiting the payment of debts subject to the approval of the Bank of Ghana;

(h) hiring specialists, experts or professional consultants;

(i) administering the account of the bank or specialised deposit-taking institution;

(j) the collection of the debts due to the bank or specialised deposit-taking institution and the recovery of goods owed by third parties;

(k) initiating or defending the bank or specialised deposit-taking institution in any legal proceeding, and

(l) executing any relevant instrument in the name of the bank or specialised deposit-taking institution.

It is important to note that the key purpose of the bank resolution regime under the Banks and SDI Act is to ensure stability of the entire financial system with minimal cost to the taxpayer.

The Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions has this to stay about effective resolution regimes.

"The objective of an effective resolution regime is to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation. An effective resolution regime should…provide for speed and transparency and as much predictability as possible through legal and procedural clarity and advanced planning for orderly resolution"

In my opinion, having an official administrator or persons related to it appointed as Receivers does not lead to a conflict of interest situation but will rather engender good

information flow. The Receiver will start his work armed with sufficient information to speedily carry out a successful resolution of the failed bank or SDI. For me this fosters financial stability which is an important objective of the bank resolution regime.

It is for these reasons that I agree with my esteemed sister that the restrictions placed on section 122(8) cannot be construed to disqualify PW1 from being appointed a receiver and by extension prevent him from giving evidence.

The appeal fails in its entirety and same is dismissed.

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

CONCURRING MAJORITY OPINION

ASIEDU JSC:-

Introduction:

The core issue for determination in this appeal is whether or not Nii Amanor Doddoo, PW1 herein, is a competent witness who can legally testify in the criminal trial which is on-going before the trial High Court, Accra.

The appeal is against the decision of the Court of Appeal given on the 17th day of February 2022 in which the Court of Appeal dismissed an appeal against the decision of the High Court where the trial High Court dismissed an objection raised by the Appellants herein to the competence of Nii Amanor Dodoo, PW1 herein, to testify for the prosecution in his capacity as the Receiver at the trial of the Accused persons.

Facts:

The Accused persons are standing trial before the High Court, Accra for various offences including Conspiracy to Commit Fraudulent Breach of Trust; Fraudulent Breach of Trust;

Money Laundering; Dishonestly Receiving; Contravention of the Bank of Ghana Act, 2002 (Act 612); Willfully Causing Financial Loss to the State; Conspiracy to Falsify Accounts and Falsification of Accounts, for the diverse roles they played leading to the collapse or liquidation of Unibank.

In their Notice of Appeal, the Appellants seek basically three reliefs from this court. These are:

1. *"That the ruling of the Court of Appeal dated 17th February 2022 be reversed and the appointment of Mr. Nii Amanor Dodoo (PW1) as Receiver of Unibank be declared null and void vide section 122(8) of Act 930.*

2. *That all acts by Nii Amanor Dodoo (PW1) in his capacity as Receiver of Unibank be declared null and void ab initio.*

3. *That the testimony of Nii Amanor Dodoo (PW1) in his capacity as Receiver of Unibank adduced at the substantive criminal trial be expunged from the record before the trial High Court"*

These reliefs are premised on two grounds of appeal filed by the Appellants. They are:

1. *The learned Justices of the Court of Appeal erred in law by ruling that Nii Amanor Dodoo (PW1)'s position as a Receiver of Unibank did not flout section 122(8) of the Banks and Specialised Deposit-Taking Institutions Act, (Act 930) thereby occasioning a grave miscarriage of justice;*

2. *The learned Justices of the Court of Appeal erred in finding that PW1 is a competent and compellable witness to testify in the substantive criminal trial thereby occasioning a grave miscarriage of justice*

Particulars of Error:

a. *The appointment of PW1 as a Receiver of Unibank was not illegal or void or contrary to section 122(8) of Act 930*
b. *That PW1, testifying in his capacity as a Receiver of Unibank was a competent witness.*

Consideration of the appeal:

The contention of the Appellants is summarized in paragraph 14 of the statement of case filed on their behalf by their lawyer. Counsel says that:

> *"The appellants are contending that PW1's appointment as a Receiver of Unibank by BOG was contrary to statute and as a result, void ab initio. Therefore, everything that he did or purports to do as a Receiver of Unibank flows out of illegality and should not be countenanced by a court of law. Further, appellants contend that if PW1 is stripped of his position as a Receiver of Unibank, he has no personal knowledge of matters he has testified to so far. This is because from his own showing, he became seised of these matters by virtue of his appointment as a Receiver and nothing else. The relevant section of Act 930 in contention is section 122(8) …"*

In explaining their position further, Counsel stated at paragraph 40 and 42 of his statement of case as follows:

> *"It is respectfully submitted that, in the event that his appointment is declared illegal and void ab initio by this court then it means that PW1 is not qualified first of all to be a Receiver of Unibank and secondly that he is not competent to testify in that sole capacity in which case his evidence at the trial would have to be expunged. This is the more reason why the legality of his appointment is a foundation issue which has to be determined by this apex court"*

At paragraph 42 Counsel submits that:

"With all due respect to the learned Judges of the lower court, it appears they failed to appreciate the contention of the appellants. My Lords, it has never been the case of the appellants that PW1 cannot testify at the trial or (sic) any matter. Rather, what the appellants contend is that PW1 cannot testify in his capacity as a Receiver because his appointment is flawed as same was contrary to section 122(8) of Act 930. Therefore, PW1 could testify in any other capacity save as a Receiver. This is the argument of the appellants and the reference by the lower court to Section 51 of the Evidence Act, NRCD 323 was a red-herring."

In response to the above submission, it has been argued on behalf of the Respondent, in summary, that the appointment of PW1 as the Receiver of Unibank does not flout section 122(8) of Act 930 and therefore cannot be taken to be illegal and that PW1 is not barred from testifying as a Receiver in this matter.

The arguments that have been put forth therefore demands that this court first determines whether or not the appointment of Nii Amanor Dodoo (PW1) as the Receiver of Unibank flouted section 122(8) of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) and therefore illegal and, consequently, whether or not Nii Amanor Dodoo (PW1) is competent to testify in the trial court as a Receiver.

From the statements of case filed for and on behalf of the Appellants and the Respondent herein, it is clear that the Appellants and the Respondent agree that KPMG is an audit firm and a partnership. Again, the Appellants and the Respondent also agree that Nii Amanor Dodoo (PW1) herein, at the material time, was a Senior Partner of KPMG. Further, Appellants and the Respondent do not dispute the fact that Unibank was placed under Official Administration by the Bank of Ghana in the exercise of its powers under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The Appellants and the Respondent further agree that the Bank of Ghana, again, in pursuance of its powers under Act 930 appointed KPMG as the Official Administrator of Unibank. From

the statements of case filed by the Appellants and the Respondent herein, it is agreed that the work of the Official Administrator spanned the period 20th March 2018 to 31st July 2018. It is also on record that after the official administration of Unibank has ended, the Bank of Ghana, exercising its powers under Act 930, appointed Nii Amanor Dodoo (PW1) as a Receiver of Unibank.

As already noted above, a follow-up question which this court is called upon to answer is whether or not the appointment of Nii Amanor Dodoo (PW1) as a Receiver of Unibank is contrary to the provisions in section 122(8) of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The task of this court is therefore to ascertain the true and proper meaning to be placed on section 122(8) of Act 930. In so doing it is important to re-iterate the principle of construction of statute as stated by this court in **De Simone Limited vs. Olam Ghana Limited [2017-2018] 1 SCLRG 286** to the effect that:

> *"It is a cardinal principle in the construction of statute that the provisions of a statute are to be construed as a whole, in order that particular provisions fit into the purpose and object of the statute. It is also permissible to construe the provisions of a statute by reference to other existing statutes so that the legislative intent can be unearthed. As the title of the Alternative Dispute Resolution Act, 2010, (Act 798) clearly suggests, the purpose of the Act is to allow parties to choose an alternative forum other than the regular courts for the resolution of their disputes. It is therefore important that the construction of the provisions of the Act should reflect the general purpose of the Act."*

Section 122(8) of Act 930 provides that:

> *"(8) The official administrator shall* ***not acquire significant shares*** *or* ***accept appointment as a director, key management personnel*** *or* ***to any other office or position in the bank or specialised deposit-taking institution*** *which was the subject*

of the administration for a minimum period of two years after the end of official administration."

The power to appoint an Official Administrator for a bank or specialised deposit-taking institution is given to the Bank of Ghana under section 107(1) of Act 930 and that power may be exercised by the Bank of Ghana if any of the circumstances stated under section 107(1) (a) to (g) occurs. These circumstances ranges from the mismanagement of the Bank or Specialised Deposit-Taking Institution by the management of the said bank or institution leading to serious jeopardy of the interest of customers, depositors and the dissipation of the asset base as well as the reserve of the entity with the Bank of Ghana; indulgence in illegality by the management of the Bank or Specialised Deposit-Taking Institution which seriously affects the financial health of the bank or specialised deposit-taking institution; failure of the entity concerned to heed orders given by the Bank of Ghana under sections 102 to 106 of Act 930, among others. The Official Administrator when appointed shall administer the said bank or institution for a period not exceeding a total of twelve months under section 107(3) of the Act.

As soon as official administration commences, all the powers and functions and responsibilities of the management of the affected bank or special deposit-taking institution are, by law, vested in the Official Administrator and, no action or decision can lawfully be taken by any official of the bank or institution except by the authority of the Official Administrator. Indeed, as provided by section 108(4) of Act 930 *"the official administrator shall have exclusive powers to manage and operate a bank or specialised deposit-taking institution in accordance with the instructions, directives, and guidelines of the Bank of Ghana."* The powers given to the Official Administrator are to be exercised, in my opinion, so as to resuscitate an ailing bank and for that reason section 108(5) provides in no uncertain terms that:

(5) The official administrator may take any action necessary or appropriate to—

(a) carry on the business of a bank or specialised deposit-taking institution;

(b) preserve and safeguard the assets and property of a bank or specialised deposit-taking institution; or

(c) implement a plan of action that has been approved by the Bank of Ghana with respect to that bank or specialised deposit-taking institution.

Hence, the role of the Official Administrator to the bank or the specialised deposit-taking institution is like that of a salvor to a sinking ship; to save the ship, if possible, from sinking. In the exercise of these powers and functions, it cannot be denied that the Official Administrator might come across very highly sensitive information about the ailing bank. Information such as the financial strength of the bank, its trading activities, its customer base, the share holding structure of the members of the bank, the assets of the bank or deposit taking institution, information with regard to the debt structure and other liabilities of the bank and specialised deposit-taking institution. Information bordering on strategic investment undertaken by the bank or specialised deposit-taking institution may all come to the knowledge of the Official Administrator. This is as a result of the wide powers given to the Official Administrator under Act 930. For instance, section 113(1)(2)(3) provides that:

113. Control of the bank or specialised deposit-taking institution by official administrator

(1) The official administrator shall on appointment to office secure the properties, offices, assets, books and records of the bank or specialised deposit-taking institution involved, and may take the necessary steps including—

(a) changing the locks to the buildings and offices of the bank or specialised deposit-taking institution to prevent unauthorised access;

(b) changing the passwords to the computers of the bank or specialised deposit-taking institutions and granting access only to a limited number of employees; and

(c) issuing to authorised employees a new type of entrance pass to the premises of the bank or specialised deposit-taking institution and controlling the access of other employees to those premises.

(2) The official administrator shall in the course of the official administration have unrestricted access to, and control over the properties, offices, assets and the books of account and other records of the bank or specialised deposit-taking institution.

(3) A law enforcement agency shall, on request, assist the official administrator to gain access to any premises of the bank or specialised deposit-taking institution to gain control over and to secure the properties, offices, assets, books and records of the bank or specialised deposit-taking institution.

Section 114(3) and (4) also enjoins the Official Administrator to prepare an inventory of the assets and liabilities and also a report on the "*financial condition and future prospects*" of the bank or specialised deposit-taking institution placed under his care. This report is also supposed to include the valuation of the assets of the bank or the institution if the bank or institution is to be liquidated. It is also the duty of the Official Administrator to make proposals, in the report, which will ensure that the bank or the institution placed under official administration complies with the law by carrying out plans which has the potential of taking the said institution out of its sinking position by way of increasing the capital base of the bank and also minimising *"disruption to depositors and preserve the stability of the financial system, if the bank or specialised deposit-taking institution cannot be rehabilitated."* The increase in the capital base of the bank may be made from two sources: either by calling upon the existing shareholders to subscribe to or purchase additional shares as provided for under section 115 of the Act or by floating shares to new investors

in order to raise the needed funds in accordance with the provisions of section 116 of the Act. There are other measures which the Official Administrator may carry out under the Act in order to salvage the bank or specialised deposit-taking institution placed under official administration. These are provided for under sections 117 through to section 120 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930).

With all this information coming to the knowledge of the Official Administrator, the law-maker thought it wise to safeguard the institution concerned from probable machinations, insider-trading and under-hand dealings from an unscrupulous Official Administrator who might want to take advantage of the information that have come to his knowledge, as a result of his work as the Official Administrator, for his personal benefit or aggrandisement. It is for these reasons, among others, that Parliament enacted section 122(8) of the Act which states that:

> *"(8) The official administrator shall not acquire significant shares or accept appointment as a director, key management personnel or to any other office or position in the bank or specialised deposit-taking institution which was the subject of the administration for a minimum period of two years after the end of official administration."*

Thus, within a period of not less than two years after his work as the Official Administrator had come to a close, an Official Administrator, through whose effort, a bank or specialised deposit-taking institution which was otherwise on its way to collapse had been revived is, by the provisions in section 122(8), prohibited from: (1) acquiring significant shares in the revived bank or institution; (2) accepting appointment either (a) as a director, (b) key management personnel, (c) or to any other office or position *"in the bank or specialised deposit-taking institution which was the subject of the administration for a minimum period of two years after the end of official administration."* The term key "management personnel" is defined in section 156 to include:

"the chief executive, deputy chief executive, chief operating officer, chief finance officer, board secretary, treasurer, chief internal auditor, the chief risk officer, the head of compliance, the anti-money laundering reporting officer, the head of internal control functions, the chief legal officer, the manager of a significant business unit of the bank, a specialised deposit-taking institution, or a financial holding company or any person with similar responsibilities"

In other words, the key management personnel are the brains behind the bank. They constitute those who think for the bank and run the daily operations and administration of the bank or specialised deposit-taking institution. It implies therefore that section 122(8) of Act 930 prohibits the Official Administrator from being a director and from holding any office of influence or of utmost importance such as any of those mentioned above and also from acquiring any share of significance in a bank or specialised deposit-taking institution that had undergone official administration under his watch within two years immediately following the end of official administration. It must also be emphasized that the person prohibited from holding the office is no other than the Official Administrator.

It is very crucial for this court to point out, in no uncertain terms, that per the provisions of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) any official administration exercise undertaken with respect to any bank or specialised deposit-taking institution which is in distress can have only one of two results: That is to say that, the placement of a bank or specialised deposit-taking institution under official administration by the Bank of Ghana under section 107 of Act 930 may terminate and result in either the bank or special deposit-taking institution concerned being rehabilitated and continuing as a going-concern **or** the said entity being placed under receivership by first; the revocation of the licence of the said entity and, secondly, the appointment of a Receiver therefor under section 123(1) and (2) of Act 930 if the Bank of

Ghana determines that the entity which had been placed under official administration is insolvent or likely to become insolvent within the next sixty days.

Thus, where it is determined that an entity under official administration had been resuscitated sufficiently to enable it stand on its feet once again and continue in business as a going concern then, as provided by section 122(3), *"the official administrator concerned shall carry out the duties of the bank or of the directors and key management personnel of the bank or specialised deposit-taking institution, until the nomination and election of new directors and the appointment of key management personnel."* And, after the nomination or election or appointment of new directors and key management personnel for the rehabilitated entity, the Official Administrator shall, in accordance with section 122(5) "*return the properties, offices, assets, books and records of the bank or specialised deposit-taking institution to the newly constituted board of directors of the bank or specialised deposit-taking institution*" and then, within a period of fourteen days after his stewardship had come to an end, the Official Administrator shall "*prepare and submit to the Bank of Ghana a final report and accounting of the official administration*."

Thus, as already pointed out, it is after his work as Official Administrator had come to a close and the entity, hitherto under official administration, had been revived and its now on its own feet and operating as a going concern with its own board of directors and key management personnel in place in charge of the daily management and administration of the entity, that section 122(8) kicks-in to ensure that the Official Administrator does not take advantage of the knowledge gained about the bank or specialised deposit-taking institution by way of a prohibitive injunction for a period of not less than two years from buying or acquiring significant shareholding in the entity or being appointed a director or to any key management office in the bank or any such office.

Thus, it is only where the entity continues to operate as a going concern that the Official Administrator can be prohibited under section 122(8). The same cannot be said about a

bank or specialised deposit-taking institution which had been declared insolvent under section 123 of Act 930. In my opinion, where section 123 is invoked, one cannot correctly talk about the Official Administrator being prohibited from acquiring significant shares in the entity, hitherto, under official administration and neither can one correctly talk about the Official Administrator being prohibited from taking up positions such as director nor key management personnel in the bank. Once section 123 is invoked, it implies that the said bank or specialised deposit-taking institution is being managed in order that "it may exit to eternity with minimal pain". Such an entity is no longer on the road to recovery; it is dead or about dying and the Receiver is appointed to see to it that the minimum or the least damage is done to depositors, customers, creditors and persons who may have some interest of a sort in the entity when it was in operation prior to its placement under official administration. Simply put, section 122(8) does not affect a Receiver appointed under section 123(2) of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). Hence, notwithstanding the fact that Nii Amanor Dodoo was a partner in KPMG; and, notwithstanding the fact that KPMG was the Official Administrator of Unibank, it cannot be correctly argued that the appointment of Nii Amanor Dodoo (PW1) herein was illegal and, must as a matter of law, be declared null and void.

In other words, Nii Amanor Dodoo, the within named Receiver of Unibank cannot be said to have been appointed in breach of section 122(8) of Act 930. Indeed, he was not appointed in breach of any law. His appointment as a Receiver was not made to enable him manage Unibank as a going concern but rather to enable him to oversee to the lawful liquidation of Unibank under Act 930. It needs to be pointed out that sections 123 to 139 which governs the appointment and the role of the Receiver bears the caption "receivership and liquidation" and that the Receiver, PW1 herein, cannot be said to have been appointed contrary to section 122(8) and that he has accepted a position in Unibank,

a company that is under liquidation, a company that is on the "verge of dying". Having been placed under receivership means that, Unibank could not be rehabilitated, it means that Unibank could no longer be operated as a going concern, it means that Unibank is "being seen off". It can therefore not be correctly argued that PW1 had accepted a key managerial position in a dying company. I am not, in the least, impressed with ground one of the grounds of appeal and the arguments put forth under that ground of appeal. The appointment of PW1 as a Receiver of Unibank was not illegal; the appointment of PW1 as a Receiver was not void; the appointment of Nii Amanor Dodoo as a Receiver was not contrary to section 122(8) of Act 930.

Reading through the statement of case of the Appellants, one gets the impression that just for the reason that Nii Amanor Dodoo, PW1 herein, was a partner in KPMG, the Official Administrator and indeed took part in the work of the Official Administrator, he is being equated to the Official Administrator as though PW1 was the Official Administrator of Unibank. However, as submitted on behalf of the Respondent, being a partnership, KPMG is a legal entity with a separate and distinct personality from the members that make up the partnership. This is made clearer by section 10 of the Incorporated Partnership Act, 1962, Act 152 which provides that:

> *"10. Corporate personality of the firm*
>
> *(1) From the date of registration mentioned in the certificate of registration issued in accordance with section 4, the firm is a body corporate under the firm name, distinct from the partners of whom it is composed, and capable of exercising the powers of a natural person of full capacity in so far as those powers can be exercised by a body corporate.*
>
> *(2) Despite a change in the constitution of the partnership, the firm shall continue to exist as a corporate body until dissolved in accordance with section 49, 50 or 51."*

One outstanding difference between an incorporated partnership under Act 152 and a limited liability company registered under the Companies Act, 2019, Act 992 is about the liability of the members. For, whereas under Act 152 the liability of the members of the partnership is not limited and for that matter members of the partnership can be called upon to contribute without any limit to the debt or obligations of the partnership firm, the liability of the members of a company incorporated under Act 992 is limited to the unpaid value of their shares. Thus, section 10(3) of Act 152 states in clear terms that:

> *"(3) Although the firm is a body corporate, each partner in the firm is liable, without limitation, for the debts and obligations of the firm in the manner referred to in section 14, but is entitled to an indemnity from the firm and to contribution from the co-partners in accordance with the rights of that partner under the partnership agreement."*

Whilst section 14(1) of Act 992 provides that:

> *"14. Incorporation*
>
> *(1) Where the Registrar is satisfied that the application for incorporation of a company complies with this Act, the Registrar shall, after payment of the prescribed Fee, certify under the seal of the Registrar that the company is incorporated and in the case of a limited liability company, that the liability of the members is limited."*

However, when it comes to their corporate status, there is little to choose from that of a partnership registered under Act 152 as provided by section 10(1) of Act 152 and a limited liability company registered under Act 992 as provided by section 18(1) of Act 992.

I am satisfied that Nii Amanor Dodoo, PW1 herein, is not the Official Administrator. Rather, Nii Amanor Dodoo, PW1 is the Receiver of Unibank and the position of Official Administrator and Receiver are not the same. I will proceed to dismiss ground one as not having been made out.

Ground Two:

In the second ground of appeal, the Appellants say that "*the learned Justices of the Court of Appeal erred in finding that PW1 is a competent and compellable witness to testify in the substantive criminal trial thereby occasioning a grave miscarriage of justice*". In his statement of case, filed for and on behalf of the Appellants, nowhere did Counsel dispute the competence of Nii Amanor Dodoo (PW1) to testify. Rather, Counsel's argument was that in view of the provisions in section 122(8) of Act 930, the appointed of Nii Amanor Dodoo as a Receiver was a nullity and that being so, whatever Nii Amanor Dodoo had done on the strength of his appointment as a Receiver was a nullity. I have come to the conclusion, as shown above, that the appointment of Nii Amanor Dodoo did not infringe section 122(8) of Act 930 and consequently there is nothing illegal about PW1's appointment as a Receiver of Unibank.

Sections 58, 59 and 60 of the Evidence Act, 1975, NRCD 323 give competence to all persons to testify at a trial once a person has personal knowledge of the issues about which he testifies and is capable of expressing himself to be understood by the court either directly or through an interpreter and once the person understands the duty cast on him as a witness to speak the truth. See **Agyei Osae & Others vs. Adjeifio & Others [2007-2008] SCGLR 499.** The sections provide that:

> *"58. Competent persons*
>
> *Except as otherwise provided by this Act, a person is competent to be a witness and a person is not disqualified from testifying to a matter.*
>
> *59. Disqualification of witnesses*
>
> *(1) A person is not qualified to be a witness if that person is*

(a) incapable of coherent expression so as to be understood, directly or through interpretation by another person who can understand that person; or

(b) incapable of understanding the duty of a witness to tell the truth.

(2) A child or a person of unsound mind is competent to be a witness unless the child or that person is disqualified by subsection (1).

60. Personal knowledge required

(1) A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter.

(2) Evidence to prove personal knowledge may, but need not consist of the testimony of the witness personally.

(3) A witness may testify to a matter without proof of personal knowledge if an objection is not raised by a party.

(4) This section is subject to section 112 relating to opinion testimony by expert witnesses."

As already pointed out, the Appellants do not dispute the competence of Nii Amanor Dodoo to give evidence per se and once I have come to the conclusion that there is no proper legal basis for the challenge mounted by the Appellants about the legality of the appointment of Nii Amanor Dodoo as the Receiver and once the Appellants do not dispute the fact that Nii Amanor Dodoo has personal knowledge of the matters about which he had filed Witness Statement as a Receiver of Unibank, the said PW1 has the competence to give evidence in the matter and is not disqualified in any way from giving evidence. It is very absurd for an argument to be made to the effect that the Official Administrator in this matter is qualified to give evidence in his capacity as Official Administrator but that the Receiver is not qualified to testify in his capacity as a Receiver

except in some other capacity. I find no merit in the second ground of appeal also. I will proceed to dismiss this ground of appeal in addition.

CONCLUSION:

In conclusion, I will affirm the conclusion reached by the learned justices of the Court of Appeal to the effect that Nii Amanor Dodoo (PW1), the Receiver of Unibank is competent to testify in the criminal case pending before the High Court, Accra and is otherwise not disqualified in any way from giving evidence about matters which have come to his knowledge in his capacity as the Receiver. The appeal is hereby dismissed.

S. K. A. ASIEDU

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG JSC:-

My Lords, there is pending in the High Court criminal proceedings involving the appellants before us for roles they played in the management of Unibank (Ghana) Ltd, one of the banks whose licences were revoked by the Bank of Ghana under the **Banks and Special Deposit-Taking Institutions Act, 2016 (Act 930)**. The prosecution called one Nii Amanor Dodoo as PW1 to give evidence against the appellants and when he stated

that he was testifying in the capacity of Receiver of Unibank appointed by the Bank of Ghana pursuant to Act 930, the appellants took an objection. The ground of the objection was that his purported appointment violates that statute so he is not competent to testify in the capacity of Receiver of Unibank. This was for the reason that the witness was a senior partner of KPMG, a firm that the Bank of Ghana appointed as the official administrator of Unibank prior to the revocation of its license. It thus became necessary for the High Court to construe the relevant provisions of Act 930 since the competence of the witness to testify in the capacity of Receiver of Unibank was dependent on the lawfulness or otherwise of his appointment. The provision at the centre of the dispute is section 122(8) of Act 930 and it is as follows;

(8) The official administrator shall not acquire significant shares or accept appointment as a director, key management personnel or to any other office or position in the bank or specialised deposit-taking institution which was the subject of the administration for a minimum period of two years after the end of official administration.

Both the High Court and the Court of Appeal held that the appointment of the witness did not contravene Act 930 and the appellants have impeached their interpretations of the provision in this final appeal. From the grounds of appeal and the arguments that have been put forth by both parties, the main issue for determination in this appeal is whether or not the appointment of Nii Amanor Dodoo (PW1) as the Receiver of Unibank flouted section 122(8) of Act 930 and therefore is illegal and, consequently, whether or not Nii Amanor Dodoo (PW1) is competent to testify in the trial court as a Receiver.

My Lords, though it is section 122(8) of the Act that is to be interpreted, settled canons of the interpretation of statutes and deeds require that we take into account other relevant provisions of the Act and consider the purpose and context in which the section was

enacted. In the case of **Abu Ramadan & Nimako v EC & A-G [2013-2014] 2 SCGLR 1654,** Wood C.J, stated as follows at p. 1674;

"To arrive at a proper construction of regulation 1(3)(d) and (e) of the Public Elections (Registration of Voters) Regulations, 2012 (CI 72), firmly established principles of statutory interpretation require that CI 72 be read as a whole, not piecemeal, and purposely construed and the impugned legislation interpreted in the context of the other parts of CI 72."

This approach to interpretation that is referred to as the purposive approach has received statutory backing from section 10(4)(d) of the **Interpretations Act, 2009 (Act 792)** which requires that our courts, in interpreting laws, must have recourse to the purpose and spirit of the provision in question. It is therefore important for us in this case to pay particular attention to the essential background facts of this case which are not in dispute.

The Bank of Ghana is the authority in Ghana for licensing companies to engage in the business of banking and deposit-taking from the public. Before a business is licensed as a bank or deposit-taking institution, it must meet minimum technical and financial requirements set by the Bank of Ghana. After the grant of a license, the Bank of Ghana exercises continuous supervision of the operations of licensed banks and deposit-taking institutions to ensure that the interests of members of the public who keep their monies with such institutions is protected. What Act 930 does among other things is, that it gives powers to the Bank of Ghana to take proactive measures to protect the interests of depositors if in the course of its monitoring duties it detects improper handling of deposits and assets by the management of a bank or deposit-taking institution. These measures may be in the form of directives to be complied with by the management of the bank or institution in question, but where the irregularities are considered grave, the Bank of Ghana may appoint an official administrator to take direct control of the bank or institution in default for a specified period of six months or two consecutive three months each. During that period, the official administrator becomes the directing mind

of the bank and the share holders, directors and key management personnel of the bank shall act in accordance with her orders, which shall be in accordance with the laws on banking and guidelines of the Bank of Ghana. Section 108 of the Act provides as follows;

General powers of the official administrator

108. (1) The powers, functions and responsibilities of the shareholders, directors, and key management personnel of a bank or specialised deposit-taking institution shall be vested in the official administrator.

(2) The official administrator may request the shareholders, directors or key management personnel to carry out any activity under this Act

On the expiry of the period of official administration, depending on how the bank or deposit-taking institution performed during that time, the Bank of Ghana is required to decide the future of the defaulting institution; either to maintain its license and return it to the previous shareholders and managers or to revoke the license of the institution if, despite the official administration, the bank is considered insolvent or likely to become insolvent in the next six months. Where the Bank of Ghana opts for closure of the bank or deposit-taking institution, it shall appoint a Receiver who shall take possession and control of the assets and liabilities of the defaulting institution. This means that where the closure is preceded by official administration, the official administrator shall hand over to the Receiver. However, if the official administration does not result in closure, then the official administrator shall hand over to the previous owners of the bank or deposit-taking institution.

Sometime in 2018, the Bank of Ghana, in the course of supervising the operations of Unibank came upon information that it believed showed that the owners and managers of that bank were not running it properly and that deposits of their customers were at risk. They therefore decided to appoint an official administrator to take direct charge of

the bank from 20th March, 2018 to 31st July, 2018. The Bank of Ghana appointed KPMG, an auditing firm of note, as the official administrator of the bank. Nii Amanor Dodoo, at all times material, was a Seniour Partner of KPMG and was thereby involved in the management of Unibank for the four months. When the period of official administration ended, it was not extended but by a letter dated 1st August, 2018, the Bank of Ghana appointed a Receiver in the person of this same Nii Amanor Dodoo of KPMG, to take over the bank from the official administrator. Nii Amanor Dodoo took over the affairs of Unibank and it was while performing his functions as Receiver that he provided information about Unibank to the Attorney-General who had launched criminal investigations into the operations of the bank. That is how come the Attorney-General subsequently called him as a prosecution witness.

My Lords, the contention of the appellant is, that by section 122(8) of the Act, the legislature intended to disqualify for two years a person in the position Nii Amanor Dodoo finds himself from being appointed Receiver of Unibank on account of the role he played during the four months that Unibank was under official administration. The appellants submit in their statement of case that the purpose for which the legislature enacted section 122(8) was clearly to prevent a person who acted as official administrator of a bank or deposit-taking institution from playing a significant role in the affairs of that bank or institution for two years after her duties as official administrator have come to an end. They argue that the words "accept appointment as a director, key management personnel or any other office or position in the bank…" is referable to the office of Receiver of the bank or deposit-taking institution that was subject of the administration. The appellants refer to the functions and powers of a Receiver as provided under section 127 of the Act and submit that those functions are precisely what a person who acted as official administrator is prohibited by section 122(8) of the Act from playing in the bank or institution within two years after the administration.

The appellants further state, that the powers given by the Act to an official administrator are far reaching and depending on the way an administrator discharges her functions, it could influence the decision of the Bank of Ghana whether to return the bank to its previous owners or to withdraw its license and appoint a Receiver for it. In their view, the prohibition under section 122(8) is placed on the official administrator to dissuade her from doing anything during the administration which she can immediately take advantage of after the administration. This way, the official administrator is prevented from putting herself in a conflict of interest position. A follow up contention of the appellants is that, having regard to the nature of liability of partners of a firm under section 16 of the **Incorporated Partners Act, 1962 (Act 152),** Nii Amanor Dodoo has full individual liability for all debts and obligations of KPMG, therefore, the prohibition against administrator in this case attaches against him personally. He is thus personally disqualified under section 122(8) from accepting appointment as Receiver of Unibank.

For his part, the respondent takes the view that section 122(8) is limited to a situation where, at the end of an official administrator's work, the Bank of Ghana decides to return the bank or institution to its previous owners and managers and does not apply where the license of the bank or institution is revoked and a Receiver is appointed. He submits that the provisions about what shall happen where the license of the bank is withdrawn are to be found at Part 9 of the Act, from sections 123 to 129, such that if the legislature intended the prohibition under section 122(8) to apply where the license is revoked, they would have repeated a similar provision somewhere under Part 9 of the Act. The respondent states that where official administration ends with the closure of the bank or institution, there will be no management personnel positions to which the administrator could be appointed. Furthermore, the respondent adopts the reasoning of the Court of Appeal to the effect that the words "or any other office or position" in section 122(8) ought to be construed *ejusdem generis* and limited to positions an administrator would be eligible

for, and that excludes Receiver. The respondent discounts the argument about preventing possible conflict of interest of the official administrator by submitting, that after the period of administration, it is the Bank of Ghana that has the final say on whether to return a bank to its owners or to close it down so it is not possible for the administrator to be conflicted in his duties. In answer to the appellants submission that section 122(8) disqualifies Nii Amanor Dodoo personally, the respondent relies on section 10(1) of Act 152 and argues that an incorporated partnership has a distinct corporate personality different from the partners. Therefore, any disqualification against KPMG does not extend to affect a partner personally.

My Lords, in the first place, the primary rule of interpretation is to start from the words of the statute or deed and give ordinary words their natural and plain meaning within the context they appear. If the words are technical words or terms of art, then they are to be given their technical or special meaning otherwise, the only time the natural and plain meaning of ordinary words of a statute or deed shall give way to a secondary meaning is where the natural meaning leads to an absurdity or an unjust outcome. In **Osei v Ghanaian Australian Goldfields Ltd [2003-2004] SCGLR 69,** at page 73 of the report, Wood JSC (as she then was) said as follows in respect of the primary rule in interpretation of deeds:

"….the intention must be ascertained from the document as a whole, with the words used being given their plain and natural meaning and within the context in which they are used."

In this case, the language of section 122(8) does not distinguish between a situation where the work of an official administrator ends in revocation of the license of a bank or institution and where it does not. The section does not limit the prohibition against an official administrator to a situation where the work of the administrator ends with the return of the bank to its original owners and managers, yet the respondent before us seeks to introduce such a distinction in the provision and to limit the prohibition to where the

bank is returned to its original owners. What is the basis for this distinction and the limitation of the disqualification of the official administrator to only where the administration ends in return of the bank? The only reason proffered by the respondent is, that if the section is interpreted as a whole that ought to be what was intended by the law maker. This is an admission by the respondent that the position being urged by the him is not plain from the express language used by the draftsman.

However, the respondent's alleged whole interpretation of the section is premised on a basic legal misconception when he claims that if the license of a bank or deposit-taking institution is revoked, there will be no positions of director and key management personnel in the bank or institution to which the official administrator could be appointed. This is a profound fallacy, because the revocation of a banking license does not immediately result in the sudden death of the limited liability company that was granted the license in the first place. That limited liability company continues to live as a legal organism and operate as a bank or deposit-taking institution until it is finally wound up in accordance with law. For instance, notwithstanding the revocation of the license and appointment of a receiver, section 127(2) of the Act provides as follows;

(2) Despite subsection (1), the receiver may instruct the shareholders, directors and key management personnel to exercise specific functions ***for the bank or specialised deposit-taking institution.*** (Emphasis supplied).

Thus, notwithstanding the revocation of the license, the company is still referred to as a bank or deposit-taking institution by the Act. There still will be some key management personnel physically in place in the offices and branches of bank or deposit-taking institution to carry out the directives of the receiver. Key management personnel is defined under section 156 of the Act as follows;

"key management personnel" includes the chief executive, deputy chief executive, chief operating officer, chief finance officer, board secretary, treasurer, chief internal auditor, the chief risk officer, the head of compliance, the anti-money laundering reporting officer, the head of internal control functions, the chief legal officer, the manager of a significant business unit of the bank, a specialised deposit-taking institution, or a financial holding company or any person with similar responsibilities;

Section 127(3)(b)&(f) of the Act state as follows;

(3) The rights and powers of the receiver include

(b) managing, operating and representing *the bank or specialised deposit-taking institution;*

(f) borrowing money on a secured or unsecured basis;

So, whether after official administration a limited liability company continues as a licensed bank or deposit-taking institution in the hands of the original owners or in receivership, the limited liability company as a legal person would still have shareholders, directors and key management personnel and would carry on the business of banking or deposit-taking but only in a very limited and controlled manner.

But, it must be recognised that the prohibition under section 122(8) has not been stated to be targeted at the manner or who makes the appointments prohibited. It prevents the acceptance of the appointment, period. Therefore, whether an appointment as chief finance officer, for example, is offered by the original owners of a bank or deposit-taking institution that has just emerged from official administration, or it is offered by the receiver of a bank or deposit-taking institution, the law says that the official administrator SHALL NOT ACCEPT THE APPOINTMENT within two years. Is it being suggested that if a receiver takes charge of a bank and there is immediate need for appointment of chief finance officer of the bank in receivership because the previous one resigned, the receiver

can appoint the previous administrator as chief finance officer? That is a situation that can possibly arise after administration has ended in revocation of a bank's license but section 122(8) would not allow such appointment. It is thus clear that the prohibition under section 122(8) is intended to apply with equal force whether after administration the license of the bank or deposit-taking institution is revoked or not.

When the provision is analysed in this manner, it becomes clear that it is the respondent who is trying to complicate section 122(8), otherwise it speaks in plain words and the intention of the law maker has been made abundantly clear as the prohibition has not been expressly limited to where the official administration ends in the return of the bank or deposit-taking institution to its original owners and managers.

As succinctly expressed by Kludze JSC in **Asare v. Attorney-General [2003-2004]SCGLR823 at 847:**

"expressum facit cessare tacitum. It means "when a thing is expressly stated, it ends speculation as to whether some-thing inconsistent may be implied." It also means that express enactment shuts the door to further implication and speculation: see Whiteman v Sadler [1910]AC 514 at 517."

Under this very section 122, when the legislature decided to limit the effect of some provisions to the situation where, after the administration the bank is returned to its original owners, they expressly said so in plain language. That is subsection (3) wherein it is stated as follows;

(3) Subject to subsection (4), where the termination of an official administration does not involve a closure of the bank or specialised deposit-taking institution, the official administrator concerned shall carry out the duties of the bank or of the directors and key management personnel of the bank or specialised deposit-taking institution, until the nomination and election of new directors and the appointment of key management personnel.

In similar vein, if it was the intention of the law maker to limit the prohibition in section 122(8) to where the administration does not end with the revocation of the license of the bank or institution, it is expected that they would have done so expressly as they did in subsection (3). Prohibiting an official administrator from accepting appointment as a Receiver following the revocation of the license of the bank or deposit-taking institution has not been shown to result in any absurdity so I find no justification whatsoever for urging the court to depart from the plain and ordinary language of section 122(8) and opt for a contrived limitation of the prohibition which clearly applies in either situation.

In the case of **Margaret Banful & Anor v Attorney-General & Anor, Writ No J1/7/2016 unreported judgment of the Supreme Court dated 22nd June, 2017**, the case concerning the agreement between the Government of Ghana and the Government of the United States by which two Yemeni Gitmo Detainees who were relocated to Ghana without approval of the agreement by the Parliament of Ghana as required by article 75 of the Constitution, 1992, the Attorney-General argued that there were two types of international agreements, one type requiring parliamentary approval under article 75 and another type not coming within the purview of article 75. The Supreme Court lightly dismissed that distinction in the following words by Sophia Akuffo, C.J;

"The Defendant seeks to persuade us that, in interpreting article 75, we must make a distinction between an agreement intended to create a legal liability and one which, although made between two state parties, is not intended to create legally binding obligations and rights. We, however, received very scant help regarding the basis for such a distinction save that, according to the Defendant, such distinction, is based on 'State Practice'…

The language of Article 75 is perfectly clear. The Article forms part of the set of provisions governing the role of the Executive arm of government in Ghana's international relations. The scope of the Article deals with treaties in general (c.f. the side notes) and the body of the text makes reference to 'treaties, agreements and conventions'. It is also clear that the instruments referred to

relate to Ghana's international relations with other countries or groups of countries and the Article requires that such instruments must be ratified by Parliament. ***The Constitution makes no mention of any formal distinctions that are dependent on the formality with which such an instrument is formatted or brought into being." (Emphasis supplied).***

Section 122(8) is stated in language that is perfectly clear and makes no mention of distinction that depends on whether the administration ends in the revocation of the license of the bank or in receivership. Therefore, there is no basis for us to accept such distinction and limitation introduced by the respondent.

Secondly, it has been suggested, that the general words "or any other office or position" ought to be interpreted in a manner that limits them to the genus or kind or class of offices or positions that have been specifically mentioned in the preceding part of the sub-section. It is clear from the facts of this case, that the part of the sub-section that talks of "shall not acquire significant shares" does not come into play at all in this case so that ought to be left out in determining the relevant genus here. The draftsman used the disjunctive word "or" after "acquire significant shares" meaning she was referring to two different scenarios and prohibiting the official administrator in respect of both scenarios. If after the official administration the bank is returned to the original owners, then there is possibility for an administrator to acquire shares in it and that is prohibited. But the second scenario of accepting appointment as director, key management personnel or other office or position, as I have demonstrated supra, applies whether after the administration the bank continuous in the hands of the original owners or in receivership. It is the part of the subsection that says "or accept appointment as" that applies to the facts of this case. In this case, it is Nii Amanor Dodoo's acceptance of appointment as Receiver that has been challenged so the reference to the part on "the official administrator shall not acquire significant shares", that the Court of Appeal included in their analysis to determine the genus constituted by the preceding specific

words of the sub-section was in plain error. Furthermore, the reference to the prohibition against acquisition of shares that featured prominently in the efforts to find the intention of the legislature, as far as the facts here are concerned, is misplaced and it is resorted to only by a failure to recognise that by the use of the word "or" the legislature intended to cover two possible different situations with the prohibition.

The specific positions are "director, key management personnel.." Now, it must be noted that those two are "positions" in a company and not "offices" but the legislature decided to add "office" after the positions specifically mentioned. This, for me, can only mean a deliberate intention on the part of the law maker to expand the scope of the disqualification of the official administrator. Where it is clear that the legislature intends general words to have a wide breadth, it is the duty of a court interpreting that enactment to give the words such scope. So, before applying the maxim of *ejusdem generis* as an AID to interpreting general words, a court must consider whether, apparent from a reading of the whole provision, a wide extent was not deliberately intended.

In his leading book on Interpretation titled **"The Law of Interpretation in Ghana (Exposition & Critique)" 1st Ed (1995) S Y Bimpong-Buta** at p.111 warned as follows;

"Conditions for application of the rule [ejusdem generis]

What are the conditions for the application of the rule? It must be stressed that the rule is not to be applied merely because a provision in a statute or document has a general word or words following particular words. If there are sufficient grounds to show that the general words have not been used as limited by the class of things falling within the class of the specific words; if an overall view of the scope of the Act shows that the general words are to be construed generally, the court must so construe then even if they follow specific expressions. In order words, the mischief rule must prevail over the ejusdem generis maxim."

It is normal practice when making laws to prevent conflict of interest situations to add general words since the possible circumstances of conflict of interest are too numerous to be covered by use of particular words no matter how many. Where the legislature uses such general words, courts have given extended reach to the general words in order to prevent the mischief targeted by the legislation.

In the case of **Rands v Oldroyd [1959] 1 QB 204,** the court had to interpret section 76(1) of the Local Government Act, 1933 which provided as follows;

…a member of a local authority who has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and who is present at a meeting at which the matter is considered is bound to disclose his interest and to refrain from voting in the matter.

The defendant in the case was the managing director and majority shareholder of a construction company that in the past participated in tenders and built council houses for the borough. He became an elected councillor and was appointed vice-chairman of the housing and town planning committee of the council. A motion was proposed to increase the staff strength of the council's works department so that they could tender and undertake some of the bigger housing projects of the council. The motion was opposed by some councillors who preferred that the staff strength be maintained as it was. The defendant participated in the debate without disclosing any interest and voted for the position against increasing the staff strength and that side won the vote.

The defendant was charged under section 76(1) of the Act for failing to disclose his interest in the matter and voting on the motion though he had an indirect pecuniary interest in the council maintaining a small construction staff as his company could enjoy an advantage in the future if it decided to tender for building contracts from the council. It was argued that the words "or other matter" in the Act covered the subject matter of

the motion that was debated and voted on. The defendant counter argued that "other matter" ought to be interpreted *ejusdem generis* with the previous words and limited like a contract or proposed contract to be in reference to a matter of present and existing pecuniary interest. He submitted that the motion was not about a present tender and that, in any event, his company for sometime had not participated in any tender for building council housing. The court rejected the contentions of the defendant and gave the words "other matter" a wide meaning to include the matter of increasing the staff strength of the local council's works department. Lord Parker, C.J said as follows at pp.211-212;

"The all-important matter is to consider the mischief aimed at by section 76. One can say it is obvious, and indeed it is. It was put by Lord Esher M.R. in ***Nutton v Wilson****, a case considering a rather similar provision in the Public Health Act, 1875, in these words: "I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation". Lindley L.J. in the same case said: "To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."*

I will shortly discuss in greater detail the purpose for the provision in section 122(8) but, from an overall reading of the section, and the addition of the very general words "any other office or position" to the positions an administrator is prohibited from occupying within two years after administration, it is plain to me that the law maker deliberately used the general words in the section to cover a bigger spectrum so the court ought to interpret the words widely to include the office of receiver.

Having said that, even if we consider the class that the specific words in the section may be said to constitute, can we say that the office of "Receiver", within the contemplation of Act 930, does not fall within that class? The section disqualifies an administrator from

accepting appointment as "director, key management personnel…" so what positions or offices does a Receiver occupy in relation to the bank or deposit taking institution when she is appointed? Section 127(1) of the Act provides as follows;

127. (1) On the appointment of the receiver, the receiver shall be the sole legal representative of the bank or specialised deposit-taking institution, and shall succeed the rights and powers of the shareholders, the directors and the key management personnel of the bank or specialised deposit-taking institution

It is thus plain from the above provision that the office of Receiver under the Act encompasses director, key management personnel and far more. As such, the office of Receiver fits perfectly in the class of positions specifically mentioned in section 122(8). So, even if we are to apply the maxim of *ejusdem generis* to construe the general words in section 122(8), an official administrator is disqualified from accepting appointment as Receiver of a bank or deposit-taking institution of which she was administrator.

Thirdly, in **Asare v Attorney-General (supra) at p.833,** Dr Date-Bah, JSC, in expressing the need for judges when interpreting an enactment to consider the purpose of the provision said as follows;

"What I have stated above has been merely to emphasise that I consider the purposive approach to be more likely to achieve the ends of justice in most cases. It is a flexible approach which enables the judge to determine the meaning of a provision, taking into account the actual text of the provision and the broader legislative policy underpinnings and purpose of the text. Judicial interpretation should never be mechanical."

Accordingly, we have to ask ourselves the question; what is the purpose that the legislature sought to achieve with section 122(8)? Without any shred of doubt, the provision seeks to insulate an official administrator from playing a significant role in the affairs of a bank or deposit-taking institution immediately after the end of the official

administration in order that in discharging her duties as official administrator, she will not be influenced by the possibility of any personal advantage or semblance of it that could arise after the administration. The provision seeks to avoid potential future conflict of interest by a person who acts as official administrator and this is a noble policy to promote good governance in any public office. The respondent has not suggested any different legislative policy underpinning section 122(8) other than preventing potential future conflict of interest. His only argument is, that he does not consider that the functions of an administrator under the Act can place a person in potential conflict of interest in the future since it is the Bank of Ghana and not the administrator who has the final say whether to withdraw the license or return the bank to the original owners. But if we are to press this argument of the respondent to its logical end, then it means that he does not consider that an administrator can be in a conflict of interest situation if she were to play a role in the bank or deposit-taking institution if after the administration it is returned to the original owners. But that is not what he is saying.

In any event, the law maker, who decides the policy underlying a statute and not the court, has considered that there is potential for future conflict of interest from the work of an administrator and has legislated to prevent it. So why should it apply only to where the bank or institution proceeds after official administration as such in the hands of the original owners and managers and not where it proceeds as a bank or deposit-taking institution in receivership? I find no argument in the submissions of the respondent that explain why an official administrator becoming a chief finance officer, for example, in a licensed bank or deposit-taking institution in the hands of the original owners can find herself in a conflict of interest situation by virtue of work she did four months earlier as official administrator but would not find herself in conflict of interest if she becomes a chief finance officer in a bank or deposit-taking intuition in receivership.

My Lords, there is sufficient reason from a comprehensive consideration of the work that an official administrator is empowered to do under the Act *visa vis* that of a receiver under the Act, to justify separating completely the two offices. Section 108(5)(b) of the Act provides that;

(5) The official administrator may take any action necessary or appropriate to; (a) carry on the business of a bank or specialised deposit-taking institution;

From the above provision, during that period the official administrator exercises wide powers and may extend credit to certain customers as she considers deserving or may terminate existing credit to some customers who in her assessment were not qualified for it, or she may deal with other assets of the bank or deposit-taking institution in any manner she deem fit. When the official administrator hands over to the receiver, the Act empowers the receiver to review all transactions entered into five years immediately preceding the receivership, obviously including transactions that would have been undertaken by the official administrator, and may set aside those the receiver considers were not in the overall interest of the bank or deposit-taking institution now in receivership. Section 132 of the Act provides as follows;

Setting aside of pre-receivership transactions

132. (1) The receiver may set aside the following transactions affecting the assets of the bank or specialised deposit-taking institution and recover the assets from the transferee or other beneficiary of the transaction:

(a) gratuitous transfers to, or to persons related to, affiliates, insiders or key management personnel of the bank or specialised deposit-taking institution made within five years

(b) transactions with affiliates, insiders or key management personnel of the bank or specialised deposit-taking institution conducted within five years before the effective date of the receivership, if detrimental to the interest of depositors

(c) gratuitous transfers to third parties made within three years

(d) transactions in which the consideration given by the bank or specialised deposit-taking institution considerably exceeded the received consideration, made within three years before

(e) a transaction based on a forged or fraudulent document that the bank or specialised deposit-taking institution has

(f) any act done with the intention of all the parties involved to withhold assets from the creditors of the bank or specialised deposit-taking institution, or otherwise impair their rights, within five years before the effective date of

(g) transfers of property of the bank or specialised deposit-taking institution to, or for the benefit of, a creditor on account of a debt incurred within one year before the effective date of the receivership which has the effect of increasing the amount that the creditor would receive in a liquidation of the bank or specialised deposit-taking institution,

(h) any attachment or security interest other than an attachment or security interest that existed six months before the effective date of the receivership.

Laws are made on the assumption that human beings are not angels and there is the need to put in place measures to check possible abuse of power or discretion. In my understanding, by the above provisions, the receiver is given power to, among other things, correct any wrong or misjudged decisions that the official administrator may have taken during her tenure. Therefore, to allow effectively the same person to supervise her

own work, is contrary to all known principles of good governance. Consequently, I find policy reasons within the statutory framework of Act 930 to conclude that it could not have been the intention of Parliament that the same person may serve in both offices as official administrator and receiver.

Section 10(4)(a)&(b) of the Act 792 states that;

Without prejudice to any other provision of this section, a Court shall construe or interprete a provision of the Constitution or any other law in a manner

(a) that promotes the rule of law and the values of good governance,

(b) that advances human rights and fundamental freedoms,

The interpretation of section 122(8) of the Act preferred by the respondent would enable an administrator of a bank or institution in distress to hand over the same bank or institution to herself. This will nullify the effectiveness of some of the measures the legislature has put in place to correct and rectify any mistakes, misjudgement or plain dishonesty in the work of the official administrator.

Finally, the other aspect of this case is whether the disqualification in this case ought to be limited to the firm KPMG alone or it affects Nii Amanor Dodoo as a Seniour Partner thereof. When a court is called upon to interpret a provision in an enactment, it is usually in relation to a particular set of facts that have arisen and the court's duty is to decide whether or not that set of facts fall within the circumstances that the law maker intended the provision to cover and, if it does, to proceed to give effect to the intention of the law maker, both express and by necessary implication. Now, in order for the disqualification stated in section 122(8) to have real bite, the provision extends it beyond a director in the bank or institution, who, within the framework of Company Law, has control over policy, to a whole range of personnel referred to as "key management personnel" defined under section 156 of the Act as reproduced above.

By parity of interpretation, it would mean that any person who occupied the position of director or comparable position or any of the above key management positions in a company or firm that acted as administrator, where the official administrator is a limited liability company or a partnership firm, is covered by the disqualification under section 122(8). So, the reference to "The Official Administrator" in section 122(8), which has not been specifically defined under the interpretation section of the Act, by necessary implication is referable to a person who acted in the equivalent position of director or key management personnel in the official administrator where a limited liability company or incorporated partnership is appointed administrator. Any other definition of official administrator in relation to a limited liability company or partnership firm that limits the prohibition to the artificial legal entity alone and frees its directors, partners and key management personnel to accept appointments in violation of section 122(8) of the Act is a pretentious interpretation. Such construction will, in the circumstances of this case, mortify the prohibition against an official administrator that was intended by Parliament.

In addition, the appellants make a valid legal argument when they point out that by section 16 of Act 152, the obligations of an incorporated partnership are enforceable against the partners personally. To interpret the disqualification under section 122(8) to exclude a Seniour Partner of the firm that acted as the administrator would be to make nonsense of the provision and defeat the clear intention of the legislature.

Accordingly, on a true and proper interpretation of section 122(8) within the context of the whole of Act 930, I am of the firm opinion that Nii Amanor Dodoo is prohibited by the law from accepting appointment as Receiver of Unibank Ltd. Consequently, the position he currently occupies is contrary to statute and he does not have the competence to testify in this case in that capacity. The respondent appears to appreciate this position for he submits as follows at page 15 of his statement of case;

"My Lords, PW1's competence as a witness was based on the lawfulness or otherwise of his appointment in relation to section 122(8) of Act 930."

I have shown above that the witness' appointment is in clear violation of the statute so he is not competent. Strangely, after stating the correct legal position on the competence of this witness, the respondent submits in the alternative that the issue in this case should be about the probative value of his evidence and not his competence. The respondent however misses the fundamental point that the witness is testifying in an official capacity created by statute. If he does not have that official capacity he cannot testify in that capacity. A police officer who has retired from the Police Service after attaining the compulsory retirement age cannot testify in court in a criminal matter in the capacity of a police investigator and tender investigation caution statements that were officially obtained under statutory authority. It is as simple as that.

I wish to emphasis that this appeal is not about efforts to hold persons that brake the criminal laws of Ghana accountable. The issue here is about upholding the due process of law in the course of law enforcement and I wish to commend counsel on both sides for arguing the case within the confines of that issue.

In conclusion, the appeal succeeds and is allowed. The decision of the Court of Appeal in this case dated 17th February, 2022 is hereby set aside. The objection against the evidence given by PW1 is upheld and the evidence he had given shall be expunged from the record. Nii Amanor Dodoo is hereby restrained from testifying in the capacity of Receiver of Unibank Ltd in the criminal case in the High Court involving the appellants herein.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

CONCURRING DISSENTING OPINION

AMADU JSC:-

(1) The facts giving rise to this appeal are not at all in dispute. The key question for determination is the scope and effect of Section 122(8) of the Banks and Specialized Deposit-Taking Institution Act, 2016 (Act 930) which the Appellants contend disqualifies Nii Amanor Dodoo from testifying for the prosecution *(Respondent herein)* in his capacity as Receiver on matters which came to his knowledge by reason of the alleged illegality in his appointment as the Receiver of Unibank Ghana Limited *(In Receivership).*

(2) For the avoidance of doubt the Section 122(8) of Act 930 provides:

> ***"The official administrator shall not acquire significant shares or accept appointment as a director, key management personnel or to any other office or position in the bank or specialized deposit taking institution which was the subject of the administration for a minimum period of two years after the end of official administration".***

(3) The 1st, 2nd and 4th Appellants herein are among nine (9) Accused persons facing trial for various offences at the High Court. It is not in dispute that the said Nii Amanor Dodoo has within a period of less than the two (2) years statutory threshold provided in Sub-section 8 of Section 122 of Act 930, been appointed as the Receiver of Unibank Ghana Ltd. notwithstanding the restriction contained in the provision of the law referred to above. Subsequent to their arraignment for the said offences in respect of their management of the affairs of the bank, Nii Amanor Dodoo as Receiver thereof, was called by the prosecution to testify at the trial as PW1.

(4) The issue which arose following the objection of the Appellants is with respect to the eligibility of Nii Amanor Dodoo to hold the office of Receiver notwithstanding the restriction in Section 122(8) of Act 930 and to testify on those matters which came to his personal knowledge by virtue of his position as Receiver which the Appellants allege is grounded on illegality. The Appellants' case is that, by virtue of the position of the said PW1 as a partner in the firm of Auditors which performed the function of Administrator of the bank, Nii Amanor Dodoo (PW1) was caught by the statutory restriction in Section 122(8) of Act 930. Therefore, not being eligible to perform the duty of Receiver, so is he disqualified to testify on the matters that came to his knowledge as ***Receiver.***

(5) This appeal therefore turns on the determination of the legality of Nii Amanor Dodoo to hold the office of Receiver of the said bank. An answer one way or the other will invariably determine the secondary issue of his competence to testify for the prosecution on those matters which came to his institutional knowledge as Receiver within the said period of less than two years. According to the Appellants, by accepting the appointment as Receiver of the bank, Nii Amanor Dodoo has acted in violation of the express provisions of Section 122(8) of Act 930.

(6) I have had the opportunity of reading in draft the opinions of the majority articulated by my respected sister, Professor Mensa-Bonsu (Mrs.) JSC and the concurring opinions of my brothers Baffoe-Bonnie JSC, and Asiedu JSC, as well as the minority opinion of my revered brother Pwamang (JSC) respectively. From my appreciation of the facts and legal issues arising, I have no difficulty in agreeing with the position of Pwamang JSC in this appeal.

(7) First, with respect to the liability of Nii Amanor Dodoo as a Senior Partner of the firm of Auditors which administered the bank and the interpretation of Section 122(8) of Act 930 on the undisputed facts contained in the record of this appeal, I

fully adopt the thinking and reasoning eruditely articulated by Pwamang JSC in that, irrespective of the firm of KPMG which is a partnership, that per se, will not insulate Nii Amanor Dodoo from personal liability of any default by the Partnership within the meaning of the provisions of the Incorporated Partnership Act 1962 (Act 152). By the combined effect of Section 122(8) of Act 930 and Section 17(2) of Act 152 the said PW1's legal eligibility as ***Receiver*** and for that matter a witness competent to testify in that capacity is prohibited by law. Consequently, having been legally disqualified from the holding office of Receiver, he cannot testify on matters that came to this knowledge or perception by virtue of that office.

(8) From my appreciation of the meaning, scope and effect of the provision in Section 122(8) of Act 930, I am unable to exclude the current position of ***"Receiver"*** held by Nii Amanor Dodoo from the ***"genre"*** of the positions contemplated by the words:

> ***"….or to any other office or position in the bank" which clearly demonstrates the legislative intent of exclusion by the literal meaning of the words of the provision.***

(9) My view on the interpretation of Section 122(8) of Act 930 is consistent with the position of this court in the case of **KUENYEHIA VS. ARCHER, [1993-94] 2 GLR 525 SC** where this court held *inter alia* Francois JSC at page 562 of the report that:

> ***"rules of construction do not permit, a passage which has clear meaning, to be complicated or obfuscated by any interpolation, however well intentioned."***

It is worth nothing that this view on the interpretative approach to the words used in a statutory provision was quoted with approval by Akamba JSC in the case of **MARTIN KPEBU VS. ATTORNEY-GENERAL,** Writ No.J1/8/2015, dated the 5th day of December, 2016.

(10) In the same **KUENYEHIA VS. ARCHER** case, Francois JSC noted as follows:

"This has been expressed by Devlin J. in his inimitable way in ***NATIONAL ASSISTANCE BOARD VS. WILKERSON [1952] 2 ALL ER 255 AT 260: "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."***

(11) Lord Simon states the consequences of rejecting this principle in search of the esoteric in **BLACK-CLAWSON INTERNATIONAL LTD. VS. PAPIERWERKE WALDOF-ASCHAFFENBURG AG [1975] 1 ALL ER 810 AT 847** as follows:

"It is refusing to follow what is perhaps the most important clue to meaning. It is perversely neglecting the reality, while chasing shadows. As Aneurin Bevin said: 'Why gaze in the crystal ball when you can read the book? Here the book is already open; it is merely a matter of reading on."

(12) As was stated by the Learned authors Halsbury's Laws of England, 3rd Ed. Vol.36 p 392 para 587: ***"Words are primarily to be construed in their ordinary meaning or common or popular sense … [W]here the words used are familiar and are in common and general use in English language, then (1) it is inappropriate to try to define them further by judicial interpretation and to lay down their meaning as a rule of construction, and the only question for a court is whether the words are apt to cover or to describe the circumstances in question in a particular case, and***

(2) evidence that they are used in some special and peculiar sense is not admissible."

(13) Further, in the case of **REPUBLIC VS. HIGH COURT, ACCRA; EX-PARTE YALLEY (GYANA & ATTOR INTERESTED PARTIES)** - **[2007-2008] GLR 512** Wood C.J observed as follows:- ***". . .I examined the case law on statutory interpretation and observed that on the construction of statutes, the literalist, the ordinary, plain, or grammatical meaning, should be adhered to if it clearly advances the legislative purpose or intent and does not lead to any outrageous consequences. This rule of construction may fitly be described as the subjective-purpose rule, with this rule being invoked only where the objective – purpose rule leads to mischief or injustice . . ."***

(14) In my view therefore, if the legislative intent were meant to apply the words differently and restrictively from what they plainly mean, so as not to include such "***office***" or "***position***" of a ***Receiver,*** who by law holds all key offices in the bank with personified effect, the legislature would have expressed the wording of the provision in a manner that will exclude the ***Receiver*** from the effect of the words used.

(15) From evidence on record, while holding the position of Receiver, the said Nii Amanor Dodoo has become the *alter ego* of the company, Unibank Ghana Ltd. and performs these functions he should not by law perform within the scope, meaning and effect of Section 122(8) of Act 930.

(16) I am aware any decision which disqualifies Nii Amanor Dodoo from holding the office of ***Receiver*** will have a collateral effect of rendering unlawful the duties he has already performed by reason of holding that office. However, that situation will be a mere inconvenience which cannot take precedence over due process and

the consequence of judicialism. Any contrary position in my view will be a judicial endorsement of a clear illegality which will perpetuate injustice to the Appellants.

(17) As I said in my concurring opinion in Civil Motion No.J8/37/2021 in the case of **OGYEEDOM OBRANU KWESI ATTA VI VS. GHANA TELECOMMUNICATIONS CO. LTD. & ANOR**. dated 31st March 2021;

> ***"Judicial decisions are made to resolve particular disputes. A decision derives it's quality of justice, soundness and profoundness from the peculiar surrounding circumstances (and facts) of the dispute it is presumed to adjudicate within the context of the relevant applicable law"***

(18) In the instant case, there should be no reason for any indulgence of any illegality arising from a violation of a statutory provision. Given the competing rights of the parties to justice, I too will allow the appeal and abide the order contained in the lead minority opinion.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

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