IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)

AMEGATCHER JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/21/2022

22ND FEBRUARY, 2023

MOKAB COMPANY

GHANA LIMITED ……. PLAINTIFF/APPELLANT/RESPONDENT

VRS

BRAGHA CONSTRUCTION

LIMITED ……. DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

MAJORITY DECISION

LOVELACE-JOHNSON (MS.) JSC:-

The designations of the parties at the High Court will be maintained in this appeal.

By an amended writ issued in February 2016, the Plaintiffs claimed against the defendants as follows

(i) An order for specific performance of the 17/08/2010 written Agreement between the Plaintiff and Defendant and for the Defendant to transfer the title documents to the land, referred to in paragraph 1 and Schedule "A" of the Agreement, from its name to B & M Company and to account for and pay to B & M Company Ltd all monies and benefits received from the sale/lease of portions of the said land.

(ii) A declaration that on the strength of the agreement executed between the Plaintiff and the Defendant on 17th August 2010, the Plaintiff is entitled to 70% of the landholding described in schedule "A" of the said agreement and in the name of the Defendant.

(iii) A consequential order that the Defendant transfers to the Plaintiff 70% of the land described in paragraph 1 and schedule "A" of the agreement of 17th August 2010

(iv) Interest on all sums found due and payable to the Plaintiff either pursuant to contract or pursuant to Rules 1-4 Court (Award of interest and Post Judgment Interest) Rules 2005 (CI 52).

(v) Costs

Defendants denied the above claim and further counterclaimed for

(i) A declaration that Plaintiff breached its contractual and fiduciary obligations to the Defendant when Plaintiff falsely represented to Defendant that the extra sum of Gh₵ 216,000.00 required to complete payment for the land was sourced or obtained from a third party

(ii) A declaration that by reason of Plaintiff's breach of its contractual and fiduciary obligations to Defendant, Defendant rightly terminated the agreement the basis of Plaintiff's present suit

(iii) A declaration that upon termination of the agreement Plaintiff is only entitled to reimbursement of Plaintiff's money advanced Defendant to assist Defendant complete purchase of the property.

OR IN THE ALTERNATIVE

(i) A declaration that Plaintiff is under an obligation to reimburse Defendant in the sum of two hundred and thirty-three thousand, two hundred and fifty-four Ghana cedis, fifty pesewas (Gh233,254.50) being half of the total sum of extra expenses incurred by Defendant in completing the formalities for the purchase of the land the subject matter of the Plaintiff's suit.

(ii) Interest on the aforesaid (sic) of two hundred and thirty-three thousand, two hundred and fifty four Ghana Cedis, fifty pesewas (Gh233, 254,50) from January 2008 to date.

(iii) An order for the recovery of the said (sic) of sum two hundred and thirty-three thousand, two hundred and fifty-four Ghana Cedis, fifty pesewas (Gh233, 254,50) forthwith.

At the end of the trial, the high court dismissed the above counterclaim, refused to decree specific performance or make the orders sought regarding the ownership and transfer of 70% of the land the subject matter of the written agreement by the Plaintiffs.

The court however ordered a refund of an amount of GH₵ 450,000 described as the sum

'….*paid by the Plaintiff and received by the Defendant as part of the Plaintiff's initial contribution to purchase the land being subject matter of the agreement dated 17/08/2010 together with interest……"*

The court also ordered a refund of an amount of GH₵ 216,000 admitted by the defendants and general damages of GH₵100,000 for breach of contract in lieu of the order for specific performance and assessed costs at GH₵ 20,000.

Being dissatisfied with these awards, the plaintiffs filed an appeal to the Court of appeal which, while upholding the trial court's refusal to grant specific performance, set aside the award of the above sums and in their stead ordered in favour of the plaintiffs, 70% of the market value of the 30 acre land purchased, with an order that the said valuation be done by the Land Valuation Division of the Lands Commission.

The Defendants, dissatisfied with the above have launched the present appeal and seek from this court a reversal of the order of the court of appeal regarding the computation of damages awarded in favour of the Plaintiffs. Their grounds of appeal are as follow

i. The court below exceeded its jurisdiction when it ordered that the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tseaido be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% of the current market value of the said land.

Particulars of Error

a. Plaintiff/Appellant/Respondent did not pray the court for the said relief nor was the relief incidental to nor consequential upon any of the reliefs sought by Plaintiff/Appellant/Respondent from the trial High Court.

b. The Court below is not entitled in the exercise of its appellate powers to substitute for a party reliefs not prayed for by the party in place of what the Court deems fit and/or proper or deserved by the party invoking the jurisdiction of the court for specific reliefs.

c. Plaintiff/Appellant/Respondent having claimed an order for accounts, the most appropriate order to have made in the proper exercise of the appellate powers of the court below was to have granted Plaintiff/Appellant/Respondent's prayer for accounts

ii. The Court below erred in law when it ordered that the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tseaido be valued at its current market value.

Particulars of error

a. There is no legal basis for ordering that the land be valued at its current market value especially that the evidence adduced in the trial High Court confirmed that the relationship between the parties [Plaintiff/Appellant/Respondent] and [Defendant/Respondent/Appellant] was a profit sharing agreement the effect being that Plaintiff/Appellant/Respondent was only entitled to the profits, if any, made by Defendant/Respondent/Appellant from sale of the land to third parties.

b. The order is manifestly unfair as it completely overlooks the enhanced value of the land especially that the evidence before the trial court [which the Court of Appeal re-heard] confirmed that the land had been already sold and must have been developed at the time of the judgment of the Court of Appeal.

iii. The court below wrongly interfered with the discretion exercised by the trial High Court.

Particulars of error

a. There was no finding by the court below that the trial High Court's exercise of discretion to award damages instead of ordering specific performance was based on any wrong or inadequate material placed before the court

b. The court below made no finding that the trial High Court's exercise of discretion failed to take into account any relevant matter put before the trial court by Plaintiff/Appellant/Respondent.

c. The court below did not make any finding that the trial High Court's decision to award damages rather than order specific performance was based on a misunderstanding of the law or an inference that particular facts existed or did not exist when the evidence on record showed the trial High Court's decision to be wrong.

iv. The case law authorities relied upon by the court below to order that the land in dispute between the parties be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% of the assessed value do not justify the said order.

The Plaintiffs have also filed a cross appeal the details of which will be set out shortly.

By the above grounds, the defendants, in sum, allege against the court of appeal, an excess of jurisdiction, error in law regarding the order to assess 70% of the land at its current

value, a wrongful interference with the exercise of the high court's discretion and a complaint that the authorities relied upon by the said court do not justify its order that 70% of the assessed value of the land be paid to the Plaintiffs.

The allegation of lack of jurisdiction is based on their position that the order made by the court of appeal was not sought by the Plaintiffs and in so making the court substituted a new case for them. They also take the position that, the evidence having established that the agreement between the parties was one of a profit sharing one, Plaintiffs were only entitled to a share of such profit if any were made from the sale of the land to third parties and seeing that the land had already been sold and its value enhanced, the order for valuation was unfair. Finally as earlier stated, Defendants argue that the Court of Appeal interfered with the exercise of discretion by the high court without showing that the latter court exercised the said discretion wrongly.

In their cross appeal the Plaintiffs take the position that the failure to grant the order of specific performance in their favour was wrong and the said failure amounted to *'sanctioning the proven acts of breach by the defendant of its contractual obligation under the contract between the parties."*

This is how the grounds of the cross appeal were set out.

> *(i).The learned justices of the court of appeal were wrong in not making an order of specific performance in favour of the Plaintiff.*
>
> *(ii).The failure of the Court of appeal to grant an order of specific performance in favour of the Plaintiff had the effect of sanctioning the proven acts of breach by the defendant of its contractual obligations under the contract between the parties.*

The Defendants raise a preliminary objection to the formulation of these grounds of appeal and submit that they are incompetent since they do not meet the statutory standards set by the Supreme Court Rules, **C.I.16**.

Rule 6(2)(f) of C.I.16 provides as follows

A notice of civil appeal shall set forth the grounds of appeal and shall state-

The particulars of any misdirection or error in law, if so alleged.

Rule 6(4) also provides in part as follows

The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal, without any argument or narrative and shall be numbered seriatim;…

Clearly, both grounds of appeal filed by the Plaintiff and reproduced above are poorly formulated and offend the above mandatory rules which require the setting down of particulars of any alleged errors of law and prohibits argumentative and narrative grounds of appeal.

Ground (a) does not provide any particulars of the manner in which the court was wrong (i.e particulars of its error) and ground (b) is a narration about the consequences of a certain action(the failure to grant specific performance) by the court of appeal.

The response of counsel for the plaintiffs at page 14 of his statement of case that ground (ii) provided the necessary particulars needed for ground (i) is untenable.

In such circumstances, this court has struck out such grounds and we proceed to follow the said practice by striking out the offending grounds of appeal herein similarly. See the cases of **Ofosu Addo vs Graphic Communications Group Ltd [2011] 1 SCGLR 355;**

Okonti Borley& Anor vs Hausebauer Ltd [2021] DLSC 10078 among a host of other cases.

The said grounds of appeal are hereby struck out for the above reasons. The striking out also sounds the death knell of the Plaintiffs cross-appeal.

With the striking out of these grounds, there is no basis for discussing the issue of whether the concurrent findings of both courts that an order for specific performance was inappropriate in the circumstances of this case, it not having been raised as a ground of appeal before this court and this court, in its exercise of rehearing the matter, not having been given any cause to question this finding on the basis of any evidence on record.

That leaves this court with the determination of the grounds of appeal filed and relied upon by the defendants.

The arguments on these grounds by counsel for the Defendants can be found at pages 26 to 49 of his statement of case and can be summarized as follows:

- The court of appeal exceeded its jurisdiction because it made an order regarding damages for the plaintiffs when the said relief had not been sought by them and it was also not one which was consequential to a relief sought or one which arose from the pleadings which by law determine the parameters of any matter being tried.

- In so doing the court set out or substituted a new case for that put forward by the Plaintiffs.

- The failure by the court of appeal to consider that the land had been disposed of to 3rd parties and its value had increased greatly since their purchase years ago makes that court's order regarding damages in the terms of the said order unfair and inequitable and thus contrary to law since it gives Plaintiffs more than what they are entitled to, that is a share of profits in accordance with the ratio set out in their agreement.

- Having agreed or affirmed the findings by the trial court that an order for specific performance was not appropriate in the circumstances of this case, that the agreement was one for the sharing of profits, and that court having made orders

on the basis of these findings, the court of appeal was wrong in interfering with the exercise of the trial court's discretion, which wrongful exercise resulted in these orders.

The response of counsel for the plaintiffs to the above can be found at pages 20 to 36 of his statement of case and can be summarized as follows

- The plaintiffs having argued before the court of appeal that the trial court could in a bid to do justice grant a relief not specifically asked for, their present contrary position that the court of appeal in making the award of damages not asked for was substituting a different case for the Plaintiffs shows a *"lack of candor and approbation and reprobation"*
- A court has power to grant damages after it refuses to make an award for specific performance even when such has not been sought.
- The court of appeal unlike the trial court interrogated the *"adequacy or otherwise of the quantum of the award of damages based on the settled principles on award of damages"*

It is to be borne in mind that the present appeal is one against the judgment of the court of appeal. This court's power of re hearing and in effect its right to go through all the evidence on record does not change this. A lack of candor about, approbation and reprobation by the defendants on an issue before different courts, while to be frowned upon are only relevant in so far as they impinge on the applicable law and a call on the court to exercise a discretion in favour of the one so accused of such behaviour.

Did the court of appeal err in confirming the high court's act of awarding damages in the circumstances of this case when same had not been claimed as a relief by the plaintiffs?

Was the interference with the high court's exercise of discretion in the damages awarded warranted?

These, to our minds are the two questions whose resolution will determine this appeal.

Having made a finding that specific performance was not an appropriate remedy in the circumstances of this case, the high court stated as follows

"In my view, the Plaintiff ought to be entitled to refund of all its monies together with interest and general damages in a ***substantial sum consequent upon the conduct of the Defendant****"*

General damages are such damages the law presumes to have arisen from a defendant's breach of contract. They do not need to be proved strictly by evidence as expected to be done with special damages. It is sufficient if they are averred generally. See the case of

Delmas Agency Ghana Ltd vs Food Distributers International Ltd [2007-2008] SCGLR 748

The Plaintiffs stated in paragraph 14 of their amended statement of claim as follows:

"By reason of the Defendant's acts, as stated, and its breach of contract the Plaintiff has suffered loss and damages and will further suffer irreparable damages if its reliefs are not granted"

Its been said that

"….if the damage be general, then it must be averred that such damage has been suffered but the quantification is a jury question"

The above averment by the plaintiffs was sufficient notice to the defendants that plaintiffs were alleging that they had suffered loss and damage as a result of an alleged breach of contract for which they sought the relief of specific performance. It is trite that where an order for specific performance, an equitable remedy, is not appropriate, the court can award damages.

Being satisfied that the plaintiffs had suffered some injury which could be inferred from the facts of the case, the court, at law, awarded general damages. No surprise was sprung

on the defendants by the failure to set general damages down as a specific relief. See also the case of

Klah vs Phoenix Insurance Co Ltd [2012] 2 SCGLR where the court describes general damages as arising *'by inference of law and therefore does not need to be proved by evidence'*

Indeed this court in the case of **Maersk Ghana Ltd v B.T.L Limited [2021 DLSC 10687 "16]** stated that where a party fails to prove by evidence a particular loss under a claim for special damages, the court will presume general damages ***so long as he proves that he has suffered an injury or a loss***

In answer to the first question set down, we find that the award of general damages by the high court was done within jurisdiction since the court had power so to do. It did not amount to substituting the case of the Plaintiff with a different one. It was also a consequential order arising from the matter before it.

That being so the affirmation by the court of appeal on the issue (save for the quantum) was in accordance with law since the order was made within jurisdiction.

It is clear from the judgment that the high court was greatly unimpressed by the behavior of the Defendant in this matter. It equated this behavior with that described by Lord Morris in the case of **Cassel & Co vs Broome. [1972] AC 1027 @ 1094** where this description was reproduced by the trial court thus;

"The situation contemplated is where someone falls up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carried out his plan because he thinks he may well gain by doing so even allowing for the risk that he may have to pay damages"

The court then concluded by saying *"And so the Defendant will be demnified* (sic) *in damages"*

The trial court also stated as follows

"The effect of the breach of the agreement by the Defendant would then be pecuniary. The breach results in a denial of opportunity for Plaintiff to rake in reasonable profits from the subject matter. From the evidence on record, I am of the opinion that the ends of justice would well be served if the Plaintiff is adequately recompensed in damages."

It then made the following awards

(i) Refund to the Plaintiff the sum of four hundred and fifty thousand Ghana cedis (GH₵ 450,000.00) paid by the Plaintiff and received by the Defendant as part of the Plaintiff's initial contribution to purchase the land being subject matter of the agreement dated 17/08/2010 together with interest at commercial bank interest from the date of payment of the said sum of (GH₵ 450,000.00) till date of final payment

(ii) I hereby further order that the Defendant shall refund to the Plaintiff the sum of Two hundred and Sixteen thousand Ghana Cedis (GH₵216,000.00) Defendant has acknowledged receipt from Plaintiff having been sourced from a third party together with interest at the commercial bank interest rate from the date of payment to the Defendant till date of final payment

(iii) I award general damages in favour of Plaintiff for breach of contract in lieu of the order for specific performance in the sum of one hundred thousand cedis (GH₵100,000.00) against the Defendant.

(iv) ***I assess costs of this action at GH₵ 20,000.00 in favour of the Plaintiff.***

The Court of Appeal's comments and consideration of the adequacy or otherwise of the amount awarded as damages in favour of the Plaintiffs states as follows:-

"The question raised with the quantum of damages awarded by the trial court, is whether in the face of the unjust treatment by the defendant as seen in the following: One, in the manner the

Defendant used monies advanced by the Plaintiff to acquire the 30-acre land for sale to third parties. Two, considering the strategic location of the lands involved at East La, just behind the Ghana Trade Fair, a sought after place in Accra now due to its proximity to Accra. Three, the ready market for such lands and four, the anticipated profits that would have accrued to the parties, bearing in mind that the eyes of the parties upon the purchase of the land were on the profit to be reaped from the sales taking into consideration the present value of land at East La, I ask myself whether an order for refund of the monies paid by Plaintiff and which constituted 75% and later reduced to 70% as purchase price of the 30-acre land plus the award of GH₵100,000 could be said to be sufficient compensation to the Plaintiff? I think not."

The court of appeal referred to the case of **Lt Col Muller v HFC [2012] 2 SCGLR 1234** which admonished the courts not to let businessmen who breach contracts get away with such behaviour.

Can it be said that the trial court was unaware of such a caution? We hold not. It is clear that the trial High court's quotation from the **Cassel & Co. v Broome [1972] AC 1027 at 1094** case shows that it was suspicious of the circumstances of the breach of the contract just as the Court of Appeal was.

It is perhaps necessary at this stage to deal in detail with the facts in the *Muller v HFC* case supra. What should be noted is that, the facts in the case of Muller v Home Finance Co. Ltd referred to supra are quite different from the facts of the instant appeal.

Facts in the Muller v Home Finance Co. Ltd Case

The Plaintiff therein purchased a five-bedroomed house at a public auction in 2002 conducted at the instance of the defendant company, a leading financial institution and a major player in mortgage financing of houses.

The house that was purchased by the Plaintiff was advertised in the local newspapers with distinct attractive features. After inspection, the Plaintiff made a bid on the property

at an auction conducted on 12th September 2002 and succeeded in securing the property with his bid of US$40,000.00. The Plaintiff paid the bid price and the Defendant put him into possession.

The Plaintiff therein however faced resistance from the original owner of the house, one Cyril Kofi Hayford, who successfully sued the Plaintiff therein, the Defendant therein, (Home Finance Co. Ltd) and the Auctioneer as Defendants.

It must be noted that, after the Plaintiff therein failed to reach agreement with the defendant (HFC) on the sudden turn of events, he sued them at the High Court claiming the following reliefs:-

(a)"delivery of a five-bedroomed house situate at Baatsona with the features set out in paragraph (4) of the statement of claim; **alternatively the open market value of a comparable house at the same location.**

(b) loss of rent on the house from 12th September 2002 to date of payment;

(c) order for the payment of the legal costs of the Plaintiff in the earlier suit; and

(d) damages for breach of contract". Emphasis

DECISION OF THE HIGH COURT

After trial, the learned trial Judge found in favour of the Plaintiff therein and ordered as per judgment dated 6th February 2008 that it would be appropriate to order the Plaintiff to be paid the current market value of the house in the state that he purchased it. The learned trial Judge reasoned that, it is only such an order which would restore to the plaintiff, as near as possible, the property that he had lost.

APPEAL TO COURT OF APPEAL AND DECISION

An appeal by Home Finance Co. Ltd. against the decision in favour of the Plaintiff therein was concluded by the Court of Appeal thus:-

> ***"This court, however orders that the Defendant (HFC) refunds to the plaintiff the cedi equivalent to this US$40,000.00 as at 2002 when the money was paid with the prevailing interest at that time, i.e. 2002 to date."***

Dissatisfied with the above decision of the Court of Appeal, the Plaintiff therein appealed to the Supreme Court.

> ***The decision of the Supreme Court in the Muller v H.F.C case supra should therefore be understood in the peculiar circumstances of the facts of that case, the desire of the Supreme Court to do substantial justice on facts which were not only pleaded but upon which evidence was led.***

In the instant case however, what the Plaintiff and their legal advisers have asked this court to do is to grant awards based on speculation i.e. specific performance and not on any verifiable and proven facts in evidence.

Under these circumstances, the principles of law decided in the *Muller v HFC case* supra cannot be applied to the circumstances of the instant case.

We in the majority have carefully looked at the said *Muller v HFC case supra* and are of the considered opinion that it will be a travesty of justice for this court to rely on the said case to give judgment to the Plaintiff herein taking into account the nature of the reliefs they claimed in the High Court and the evidence led in support of same, coupled with the speculative nature of the Court of Appeal decision. For the above reasons, we do not think it prudent to apply the principles of law enunciated in the *Muller v H.F.C case* supra to the instant appeal.

An appeal is not meant to give an appellate court an opportunity to substitute its discretion for that of the trial court unless it can prove that that court ignored the law or did not take into account material facts or took into account facts which were irrelevant.

See the case of **Bogoso Gold Ltd vs Ntrakwa [2011] 1 SCGLR 415 @ 419**

See also the cases of **Nartey-Tokoli and Ors vs Volta Aluminium Co Ltd [1989-90] 2 GLR 341** and

Sappor vs Wigatap Limited [2007-2008] SCGLR 676 cited by counsel for the defendant in his statement of case among many other decisions of this court on this issue.

What other reasons did the court of appeal advance for interfering with the trial court's exercise of discretion?

The court further stated as follows

"If we are to advert our minds to the fact that the eyes of the parties were on the profit that were to accrue from the sale of land to be shared on a ratio of 70% to the Plaintiff and 30% to the defendant then it behoves on us to ensure that the Plaintiff is not handed a raw deal…."

The question then is, did the trial court not have this in mind when making the award of damages? It certainly did. The court stated in part as follows

"….The intention of the parties in the said agreement is to acquire, develop and sell the land for profit though the Plaintiff is under the agreement entitled to 70% of the land and the Defendant 30%. And for the purposes of the agreement the profits of sales would be shared based on that percentage ratio."

The court of appeal goes on further to state

"One could see that the order for refund of monies paid and the award of damages made by a trial Judge has gleefully been welcomed by the defendant who paid just 30% of the purchase price but knows the whopping profit he will make from the sale of those lands"

How are these sentiments relevant to the interference of the exercise of the trial court's discretion relating to the damages awarded? How does the Court of appeal know about the **possible** whopping profits?

There is also a reference in the judgment to "*the strategic location of the lands involved at East La, just behind the Ghana Trade Fair, a sought after place in Accra now due to its proximity to Accra….the ready market for such lands…."*

Where did the court of appeal get these pieces of information from? Is this personal knowledge? Are they disclosed by the evidence led? If not, are they such information that the court could by virtue of section 9 of the Evidence Act take judicial notice of and allow such to influence its decision to interfere with the exercise of discretion by the trial High Court?

Section 9. (2) of the Evidence Act 1975 indeed does make reference to the court taking judicial notice of facts which are either:

(a) so generally known within the territorial jurisdiction of the court, or

(b) and are *so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.*

It is however established that facts which are available to a judge personally cannot be assumed to be ones of public notoriety which the public could be presumed to know. To quote the learned Author and Jurist S A Brobbey from his book **Essentials of the Ghana Law of Evidence**

"….the fact should not be one in respect of which different people share different ideas and notions. It should be certain and definite. It should be beyond dispute, contest or controversy"

We are satisfied that the earlier quoted statement by the court of appeal, not arising from the evidence, and not being one of which judicial notice could be taken of, was not good ground for interfering with the exercise of discretion by the high court.

The court of Appeal further stated

"It is more curious to a casual observer that the trial court did not even assign any reason for the award of GH₵100,000 damages."

It is clear from the trial court's judgment that this award was to compensate the Plaintiffs for the Defendants breach of their contract, (their claim for specific performance having failed) taking into account the manner that the breach occurred. This was distinct from the order for a refund by the Defendants to the Plaintiffs of monies put into the venture with interest thereon for the period when they were deprived of its use.

It is worthy of note that during the cross examination of the plaintiffs at the trial their representative confirmed that per a search, exhibit K, substantial portions of the land had been sold to 3rd parties at that time. How then could an evaluation of 70% of the land at the time of the court of appeal judgment that is three years later (Plaintiff's representative testified on this issue on 5th April 2017) *"restores the plaintiff as near as possible to the position he would have been placed…"* at the time of the sale to 3rd parties three years earlier?

We have gone through the above painstaking analysis to show our appreciation of the fact that the trial court's orders were not made in a vacuum and so did not warrant the variation made by the court of appeal. That notwithstanding, we are of the opinion that regarding the damages awarded against the Defendants whose behavior the trial court found most unacceptable and which behaviour that court thought was worthy of

indemnification, an amount higher than what was awarded is what will meet the justice of this case.

This court in the case of **Tema Oil Refinery vs African Automobile Ltd [2011] SCGLR 907 @ 935** stated in part as follows

"….we think it necessary to reiterate the fact that in awarding damages for breach of contract, a court of law must not only take into consideration the prevailing economic forces that are at play in the global economic order, ***but also consider the net effect of the defendant's conduct and its negative effect on the financial fortunes of the plaintiff company…"***

In other words, the justice of this case calls not just for a refund of the monies put into the venture by the Plaintiffs, interest thereon, (for plaintiffs being deprived of the use of their money for the period when they did not have it in their possession to use for other things) but ***"a substantial sum consequent upon the conduct of the Defendants"*** as damages for their role in the failure to achieve the purpose for which the money was put into the venture ie to make profit.

The court of appeal described the trial court's award of damages as "speculative", implying thereby that it was based on insufficient evidence. The above quotation shows this to be incorrect but it is our considered opinion that the trial court itself having found from the circumstances of this case that damages should be substantial, the Plaintiffs deserve more, not because of possible profits Defendants could make or have made from sale of the lands but for their behaviour in this matter.

In answer to our second question posed, we hold that the court of appeal's interference with the trial court's exercise of discretion was unwarranted and hereby reverse their award that Plaintiffs be given the value of 70% of the market value of the 30 acre land, the subject matter of the agreement between the parties.

The award by the trial court i.e. a refund to the Plaintiffs of the amounts of GH₵ 450,000 and GH₵ 216,000 with interest by the Defendants is hereby restored. In addition to these sums, we also award to the Plaintiffs an amount of GH₵1,000,000.00 (one million cedis) as damages in place of the GH₵ 100,000 ordered by the trial court.

The appeal by the Defendants succeeds in part in the terms immediately set out above.

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

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

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

KULENDI JSC:-

INTRODUCTION:

On Wednesday, 22nd February, 2023, this Court by majority of 3-2, Amegatcher and Kulendi JJSCs dissenting, upheld in part, the Appeal by the Defendant/Respondent/Appellant (referred to in this opinion as "Appellant) against the decision of the Court of Appeal dated the 13th day of December, 2022 whilst the cross-appeal by the Plaintiff/Appellant/Respondent (hereinafter referred to as "the Respondent") against the same judgment of even date was dismissed.

Specifically, this Court made the following orders:

"1. The orders contained in the judgment of the Court of Appeal dated 16th day of December 2020 are hereby set aside in their entirety.

2. The judgment and orders of the trial High Court dated 6th June 2018, save as varied by this court are restored as follows: -

Restored Orders

(a) Refund of the amounts of GH¢450,000.00 (Four hundred and fifty thousand cedis) and GH$216,000.00 (Two Hundred and sixteen thousand cedis) respectively by the Defendants to the Plaintiffs with interest at the Bank of Ghana interest rates as applicable at due dates.

Varied Orders

(b) The Defendants are to pay damages of CHe1,000,000.00 (one million cedis) to the Plaintiffs in place of the GHIc100,000.00 (one hundred thousand) awarded by the trial High Court.

3. Both parties are to bear their own costs in this Court."

We reserved our reasons for the judgment and dissent which I hereby render in this dissenting opinion as follows:

In my view, the relevant facts and more particularly, the issues at the heart of this appeal are essentially on all fours with the case of MULLER V. HOME FINANCE CO. LTD. [2012] 2 SCGLR 1234. I therefore find the following holding at page 1235, lucid and instructive:

> "The Court of Appeal had correctly stated the principles based on the facts on record, namely, that defendant, who had caused the breach of contract, had to pay to the plaintiff, the open market value of the house lost by him to enable him purchase another house similar to the one he lost. However, the order made by the court ran counter to the court's reasoning and understanding of the said principles. The Court of Appeal had therefore erred when it ordered that the defendant company should pay to the plaintiff the cedi equivalent of US$40,000 with interest at the prevailing commercial rate, simpliciter, without taking into account the loss of the plaintiff in not enjoying the house he purchased in 2002. In effect, where there had been total failure, the measure of damages would be the current market value; and if that was not easily ascertainable, then the cost of replacement. The plaintiff was therefore entitled to the present-day value of the five-bedroom house which he contracted for in 2002. Since that house would now be significantly worth more than the US$40,000 paid by the plaintiff in 2002, the defendant must provide him with money at current open market value to enable him purchase or build a similar house. CFAO v Thome [1966] GLR 107, SC; and Borkloe v Nogbordzi [1982-83] 2 GLR 1003, CA cited."

Besides, I generally hold the view that anytime rules, principles and theories of law are applied to any sets of facts in such a way that occasions an outcome that is unfair, unjust,

inequitable and unconscionable, the ends of justice have failed, however erudite the rendition of the reasoning of a court of law may be. Consequently, I have read, digested and tried to come to terms with the conclusions of the majority of this Court but have found myself unable so to do so for the reasons set out in this dissent.

This is more so because, the relevant facts and circumstances of the instant appeal are, in my humble opinion, similar to the Muller Case (supra) in which this same Court correctly enunciated the reasoning and principles I am inclined to uphold. Any factual difference between this case and the Muller case are only to the extent that the determination of the Appellant, not only to disregard the principle of *pacta sunt servanda* but to deprive the Respondent of the proceeds and value of Respondent's investment in the land, the subject matter of the primary contract, is too obvious to be missed. This must be the reason why there is no material disagreement between the majority and minority on the conduct of the Appellant. This dissent is occasioned by the differences in the extents to which this Court can justifiably go, having regard to all known and acceptable principles of law and the facts and circumstances of this case, to ensure that a party who unilaterally breaches a contract does not unduly profit from his or her own breach with judicial endorsement.

BACKGROUND:

The background contentions that culminated into this suit can be summarized as follows:

By a contract in writing dated 17th August 2010 and made between the Appellant and the Respondent, the parties entered into a partnership agreement to join funds to raise the requisite capital for the purchase of a 30.016-acre land situated behind the Trade Fair Site, Accra, popularly called Tsaido. The initial capital for the 30.016 acres of land was Nine Hundred Thousand Ghana Cedis (GH¢ 900,000.00). Of this, the Respondent paid an amount of Four Hundred and Fifty Thousand Ghana Cedis (GH¢ 450,000.00) to the Appellant as its 50% contribution for the purchase. The Appellant however could not

raise its 50% share of the purchase price of the land. Consequently, the Respondent paid extra sums that amounted to an additional 25% of the purchase price of the land thereby raising the Respondent's contribution to the acquisition to the land from the 50% originally agreed by the parties to 75%. Subsequently, it was agreed that since the Appellant would incur expenses in the demarcation and documentation of the land, the Respondent would hold 70% instead of 75% of his investment while the Appellant held 30% in the land.

At clause 2 and 8 of the Partnership Agreement, the parties agreed that:

> "2. The parties shall take the necessary measures to change the name of the business from BRAGHA CONSTRUCTION COMPANY LIMITED which was the name used prior to the involvement of Partner B MOKAB COMPANY GHANA LIMITED to be known and called **B & M Company Limited** as soon as possible to reflect the interest of both parties.
>
> 8. All proceeds from the Business shall be paid into Zenith Bank Ghana Limited-NIA Branch, Account No. 000601090786 (hereinafter called 'the B & M Partnership Account'). This account shall be subject to an audit by an auditor appointed by the partners at the end of each accounting year of the partnership."

This notwithstanding, the Appellant proceeded to acquire and register title to the land in its own name and not in the name of B & M Company Limited as undertaken in the said clause 2 of the Partnership Agreement.

Following demands by the Respondent, the Appellant eventually agreed and adopted a board resolution dated 1st September 2011, paragraph 1 of which stated as follows:

> "That KWAME PHILIPS be and is hereby authorised to sign, file, verify and authorize the documents, to represent the company and take back documents from the office of the Managing Director of MOKAB COMPANY LIMITED **in respect of transferring SEVENTY PERCENT (70%) of its share in the THIRTY (30) ACRE PARCEL OF LAND** situate and being at La, Accra behind the Ghana International Trade Fair in the Greater Accra Region in the Republic of Ghana."

Notwithstanding these clear understandings and agreements of the parties, the Appellant, firstly, refused to acquire the land in the name of B & M Company Limited and secondly, refused to transfer **70% interest in the land** to the Respondent. Contrary to the letter and intent of the Partnership Agreement and the Appellant's own Board Resolution, the Appellant started selling the land to third parties without the knowledge and/or consent of the Respondent, let alone settling 70% of the proceeds of these sales or any funds at all, however described, on the Respondent. It is these deliberate neglects, failure and/or refusal of the Appellant to perform its side of the bargain that compelled the Respondent to issue a Writ at the High Court which was subsequently amended for the following reliefs:

i. "**An order for specific performance of the agreement between the Plaintiff and the Defendant and for the Defendant to transfer the title documents to the land from its name to B & M Co. Ltd and to account for and pay B & M Co. Ltd all monies and benefits received from the sale/lease of portions of the said land.**

ii. **A declaration that on the strength of the agreement executed between the Plaintiff and the Defendant on 17 August 2010, the Plaintiff is entitled to 70% of the landholding described in schedule "A" of the 17 August 2010 Agreement and in the name of the Defendant.**

iii. **A consequential order that the Defendant transfers to the Plaintiff 70% of the land described in paragraph 1 and schedule "a" of the agreement of 17th August 2010.**

iv. Interest on all sums found due and payable to the Plaintiff either pursuant to the contract or pursuant to Rules 1- 4 of Court (Award of Interest and Post Judgment Interest) Rules 2005 (C.I. 52)

v. Costs

vi. Further or other reliefs as the court might deem fit."

The Appellant disputed the Respondent's allegations and counterclaimed for the following reliefs:

i. "A declaration that Plaintiff breached its contractual and fiduciary obligation to Defendant when Plaintiff falsely represented to Defendant that the extra sum of GHS 216,000.00 required to complete payment for the land was sourced from a third party.

ii. A declaration that by reason of Plaintiff's breach of its contractual and fiduciary obligations to Defendant, Defendant rightly terminated the agreement the basis of Plaintiff's present suit.

iii. A declaration that upon termination of the agreement, Plaintiff is only entitled to reimbursement of Plaintiff's money advanced Defendant to assist Defendant complete purchase of the property.

Or in the Alternative

(i) A declaration that Plaintiff is under an obligation to reimburse Defendant in the sum of GHS 233,254.50 being half of the total sum of extra expenses incurred by Defendant in completing the formalities for the purchase of the land the subject matter of Plaintiff's suit.

(ii) Interest on the aforesaid of GHS 233,254.50 from January 2008 to date.

(iii) An order for the recovery of the said sum of GHS 233,254.50 forthwith."

After trial, the High Court in its judgment dated 6th June, 2018 made the following findings:

a) "The parties validly entered into an agreement to purchase the parcel of land from the Trust.

b) <u>The Plaintiff paid for and acquired 70% interest in the profits from the sale of the land.</u>

c) The Defendant's claim that the Plaintiff had breached its fiduciary duty and obligations was unsubstantiated as no evidence was led to prove same.

d) <u>That the Defendant had breached its agreement with the Plaintiff and that the unilateral termination of the agreement by the Defendant was not justifiable and further that the decision of the Defendant to sell portions of the land and to deal with it solely was a breach of the contract between the parties.</u>

e) The Plaintiff's request for an order for specific performance cannot be granted as by the uncontroverted testimony on record, B & M Co. Ltd did not exist and an order for specific performance cannot be complied with and will result in a *brutum fulmen.*

f) <u>That by the Defendant's breach what the Plaintiff was entitled to was reasonable profits which will be adequately compensated for by way of damages.</u>

The trial High Court refused to order specific performance but ordered the Defendant to:

i) Refund to the Plaintiff the sum of GHS 450,000.00 paid by the Plaintiff and received by the Defendant as part of the Plaintiff's initial contribution to the purchase of the land with interest at the commercial bank rate from the date of payment of the said sum of GHS 450,000.00 till date of final payment.

ii) Refund to the Plaintiff of the sum of GHS 216,000 Defendant acknowledged receiving from the Plaintiff as sourced from a third party together with interest at the commercial bank interest rate from the date of payment till date of final payment.

iii) Awarded General damages in favour of Plaintiff for breach of contract in lieu of the order for specific performance in the sum of GHS 100,000.00

iv) Assessed cost of the action at GHS 20,000.00 in favour of the Plaintiff.

The High Court further held in part as follows:

> "I am aware that land is undoubtedly homogenous. For this reason, in many contracts involving the purchase of land, where a breach is established, specific performance is deemed to be the most appropriate remedy. In the instant case however, it is instructive to note that although the agreement between the parties is about the purchase of land, both parties as established by the evidence did not treat the land as an end they aspired to attain. Thus, ownership and possession of the subject matter was not their ultimate goal. As I have earlier found, they had agreed to develop and sell the land for profit and that, profit making from the land was their primary object.
>
> The effect of the breach of the agreement by the Defendant would then be pecuniary. The breach results in a denial of the opportunity for Plaintiff to rake in reasonable profits from the subject matter. From the evidence on record, I am of the opinion that the ends of justice would be well served if the Plaintiff is **adequately recompensed in damages**."

Dissatisfied with the judgement of the High Court, the Respondent appealed to the Court of Appeal which by a unanimous decision, upheld the appeal and held in part as follows:

> *"one could see that the order for refund of monies paid and the award of damages made by the trial Judge has gleefully been welcomed by the Defendant, who paid just 30% of the purchase price but knows the whopping profit he will make from the sale of those lands. It is our duty to ensure that a party who has conveniently found it necessary to breach a contract is not made to profit needlessly from such a breach. The only way to do this is to set aside the order for a refund of the sum of Gh¢450,000, Gh¢216,000 together with interest to the Plaintiff. I further set aside the award of the sum of Gh¢100,000 as damages. I order, just like the Muller case, that the Plaintiff is entitled to 70% of the market value of*

the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tsaido. This restores the Plaintiff as near possible to the position he would have been placed had Defendant not taken the petulant decision to abrogate the agreement due mainly to his motive to appropriate all the profit of the sale of the land to himself and this order brings it in line with the principles that animates the award of damages."

[See page 695 of the Record of Appeal]

Thus, the Court of Appeal held Respondent to be entitled to 70% of the market value of the land and ordered the valuation of the land for the ascertainment of the amount deemed reasonable compensation for the Respondent.

In this present appeal and cross-appeal before us, the Appellant prays for a reinstatement of the High Court judgment whilst the Respondent prays for an order for specific performance.

GROUNDS OF APPEAL

From the Notice of Appeal filed by the Appellant on 22nd January, 2021, the grounds of appeal which may be found at page 698 of the Record of Proceedings are as follows:

i) The court below exceeded its jurisdiction when it ordered that the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tseaido be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% of the current market value of the said land.

ii) The court below erred in law when it ordered that the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tseaido be valued at its current market value.

iii) The court below wrongly interfered with the discretion exercised by the trial High Court.

iv) The case law authorities relied upon by the court below to order that the land in dispute between the parties be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% of the assessed value do not justify the said order.

Upon being served with the Appellant's Notice of Appeal, the Respondent also cross-appealed on the 12th February, 2021 on the following grounds:

1. The learned Justices of the Court of Appeal were wrong in not making an order of specific performance in favour of the Plaintiff.

2. The failure of the Court of Appeal to grant an order of specific performance in favour of the Plaintiff had the effect of sanctioning the proven acts of breach by the Defendant of its contractual obligations under the contract between the parties.

The grounds of appeal of the Appellant are similar if not the same and the resolution of one ground would substantially dispose of the other grounds of appeal. An attempt to

isolate and resolve each ground separately may therefore lead into needless repetition and re-evaluation of the evidence on record and the applicable law.

In brief, the Appellant's grounds of appeal are that: the court below exceeded its jurisdiction when it ordered that the 30-acre land be valued at its current market value and Respondent paid 70% of the current market value of the said land; the court erred in ordering that the land be valued at its current market value; the Court of Appeal wrongfully interfered with the discretion exercised by the High Court; and case law does not justify the order for the valuation of the land at its current value and the payment of 70% of the assessed value to the Respondent.

The cross-appeal of the Respondent which alleges that the Court of Appeal erred in not granting a relief of specific performance essentially also disputes the conclusions reached by the Court of Appeal.

A resolution of the issue of whether or not the Court of Appeal was justified in ordering that the Respondent be paid 70% of the current market value of the land, therefore essentially disposes of the entire appeal. I shall therefore resolve the contentions in this appeal by the resolution of the issue set out *supra.*

APPELLANT'S CASE.

The Appellant has argued that the Court of Appeal departed from the pleadings and reliefs sought by the parties and substituted a new case for the parties. The Appellant further argues that pleadings bind not only the parties but the court itself. The Appellant is of the contention that the Court of Appeal erred when it ordered the Appellant to pay 70% of the present value of the land to the Respondent because, that relief was not sought by the Respondent nor was that relief consequential to reliefs sought by the Respondent.

The Appellant also argues that the Court of Appeal lacked the jurisdiction to "*substitute for a party, reliefs not prayed for by the party in place of what the Court deems fit and/or proper or deserved by the party invoking the jurisdiction of the court for specific reliefs*". In aid of these contentions, the Appellant sought to rely on the cases of **Dam v. JK Addo [1962] 2 GLR 200; Hannah Kwarteng (subst. by Kwadwo Oppong) v. Adwoa Tiwaa & Adwoa Fosuaa (subst. by Diana Mensah) [2017-2018] 1 SCGLR 595**, **Harrison Edward Nartey v. Barclays Bank of Ghana (Civil Appeal no. J4/42/2017),** and submits that a Court cannot grant reliefs not sought by the parties in their respective pleadings.

RESPONDENT'S CASE:

The Respondent on the other hand contends that Appellant lacks candor and that it is merely approbating and reprobating. The Respondent says that when it appealed the decision of the High Court and contended that the High Court had in essence substituted a case not put forth by the Respondent and granted a relief not sought for by the Respondent, the Appellant herein, therein argued that the High Court has every right to grant reliefs not sought by the Respondent in the interest of substantial justice. Specifically, the Appellant in their Statement of case at the Court of Appeal argued thus:

> "We contend however that Plaintiffs argument in support of this ground is unsupported by the law. The law is that in the furtherance of substantial justice a trial Court may grant any relief which is supported by the evidence on the records as justifiable and the pleadings of the parties…. The Court below having found that the remedy of specific performance was not available to Plaintiff was duty bound to perform substantial justice by

granting a remedy which was permissible upon an examination of the records and the pleadings of the case."

Respondents contended that an order for specific performance is the most appropriate remedy since its dealings with the Appellant was for the purchase and sale of land. The Respondent prayed that in the event that this Court finds the relief of specific performance is not appropriate, this Court should uphold the alternative relief granted by the Court of Appeal and dismiss the appeal of the Appellant.

RESOLUTION:

In resolving this appeal, we note that the Appellant, whose counterclaims were dismissed by the High Court, is, in this appeal, praising the High Court judgment as sacrosanct and one which the Court of Appeal wrongly interfered with. This is evident from the grounds of appeal filed by the Appellant and the submissions made in respect of those grounds. For instance, at page 35 of the submissions of Appellant, Appellant argue as follows:

"***It is our case herein that the Court below wrongly interfered with the discretion exercised by the trial High Court. …We contend that this decision by the trial High Court is based on the facts of the case, and therefore, the Court Appeal wrongly interfered with the discretion of the trial High Court*** by ordering that the land in dispute between the parties be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% assessed value."

Obviously, the Appellant, having its counterclaims expressly dismissed by the High Court, would only mount up this spirited appeal to defend the said High Court judgment because of the blessings the award of the paltry sums of damages by the High Court would avail it despite its unilateral breach of the agreement.

In the Amended Writ of Summons and Statement of Claim of the Respondent, the Respondent, among others, sought "***further or other reliefs as the court may deem fit***"**.** What this implies is that the trial court may grant reliefs not endorsed on the Writ of Summons and Statement of Claim if it deemed it proper to do so in the interest of justice and provided such reliefs are justified by the evidence led at the trial. The principle of substantial justice is an underpinning concept of our justice delivery system. The circumstances of each case and the need to do substantial justice will always be a guiding principle in the determination of any matter in court. It is for these reasons that this Court has held per Atuguba JSC in the case of **Hannah Assi (No. 2) v GIHOC [2007-2008] SCGLR 16@24** that:

> "as much as possible pleadings should not disable the doing of substantial justice and the power of amendment particularly aids and abets that objective, subject always to the requirements of fairness and justice in the particular circumstances of a case..."

The Respondent's relief one (1) as endorsed on the Amended Writ of Summons and Statement of Claim was for specific performance of the agreement it had with the Appellant. Both the High Court and the Court of Appeal found that specific performance was not an appropriate remedy to grant the Respondent and decided to compensate the Respondent in damages. The finding that specific performance

was not an appropriate remedy in the instant case is a concurrent finding by the two lower Courts. The Respondent, who by his cross-appeal contended otherwise bore the burden to demonstrate that the said concurrent finding was perverse and occasioned a miscarriage of justice.

[See the cases of: MONDIAL VENEER (GH) LTD v AMUA GYEBU XV [2011] 1 SCGLR 466; ACHORO & ANOR. V. AKANFELA & ANOR. [1996-1997] SCGLR 209, KOGLEX LTD V. FIELD (NO 2) [2000] SCGLR 175].

The concurrent decision of the High Court and Court of Appeal to not grant the relief of specific performance was based on the finding that portions of the land had been sold off to third parties. This finding was corroborated by the pleadings and the evidence adduced at trial.

For instance, at page 312 of the Record of Appeal, Respondent's Managing Director testified as follows:

> "Q: Look at Exhibit K attached
>
> A: Yes my Lord
>
> Q: This is the search conducted by you
>
> A: Yes my Lord.
>
> Q: ***And the results is that substantial portions of the land had been sold to 3rd parties***
>
> ***A: Yes my Lord."***

The Appellant's Director also testified that 3rd party interests had been created in the land when at page 332 of the Record of Appeal, he testified as follows:

> "Q:I am putting it to you that the Defendant had a grand plan to use the Plaintiff in acquiring the land and deny the Plaintiff of its share in the land
>
> A: This was not our intention at all. **The land in contention has all been sold."**

Prior to these testimonies, the Respondent's own Amended Statement of Claim bore truth of the 3rd party interests created in the subject matter. At paragraphs 8 and 13 of the said Amended Statement of Claim, the Respondent contended as follows:

> "8. The Defendant Company, in breach of contract, ***has also sold off some portions of the land*** without the consent of the Plaintiff or B & M Company Ltd. The monies from the land sale has not been accounted for or paid into the account of B & M Company Ltd …
>
> 13. The stated acts of the Defendant in selling off portions of the land without the Plaintiff's consent, not accounting for the monies obtained from the sale of the land to the Plaintiff, refusing to transfer the title documents on the land to B & M Company Limited and trying to discharge its obligations under the agreement by breaching the contract clearly imputes fraud on the part of the Defendant"

Indeed, in the witness statement filed on behalf of the Respondent which was adopted as evidence in chief during the trial, the Respondent testified that the Appellant had already sold portions of the land to several people. In fact, the Respondent went on to tender Exhibit K in evidence which shows that there were some persons who had acquired interest in the land and had even proceeded to register same with the Lands Commission and had been issued with land title certificates.

Specifically, the Respondent Director testified in paragraph 29 of his witness statement which can be found at page 236 of the Record of Appeal as follows:

> "A search at the Land Registration Division revealed that Defendant has sold off portions of the land to several people thereby breaching the contractual obligation between the Plaintiff Company and the Defendant. Attached and marked as Exhibit "K" is evidence to that effect."

Also, although the land per the agreement was supposed to have been purchased in the name of B & M Co. Ltd., the testimony of the Respondent at trial by way of cross examination is that the said company was never established or was non-existent. Therefore, an order of specific performance requiring the Appellant to transfer the land into the name of B & M Co. Ltd. will, according to the High Court, be an order made *brutum fulmen.* The testimony of the Respondent's witness which supports the non-existence of B & M Co. Ltd. can be found at pages 306 and 307 of the Record of Appeal as follows:

Q: You talk of a certain B & M company Ltd. in your evidence in chief.

A: Yes, My Lord.

Q: Do you know who the directors of this company are?

A: Yes, My Lord.

Q: Who are the directors?

A: My Lord; B & M Company Ltd. was not established as such.

The non-existence of B & M Co. Ltd was further corroborated by the Appellant's witness during cross examination at page 332 of the Record of Appeal as follows:

Q: The Company which the parties agreed to set up jointly was B & M Company Ltd.

A: Yes.

Q: But the company which the Defendant set up was B & M Ocean Company Ltd.

A: Yes.

Q: Why didn't the Defendant set up B & M Company Ltd.?

A: This was not done because the Plaintiff as I said earlier refused to accept the expenses we made on the land and therefore we put a stop to every transaction and so there was no way we could go back to look at the terms of our agreement."

In my opinion therefore, the High Court and the Court of Appeal's finding that 3rd party rights had been created in the land, the subject matter of the dispute, is supported by the pleadings as well as the evidence adduced at trial. I am of the further opinion that the Court of Appeal and the High Court were thus justified in coming to the conclusion that the relief of specific performance by way of a transfer of 70 % of the interest in the land to the Respondent would not be justifiable in the face of 3rd party interests created in ***"substantial portions of the land".***

Philip H. Pettit, in his book "Equity and the Law of Trust" (4*Edition). London Butterworth's [1979], has also said on specific performance at page 468-469 as follows:

> "In contracts for the sale of land problems have sometimes arisen where a purchaser has sought specific performance against a vendor who is unable to give a good title without the consent of some third person, or where he had contracted to give vacant possession and some third person is in possession".

By reason of the forgone evidence and the law, specific performance will be an inappropriate remedy in the circumstance of this case given that substantial portions of the land have been sold and 3rd party rights created in relation thereto.

Consequently, the Respondent has failed to demonstrate that the concurrent finding that 3rd party interests had been created in the land and thus a relief of specific

performance was inappropriate, was a perverse finding that occasioned a miscarriage of justice.

Having rightly come to the decision that specific performance was an inappropriate remedy under the circumstance of this case, both the trial and 1st Appellate Court were right in coming to the conclusion that damages was a more appropriate recourse. The principle that damages may be awarded in lieu of an order for specific performance in appropriate cases was amply enunciated by this Court in the case of Royal Dutch Airlines (KLM) v Farmax Ltd [1989-1990] 2 GLR 623 at 644 where the Court reasoned that:

> "On the measure of damages for breach of contract, the principle adopted by the courts in many cases is that of restitutio in integrum, i.e., if the plaintiff has suffered damage that is not too remote, he must, as far as money can do it, be restored to the position he would have been in had that particular damage not occurred: see Robinson v Harman (1848) 1 Exch 850 and Wertheim v Chicoutimi Pulp Co [19111 AC 301 at 307. This means that the plaintiff has to be put into the position he would have achieved if the contract were performed, and he is allowed to recover damages on the basis of returning him to the position before the contract was made.

Further, in Halsbury's Law of England, 4th Edition, 44 at paragraphs 559 and 560, it has been stated as follows:

> "Damages in equity. Where a court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in equity in addition to or in substitution of an injunction or specific performance"

> "Where the court has jurisdiction to award damages either at law or in equity, the measure of damages and the date at which they are to be assessed is the same in either case. ***The general principle is that the innocent party is entitled to be placed, so far as money can do so, in the same position as if the contract had been performed.***"

There is therefore no disagreement that damages are warranted in law and equity where an award of specific performance is for one reason or the other impracticable, unreasonable or inappropriate. In my view, the disagreement in the damages awarded by the High Court and the Court of Appeal had to do with the method of arriving at a quantum of damages that would be fair, reasonable, and adequate to restitute the Respondent as far as reasonably practicable given that, it has been outwitted and denied the proceeds of its investment. Consequently, this dissent is occasioned by my view that, in the circumstances of this case, the awards and damages by this Court fails to ensure that the Respondent, who is the innocent party, and victim of the Appellant's breach is "***placed, so far as money can do so, in the same position as if the contract had been performed.***"

As rightly found by the High Court, "the conduct of the Respondent is consistent with what Lord Morris described in the case of Cassel & Co. Vs. Broome [972] AC1027 at 1094 where it was held that:

> "The situation contemplated is where someone falls up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carried out his plan because he thinks it will work out satisfactorily for them. He is prepared to hurt somebody because he

thinks he may well gain by doing so even allowing for the risk that he may have to pay damages."

It is obvious that the Appellant knows that the land in question as testified to by the Respondent is in a prime area and consequently, the Appellant will unduly profit if its liability in damages is to pay the paltry sums awarded by the High Court or the subsequently enhanced but still relatively extremely meagre sums awards by this Court in comparison with the value of land either sold and pocketed and/or bare lands retained by the Appellant for its benefit to the exclusion of the Respondent who paid for 75 % of the cost price of the land in issue.

It is for these reasons that the Court of Appeal's method of computing adequate damages under the circumstances by way of a current open market valuation of the land and the payment of 70% of same to the Respondent, is in my humble opinion, a fair, just, equitable, reasonable and commercially practical way of doing justice between the parties.

This ensures that the Appellant does not profit from his own wrong doing which the trial High Court and this Court has enabled and thereby indirectly endorsed the conduct of the Appellant. At the same time, an open market valuation and a payment of 70% of such a value to the Respondent would have ensured that the Respondent is duly compensated for its payment of 75% of the cost of the land, at acquisition. And award of damages of One Million Ghana Cedis (GH¢ 1,000,000.00) and interest at the prevailing Bank of Ghana rate to the Respondent, an honest participant in a business transaction who kept its side of the bargain, is a mockery of the imperatives

of commerce in the market place. After all, which business in Ghana, borrows at the Bank of Ghana rate? I would have thought that the fact that businesses borrow at a commercial rate of interest and not the Bank of Ghana rate of interest are facts that are too notorious not to be recognised by this Court.

In my opinion, adequate and/or restitutionary damages is concerned with reversing wrongful transfer of value from the party overreached to the party who has benefitted from such wrongful overreaching.

Consequently, the proper measure of such damages ought to be an objective valuation of the benefits received by the party who according to Lord Morris in Cassel & Co vrs. Broom supra "*…deliberately carries out his plan because he thinks it will work out satisfactorily for them. He is prepared to hurt someone because he thinks he may well gain by doing so, even allowing for the risks that he may have to pay damages".*

In all cases, I think that object of award of damages must be to

put the injured party in the position he would have been in as far as

money can do had the damage not occurred and not what the wrongdoer

has gained from his wrongful act.

This principle was aptly espoused in of the old English case of Hadley V. Baxendale (1854) 9 EXC 241. Similarly, the Court of Appeal held, relying on the statement of the

law by Lord Nicholls of Birkenhead in Attorney General V. Blake and Another [2000] 4, ALL E. R. 385 T 391 that:

> "***Damages are measured by the Plaintiff's loss, not the defendant's gain.*** But the common law, pragmatic as ever, has long recognized that there are many common place situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the land owner no financial loss. In such a case, damages are measured by the benefit received by the trespasser, namely, by his use of the land... In this type of case, the damages recoverable will be, in short, the price a reasonable man will pay for the right of use."

As we have intimated above, the award of damages cannot be without lawful consideration. Where a trial court fails to award appropriate damages, an appellate court can enhance or reduce the award.

In Juxon-Smith v KLM Dutch Airlines 2005-2006 1 GLR 438, this Court at page 452 delivered itself as follows:

> "The grounds upon which an appellate court would enhance or reduce an award of damages has long been established by this court in the case of Bressah vrs. Asante [1965] GLR 117. A more recent authority on the point is the case of Standard Chartered Bank (Ghana) Ltd vrs Nelson [1998-99] SCGLR 810. This court, unanimously speaking, re-stated very clearly the limits of an appellate court's power to interfere with a trial court's award of damages. Charles Hayfron-Benjamin JSC

in delivering the judgment of the court observed, at page 824, that the interference would be permitted on the following grounds:

"(a) that the judge acted on some wrong principles of law; or

(b) That the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the Plaintiff is entitled."

[See also Karam v. Asjkar [1963]1 GLR 139, S.C.]

It is also worth noting that the generally, the exercise of discretion by a court may be varied by an appellate court if it is established that the said discretion was exercised on wrong considerations.

In **Crentsil v Crentsil [1962] 2 GLR 171**, at page 175 this Court held as follows with regard to appeals against the exercise of discretion;

'In Blunt v. Blunt where the judgment of the House of Lords on appeal from the Court of Appeal was delivered by Viscount Simon, L.C. it was held that:

"An appeal against the exercise of the court's discretion can only succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact, in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matter into account."

It is for these reasons that we are unanimous in this case that the damages awarded by the trial High Court was woefully inadequate. However, this

dissent results from my thinking that the appropriate measure of damages in the circumstances of this case ought to be, as already pointed out, measured by the Plaintiff's loss and bearing in mind the maneuvers of the Appellant which occasioned the breach of contract that caused the Respondent the loss in issue. I am fortified in this thinking by the reasoning of this Court in the Muller Case (supra) where this Court found at page 1246 in clear and unambiguous terms that:

> "Fourthly, since the contract between the parties was for a house, to direct that the Plaintiff recovers his money plus commercial interest would work a lot of injustice on the Plaintiff. Without taking into consideration the present-day value of the type of
>
> house.
>
> Fifthly, since the specific house is no longer available, the only just course of action left for the Defendants is to provide the Plaintiff with monetary equivalent that would enable him to purchase a similar house. The cost or the quantum of this house must be based on the current market value of similar houses, as was rightly held and determined by the High Court and the Court of Appeal itself.
>
> Finally, **this Supreme Court must for good public policy reasons such as the need to value legal instruments or contractual transactions and thereby emphasis the concept or principle of stability of contracts.**
>
> (Emphasis ours)"
>
> .

As if the aforesaid was not emphatic enough, this Court further noted at page 1246 to 1247 of the Muller case as follows:

> "Perhaps it will not be out of place at this juncture to reiterate the fact that, if it is desirable for people to use contracts in the business world to regulate and control their dealings with one another, then it is the duty of the law courts to give teeth to these contracts to enable them bite and bite very hard when the contracts are honoured in the breach by the parties.
>
> …if adults who enter into legally enforceable contracts, conscious of the consequences whenever there is a breach, must be held accountable for any such lapses. If the law courts are not careful in providing **adequate remedies** whenever a breach of contract like the instant case occurs, then there is likely to be the risk that parties may play into the theory of "efficient breach". For instance, if the Defendant home finance company was for example, dissatisfied with the price that it received from the Plaintiff for the house, it could simply breach the contract because that would be more cost effective than honouring it.
>
> Luckily, this is not the reason in the instant case. **However, there is the need for the courts, especially a final and appellate one at that, to send clear message that contracts shall be honoured more in their observance than in their breach**."

In the circumstances of this case, the trial High Court may be said to have arbitrarily exercised discretion in its award of damages of a sum of One Hundred Thousand Ghana Cedis (GH¢ 100,000.00) for a breach of contract that enables the Appellant to retain all the appreciation in value of 30 acres of land, the acquisition of which the Appellant contributed only 30% of the purchase price. Significantly, the High Court failed to give reasons for arriving at the quantum of damages and may therefore be said to have overridden the requirement of reasons for decisions, orders and awards by our Courts, if we are to escape a criticism of arbitrariness, fancy or conjecture.

In contrast, the Court of Appeal, in my opinion, rightly examined the special circumstances of the case and resorted to an award that would be restitutionary. In its judgment, which may be found at page 694 of the Record of Appeal, the Court of Appeal reasoned as follows:

> "If we are to advert our minds to the fact that the eyes of the parties were on the profit that was to accrue from the sale of the land which was to be shared on a ratio of 70% to Plaintiff and 30% to Defendant, then it behoves us to ensure that the Plaintiff is not handed a raw deal, with our holding that specific performance is not available to him. For as noted in the Royal Dutch Airlines case supra that Plaintiff has to be put into the position he would have achieved if the contract was performed, then clearly it is evident that the position would have been in is one of 70% entitlement to the profit from the sale of the land…
>
> The reasons proffered in this judgment, in my view, justify an intervention in the alternative reliefs granted by the learned trial Judge as well as the award of damages. One could see that the order for refund of monies paid and the

award of damages made by the trial Judge has gleefully been welcomed by the Defendant, who paid just 30% of the purchase price but knows the whopping profit he will make from the sale of those lands. It is our duty to ensure that a party who has conveniently found it necessary to breach a contract is not made to profit needlessly from such a breach. The only way to do this is to set aside the order for a refund of the sum of Gh¢450,000, Gh¢216,000 together with interest to the Plaintiff. I further set aside the award of the sum of Gh¢100,000 as damages. I order, just like the Muller case, that the Plaintiff is entitled to 70% of the market value of the 30-acre land purchased at East La, behind the Ghana Trade Fair Company site and popularly called Tsaido. This restores the Plaintiff as near possible to the position he would have been placed had Defendant not taken the petulant decision to abrogate the agreement due mainly to his motive to appropriate all the profit of the sale of the land to himself and this order brings it in line with the principles that animates the award of damages."

With due deference and respect, I am of the considered opinion that the restoration of the judgment of the High Court, albeit with variations, amounts to the same effect of unduly profiting and enriching the Appellant who deliberately breached the contract whilst prejudicing the Respondent who is the victim of the Appellant's unilateral breach of the contract.

Even though this Court enhances the award of general damages, from One Hundred Thousand (GH¢ 100,000) to One Million Ghana Cedis, it varies the interest on refunds adjudged in favour of the Respondent from interest at the commercial bank

interest rate to interest at the Bank of Ghana rate and directs that "both parties are to bear their own cost in this Court", in a commercial suit of this nature and under circumstances where the two lower courts and this Court are at least unanimous in the view that it is the breaches of the Appellant that has occasioned this suit and the instant appeal.

I am constrained to say that in my candid opinion, this Court's approach to the determination of damages and in particular, the enhanced quantum of One Million Ghana Cedis (GH¢1,000,000.00) to the Respondent, given the undisputed facts of this case, can at the very least, in the words of Hayfron Benjamin JSC (as he was) be said to be an exercise of discretion in awarding damages in an amount that is "… so very small as to make it an entirely erroneous estimate of the damages to which the Plaintiff is entitled".

Similarly, in my respectful opinion, the enhancement of damages by this Court to One Million Ghana Cedis (GH¢1,000,000.00) without any objective assessment of the quantum of injury or loss suffered by the Respondent and is therefore arbitrary. This is more so when the Court of Appeal, recognizing that specific performance was rendered impracticable by the breaches of the Appellant, decreed a practical, reasonable and objective method of assessment of damages, to wit, an open market valuation of the land by the Lands Valuation Department of the Lands Commission and the payment of 70% of the value to the Respondent. I would dare to say, this is fidelity to the Muller Case principles enunciated by this Court, and I struggle to find any justification for the departure from same.

Similarly, I am simply unable to appreciate the attempts to distinguish the Muller Case from the instant case. This is because, in the Muller Case, Mr. Muller paid USD 40,000.00 for a house in 2002 and through the Defendant's breach, he did not get the house. This Court rightly found at page 1246 quoted supra that *"since the contract between the parties was for a house, to direct that the Plaintiff recovers his money plus commercial interest would work a lot of injustice on the Plaintiff. Without taking into consideration the present-day value of the type of house."*

Similarly, the Respondent's investment, per the Partnership Agreement and the Appellant's own Board Resolution, was "**in respect of transferring SEVENTY PERCENT (70%) of its share in the THIRTY (30) ACRE PARCEL OF LAND** situate and being at La, Accra behind the Ghana International Trade Fair in the Greater Accra Region in the Republic of Ghana." To paraphrase, in the language of the Muller case supra, the Respondent, contracted for an interest of 70% of the value of 30 acres of land at Tseaido, 70% of the proceeds of the sale of the 30 acres of land and/or 70% of the profits from the sale or development of the 30 acres of land.

I am therefore constrained to ask whether the total of the awards by this Court of refunds of the payments made by Respondent for land, plus interest at the Bank of Ghana rate together with the enhanced damages of One Million Ghana Cedis (GH¢ 1,000,000.00) is enough to purchase two acres of land in Tseaido, behind the International Trade Fair, at current open market value? I definitely think not.

I therefore struggle to see the difference between Mr. Muller who would not have been able to purchase the house he originally contracted for, if this Court had only awarded

damages of the US$40,000.00, he paid, plus interest together with an amount in damages which does not take into account current open-market value of the type of house that Mr. Muller contracted for. The Muller Case principles ought to have been applied to the parties in this case, given the essential striking similarities in the two cases.

Further, does the method of compensation resorted to by this Court for such a deliberate breach of contract, have the effect admonished by this Court at page 1247 of the Muller Case? Does the precedent in this case make it desirable "… for people to use contracts in the business world to regulate and control their dealings with one another"?

Again, is this Court by its awards in this case, true to "… the duty of the law courts to give teeth to these contracts to enable them bite and bite very hard when the contracts are honoured in the breach by the parties"?

Again, I am concerned to note that this precedent inspires utter disregard, even unscrupulousness in the business world and fails in deploying remedies in its discretion, both in law and in equity to effectively control dealings among businesses. In the same breath, it is my humble and respectful opinion that the award by this Court fails to bite, let alone "bite very hard when the contracts are honoured in the breach by the parties".

Also, in my respectful opinion, the inadequacy in the award by this Court, however justified, departs from the admonishing of this same Court in the Muller case supra that: "If the law courts are not careful in providing **adequate remedies** whenever a

breach of contract like the instant case occurs, then there is likely to be the risk that parties may play into the theory of "efficient breach".

Unlike the Defendant in the Muller case, who was not exactly found to have orchestrated an efficient breach because it was dissatisfied with the price it received from the Plaintiff for the house, it seems to me that in the instant case, the Appellant was dissatisfied with the Respondent's contribution to the purchase of the land having regard to the increases in value of land since about 2009 when the purchase was made. Further, the inference that the Appellant deliberately orchestrated these breaches to overreach and deny the Respondent of the increasing values of the Respondent's investment is compelling, irresistible and in many ways borne out by the evidence. Is it not curious and unusual for an Appellant whose counterclaim was dismissed in its entirety by the trial Court and who is supposedly "damnified in damages" to argue in defence of the judgment that damns it before the Court of Appeal? Is it also not intriguing that the same Appellant contends in this Court that "***the Court below wrongly interfered with the discretion exercised by the trial High Court. … that the decision by the trial High Court is based on the facts of the case, and therefore, the Court Appeal wrongly interfered with the discretion of the trial High Court by ordering that the land in dispute between the parties be valued at its current market value and Plaintiff/Appellant/Respondent paid 70% of the assessed value.***" This revealing submission before this Court results from the fact that the Appellant, appreciates that its true damnation lies more in an open market valuation of the land and the payment of 70% of that value to the Respondent. Needless therefore to say that the discretion in preferring a method of assessing damages which is essentially at large over an objective method which entails the valuation of the subject matter of dispute occasions inequity and more importantly, flies in the face of the reasoning of this same Court in the Muller case and overrides all the fine principles enunciated therein.

It is for these reasons that I am unable to agree with my venerable Lord and Ladies in the majority. I will dismiss the appeal and cross- appeal in their entirety and affirm the decision and final orders of the Court of Appeal save that I would have awarded cost in favour of the Respondent, given that this is a needless commercial dispute provoked by the Appellant and a lot of professional time, diligence and expense has gone into prosecuting this appeal.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

AMEGATCHER JSC:-

The law applicable to the facts of this case for substantial justice to be done is not new to this court. It has engaged the attention of this court in several previous decisions. Not surprising, weighing the conduct of the defendant in this breach scenario and the fact that the defendant opted to benefit at the expense of the plaintiff by reaping from where it had not sown, the learned trial judge blurted out in the following words at pages 443-444 of the ROA:

"I must state that the Defendant's witness did not impress me as one the credibility of whose testimony was unassailable. In the circumstances, I find that unilateral the *(sic)* **termination of the agreement by Defendant was not justifiable. Accordingly, the decision to keep the Plaintiff out of the subject matter and to deal with it solely constituted a breach of contract."**

The High Court then concluded as follows at page 453 of the ROA:

"The effect of the breach of the agreement by the Defendant would then be pecuniary. The breach results in a denial of opportunity for Plaintiff to rake in reasonable profits from the subject matter. From the evidence on record, I am of the opinion that the ends of justice would well be served if the Plaintiff is adequately recompensed in damages."

The Court of Appeal also had these words to describe the conduct of the defendant at page 692-693 of the ROA:

"The question raised with the quantum of damages awarded by the trial court, is whether in the face of unjust treatment of Plaintiff by the Defendant as seen in the following: One, in the manner the Defendant used monies advanced by the Plaintiff to acquire the 30-acre land for sale to third parties….."

At page 694 of the ROA the Court of Appeal proceeded as follows:

"If we are to advert our minds to the fact that the eyes of the parties were on the profit that was to accrue from the sale of the land which was to be shared on a ratio of 70% to Plaintiff and 30% to Defendant, then it behoves us to ensure that the Plaintiff is not handed a raw deal, with our holding that specific performance is not available to him."

Then at page 695 of the ROA the Court of Appeal observed:

"one could see that the order for refund of monies paid and the award of damages made by the trial Judge has gleefully been welcomed by the Defendant, who paid just 30% of the purchase price but knows the whopping profit he will make from the sale

of those lands. It is our duty to ensure that a party who has conveniently found it necessary to breach a contract is not made to profit needlessly from such a breach….. This restores the Plaintiff as near possible to the position he would have been placed had Defendant not taken the petulant decision to abrogate the agreement due mainly to his motive to appropriate all the profit of the sale of the land to himself and this order brings it in line with the principles that animates the award of damages."

What then, were the facts which prompted the reaction by the two preceding courts about the conduct of the defendant?

Background

The parties executed an agreement on 17th August 2010 to raise funds together to purchase a 30.16-acre land behind the Trade Fair Site, La at the cost of Nine Hundred Thousand Ghana Cedis (GH₵900,000.00). The defendant was required to lead in the purchase transaction and thereafter transfer the land title documents to B & M Company Ltd, a company agreed by the parties to be incorporated as a special purpose vehicle for the business project between the parties. Further, a business account was opened with Zenith Bank Ghana Limited where proceeds from the business project were to be deposited. Each party was to contribute fifty percent (50%) of the purchase price of the land.

The plaintiff initially paid the Four Hundred and Fifty Thousand Ghana Cedis (GH₵450, 000.00) being its 50% obligation in line with the agreement. The defendant could not raise its share of 50% being the other half of the purchase price. The plaintiff, therefore, raised an additional amount of Two Hundred and Twenty Five Thousand Cedis (GH₵225, 000.00) through a third party, thereby increasing its capital contribution to Six Hundred

and Seventy-Five Thousand Ghana Cedis (GH₵675, 000.00), representing 75% payment for the value of the total land purchased. After the land was purchased with capital raised by the plaintiff, the defendant refused to transfer the tittle documents of the land from its name to the holding company, B & M. The defendant also unilaterally terminated the contract with the plaintiff and independently sold off portions of the land to third parties and has, apart from failing to account for those sales also failed to deposit the proceeds in the business account. Several attempts by the plaintiff to reason with the defendant to comply with the terms of the agreement between the parties proved futile. The defendant then communicated through a letter that it has terminated the contract. The result of this behaviour was the action instituted by the plaintiff at the High Court against the defendant.

EVIDENCE:

The evidence adduced at the trial confirmed that the parties agreed to transfer to the plaintiff its share of the land, which the defendant held in trust. Thus, Exhibit J which is a board resolution by the defendant authorising its director, Kwame Philip to transfer 70% of the land, the subject matter to the plaintiff is evidence that the final agreement reached between the parties. The evidence on record also indicates that the defendant's witness under cross-examination acceded to transfer to the plaintiff's 70% share (plaintiff's interest) of the disputed land. The defendant's witness under cross examination testified (at page 329 of the ROA):

> "*Q:* **Take a look at exhibit J and read paragraph 1.**
>
> **A: Witness reads same in open court.**
>
> **Q: Exhibit J is the Board Resolution of the Defendant; not so?**
>
> **A: It is so.**

Q: In in paragraph 1 of exhibit J, Kwame Philips was authorised to transfer 70% of his share in the 30 acre trust land; not so?

A: It is so with explanation. All these things were done and later when we saw the mistrust and the agenda of the Plaintiff, we decided we could not do any business with the Plaintiff so we should give them money."

The High Court, while deprecating the conduct of the defendant in this transaction, awarded the plaintiff a refund of the purchase price paid for the land, i.e. the GHc 450,000 plus GHc 216,000 together with interest and damages assessed at Ghc 100,000. No reasons were given to justify the basis for arriving at the Ghc100,000 damages and why in this case it was prudent to permit the defendant who did not contribute to pay for the land to keep the land and pay that meagre amount at the time the value of the land had appreciated.

On appeal, the Court of Appeal, having found that the award by the learned trial judge for refund of the purchase price by the plaintiff with interest plus damages of One Hundred Thousand Ghana Cedis (Gh₵100, 000.00) was inadequate to compensate the plaintiff for its loss and to bring the award in line with the principles that animates the award of damages in common law jurisdictions, reversed that part of the decision and ordered the plaintiff to recover 70% of the market value of the 30.16 - acre land to restore the plaintiff as near as possible to the position it would have been placed had the defendant not taken the petulant decision to abrogate the agreement and appropriate all the profit of the sale of the land to itself.

It is this award by the Court of Appeal which has been reversed by a majority decision of this court. With respect, I disagree with the decision of the majority.

The principles that guide the courts in common law jurisdictions in the award of damages have long been settled by legal text writers and applied in decisions of the apex court in this country. The general objective in awarding damages is to place the injured party as far as money can do. I will refer to just two cases.

In **Royal Dutch Airlines (KLM) and another v Farmex Ltd [1989-90] 2 GLR 623 at 625** the Supreme Court explained the measure of damages based on the principle of Restitutio In Integrum as follows:

"On the measure of damages for breach of contract, the principle adopted by the courts was restitutio in integrum i.e. if the Plaintiff has suffered damage not too remote-he must as far as money could do, be restored to the position he would have been in had that particular damage not occurred. What was required to put the Plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost."

In the case of **Muller v Home Finance Co. Ltd [2012] SCGLR 1234**, the Plaintiff purchased a five-bedroom house at a public auction in 2002 at the instance of the Defendants, a leading financial institution in the country and one of the major players in mortgage financing of houses following an advertisement in newspapers. The plaintiff went and inspected the said house and found the features all in place and accordingly was satisfied with the house. As a result, the plaintiff paid the price of the house, and defendants also handed over the property to him. The Plaintiff however faced resistance from the original owner of the house when he attempted to move into the house. The plaintiff sued the defendants at the High Court, Accra. The High Court found in favour of the Plaintiff. The Defendants felt aggrieved and appealed the decision of the High Court to the Court of Appeal which varied the High Court judgment regarding award of damages and ordered

that the defendant refunds the plaintiff money as at 2002 when the money was paid with interest.

On appeal to the Supreme Court on the proper measure of damages, the Court speaking through Dotse JSC posed an important question for resolution which I will quote shortly. Because of the similarity in the ratio decidendi and the legal proposition between this case and the appeal before us, I plan to quote in extenso the arguments developed by the Supreme Court and the way it resolved that breach of contract:

"… **both courts all affirmed the fact that the plaintiff is entitled to damages for breach of contract. The question then is what is the quantum of damages that the plaintiff is entitled. Whilst the High Court held that the Plaintiff is entitled to present day value of a 5-bedroom house with similar specifications to the one purchased by the plaintiff, the Court of Appeal held that the plaintiff is only entitled to $40,000USD plus interest accrued since the purchase of the house in 2002. These are the two conflicting decisions that this court is presently faced with upholding one over the other."**

The Supreme Court answered the question posed by relying on the well know common law principle on award of damages for breaches of contract when it explained as follows:

"I believe it is fairly well settled that where appropriate, the "principle of restitutio in integrum" shall apply in cases of breach. What then would be the position which the plaintiff would have been but for the breach and for which reason he needs to be restored?....What happened to the Court of Appeal's own observation that the party that caused plaintiff the breach has to pay him the open market value of the house he lost in order to enable him purchase another house similar to the one he had lost? The Court of Appeal really did a somersault in their analysis and conclusion reached in the matter. The facts of this case, as correctly stated by the trial High Court, clearly

establish the fact that, the plaintiff must be paid sufficient damages by way of compensation to enable him purchase a similar house. However, with the orders they made, and taking into account the fluctuations in the building industry, it is certain that, the plaintiff cannot purchase a similar house with the sum of $40,000 USD in 2010, whilst the amount was paid for the original purchase in 2002. Even with interest charges, judicial notice can be taken of the fact that with the rate of inflation from 2002 up to the present single digit inflation, the plaintiff has been dealt a devastating blow by this Court of Appeal order. In my respectful opinion, this was an error and ought to be reversed by this court."

The Supreme Court then proceeded to develop the law on the subject in the following words:

"It appears that the Court of Appeal accepted the Defendant Bank's contention that it must only return the $40,000 USD plus interest to the plaintiff in order to return the plaintiff to his original position, and this to me is unreasonable, does not make sense and is also illogical. Why do I say so? This is because the defendant entered into a contract with the Plaintiff and the object of the contract was the 5-bedroom house with the amenities stated supra being handed over to him. Secondly, the price that the plaintiff paid for the house is incidental to the object of the contract, which is the 5-bedroom house. Thirdly, it has to be noted that, housing markets are known to fluctuate and the said markets can therefore be unstable whilst the house may have been worth $40,000USD in 2002 that is clearly no longer the case, that house is worth considerably more today than it was years ago. Fourthly, since the contract between the parties was for a house, to direct that the plaintiff recover his money plus commercial interest would work a lot of injustice on the plaintiff. Without taking into consideration the present day value of the type of house. Fifthly, since the specific

house is no longer available, the only just course of action left for the defendants is to provide the Plaintiff with monetary equivalent that would enable him to purchase a similar house. The cost or the quantum of this house must be based on the current market value of similar houses, as was rightly held and determined by the High Court and the Court of Appeal itself. Finally, this Supreme Court must for good public policy reasons such as the need to value legal instruments or contractual transactions and thereby emphasise the concept or principle of stability of contracts."

The Court further, in my view, properly weighed the consequences of such breaches of contracts and its role when called upon to enforce them and did the following factual and legal analysis:

"It was in 2002 that the plaintiff and the Defendants entered into the contract for the purchase of the 5- bedroom house. Ten years down the line that object has become a mirage, and it will be a travesty of justice to say at this moment that the contract is worth only $40,000, and not the actual value of a 5 –bedroom house which was the very object of the contract. Such a conduct I dare say would run counter to the notion of stability of contracts. Perhaps it will not be out of place at this juncture to reiterate the fact that, if it is desirable for people to use contracts in the business world to regulate and control their dealings with one another, then it is the duty of the law courts to give teeth to these contracts to enable them bite and bite very hard when the contracts are honoured in the breach by the parties. It has recently been stated that there are some babies who have very strong teeth who can bite very hard. If that is so, then adults who enter into legally enforceable contracts, conscious of the consequences whenever there is a breach must be held accountable for any such lapses. If the law courts are not careful in providing adequate remedies whenever a breach of contract like the instant case occurs, then there is likely to be the risk that parties may play into the theory

of "efficient breach". For instance, if the Defendant bank, was for example dissatisfied with the price that it received from the plaintiff for the house, it could simply breach the contract because this would be more cost effective than honouring it. Luckily, this is not the reason in the instant case. However, there is the need for the courts, especially a final and appellate one at that to send clear message that contracts shall be honoured more in their observance than in their breach. Considering all the above factors and principle, the only logical and reasonable thing to do is that the defendants owe the plaintiff a 5-bedroom house (or its present day monetary equivalent), and unless such a decision is given by the courts, the very usefulness of contracts as legal instruments could fall into disrepute."

After citing the legal position in Canada and England on recognition given by their courts to expectation damages in breaches of contracts, the Supreme Court correctly formulated what in its opinion is a fair and equitable compensation to pay the plaintiff for the defendant's breach of contract as follows:

"Applying the above principles to the facts of the instant case, it would mean that the plaintiff would be entitled not only to the current market value of the 5 bedroom house, but also to the lost rent that could have accrued since 2002 when he purchased the house……. I have adverted my mind to the statement of case filed by learned Counsel for the respective parties. What is clear from the legal issues raised is that, once the deal has gone bad, the Defendants cannot rely on their carelessness to avoid the legal ramifications of breaching its contractual obligations. Accordingly, the plaintiff ought to be put in the position he would have been but for the inability of the Defendants to deliver the house to him."

After citing notable Ghanaian cases on the subject, the Court observed as follows:

"**In all the above cases, the central theme running through them is that, in cases where there has been total failure, the measure of damages is the current market value principle and if that was not easily ascertainable, then the cost of replacement principle would be used. This is especially important in view of the fact that both the trial High Court and the Court of Appeal found that the Defendants lured the Plaintiff into entering a contract for the sale of the house which was subsequently declared by a court of competent jurisdiction to be invalid. Both courts also accept that the plaintiff is entitled to damages."**

The Supreme Court then concluded:

"**The Plaintiff is therefore entitled to the present day value of the 5- bedroom house which he contracted for in 2002. Since that house is now significantly worth more than the $40,000 USD which the Plaintiff paid in 2002, the Defendants must provide him with money at current open market value to enable him purchase or build a similar house."**

I cannot fathom for one moment why this court in this appeal failed to follow its previous decisions on measure and award of damages in such breaches of contracts as it had enunciated in the Farmex and Muller cases (supra). In Article 129 of the Constitution, 1992, this court is bound to follow its previous decisions unless it chooses to depart from them. The principles referred to in the cases above are still good law and have not been departed from. The decision by the majority in this appeal to allow the appeal and reverse an award of damages by the Court of Appeal which is in consonance with previous decisions of the Supreme Court, in my view, was given per incuriam. I personally do not appreciate the difference between the legal principles enunciated in the Muller case and the appeal before us.

Apart from the principles accepted and applied by this court in award of damages for breaches of contracts especially where one party sought to outwit and cheat the other, equitable principles applied by this court from time immemorial will also not lend its support to the conduct of the defendant to benefit from its wrongdoing, let alone the blessing received from this court.

In the case of **Doe v Opoku-Ansah [1997-1998] 2 GLR 149**, Aikins JSC, held, in respect of resulting and constructive trusts that:

"A resulting, implied, or constructive trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself so that it will be inequitable to allow him to deny to the cestui que trust the beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct; he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting, he was acquiring beneficial interest in the land."

In **Yamoah-Ponkoh and Ors Vrs Asomdwe House Co. Ltd. [2021] GHASC 73 (26 May 2021)** the Supreme Court explaining the applicability of the principle of constructive trust spoke through Mensa-Bonsu JSC as follows:

"It is a constructive trust that would enable the beneficial interest to be enjoyed by all who contributed money to bring it into being, as beneficial owners, even though the legal ownership of the lease was in Gabbat Co Ltd. This position was in accord with existing authority. In the *Soonboon Seo* v *Gateway Worship Centre* [2009] SCGLR 278, a Korean missionary announced that he was going to Korea to raise money for the benefit of a church based at Ashaiman near Tema, in the Greater Accra Region. The money was raised, and paid into his personal account. Upon his return to Ghana, he

announced in church that he had been able to raise some money but did not disclose how much. Subsequently, he bought land with some of the money. The church brought action against him for, *inter alia*, declaration of title to the land. The Supreme Court held, per Sophia Akuffo JSC (as she then was) at p. 296 *"The facts clearly support the creation of a constructive trust (an implied trust)"*.

Basing her decision on Taylor JSC in *Saaka* v *Dahali* [1984-86] 2 GLR 774 at 784 which cited Halsbury's Laws of England (3rd ed) vol 14 para 1155, a 'constructive trust' was defined as follows:

> ***"A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another. This happens, for instance, when one who is already a trustee takes advantage of his position to obtain new legal interest in the property as where a trustee of leaseholds takes a new lease in his own name. The rule applies where a person although not an express trustee, is in a fiduciary position …"***

She concluded that:

> **"Consequently, in the instant case the defendant-appellant held the funds in question on a constructive trust for the second plaintiff church"**

The whole purpose of the law on constructive trust as explained by Lord Denning MR in the English case of **Hussey V Palmer [1972] 3 All E R 70** is that:

By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process founded upon large principles of equity to be applied in cases where the defendant cannot conscientiously keep the

property for himself alone but ought to allow another to have the property or a share in it. It is an equitable remedy where the court can enable an aggrieved party to obtain restitution.

The learned authors, Michael Haley and Lara McMurtry in *Equity and Trusts*, Sweet and Maxwell, London, 2017, explain and expound on the law on 'Constructive Trusts'. At p.445, they define the concept of 'Constructive Trust', as follows:

> **"A constructive trust arises in order to prevent one party from resiling from an understanding as to the beneficial entitlements in circumstances where it would be unconscionable to do so. This will occur primarily where the estate owner has by words or conduct induced the claimant to act to his detriment in the reasonable belief that, in so acting, he will obtain a beneficial interest in the properties**

Thus, in another Supreme Court case of **Gregory V. Tandoh & Anor [2010] SCGLR 971 t**he plaintiff, an African American came to Ghana and met the defendant and his wife in the Central Region. They became very close family friends to the extent that the plaintiff lodged and resided with the defendants in their rented accommodation anytime she visited Ghana. The Plaintiff had made it known to the defendants that she had planned to relocate to Ghana and make it her home. She was later convinced by the defendants to provide funds for the construction of a house on a vacant plot of land belonging to the defendants. The plaintiff obliged and contributed substantially to the construction of the house on the land after which plaintiff and defendant all moved into occupation of the house, the plaintiff occupying the first floor and the defendants the ground floor. Matters soon got out of hand and it became increasingly clear that the plaintiff's family and the defendant's family cannot cohabit together in peace in the same premises, The defendants

disputed the plaintiff's substantial contribution to the construction of the house followed by series of skirmishes, quarrels and criminal acts which often time were reported to the police. The plaintiff, therefore issued a writ at the High Court, Cape Coast against the defendants and lost both at the High Court and the Court of Appeal.

On further appeal to the Supreme Court, Dotse JSC contributing to the decision of the court called in aid the requisite equitable principles in order to do substantial justice in the following words:

"The plaintiff's contribution in equity will be deemed as contributions towards the house. We shall therefore call in aid equitable principles to give meaning to the quest of this court to do justice in all cases and to all manner of persons."

Gbadegbe JSC also contributing his opinion to that case posited:

"Although the appellant is not a spouse of the 1st respondent, I am of the opinion that it is permissible for us to grant to her a beneficial interest that is proportionate to her contribution. I think that the effect of her contribution to the acquisition of the disputed property is creating a resulting trust in her favor to the extent of her contribution. In the case of Cooke v. Head [1972] 2 All ER 38, the Court of Appeal applied the doctrine of resulting trust imposed by the courts on a legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit to the case of a mistress and a man who had by their cumulative efforts acquired a property for the purpose of setting up a home together."

Furthermore, in the case of **In Re Koranteng (Dec'd), Addo V Koranteng & Ors [2005-2006] SCGLR 1039,** Date Bah JSC had this to say:

"In essence, a resulting trust was a legal presumption made by the law to the effect that where a person had bought property in the name of another, that other person would be deemed to hold the property in trust for the true purchaser. It was a trust implied by equity in favor of the true purchaser or his estate upon death. The trust was regarded as arising from the unexpressed or implied intention of the true purchaser. Thus, for a resulting trust to be established there had to be proof that the purchase money for the disputed property had been advanced by the beneficiary of the resulting trust."

From the evidence adduced based on the facts of this case and the application of the law, I can deduce the following in favour of the plaintiff:

1. There was a common intention to share the property beneficially.

2. The defendant unilaterally changed his position and appropriated the property and income from the sale alone, a decision the defendant did not have power solely to make.

3. The High Court and the Court of Appeal were faced with two conflicting decisions in that while the High Court held that the Plaintiff was entitled to the price paid for the land in 2010 plus interest and damages of Ghc100,000, the Court of Appeal held that the plaintiff was entitled to the present market day value of the land.

4. For a breach of contract of this nature and for the court to do substantial justice, plaintiff ought to be put in the position it would have been but for the failure of the defendant to deliver the 70% portion of 30.16 acre of the land it held in trust to it. As a trustee, the defendant could not have legitimately appropriated the 70% of the land that belong to the plaintiff for its own benefit. See also **Ama Serwaa v**

Gariba Hashimu, Issaka Hashimu Civil Appeal No. J4/31/2020 14th April, 2021 and **Soonboon Seo v Gateway Worship Centre [2009] SCGLR 278.**

5. The plaintiff must be paid sufficient damages by way of compensation to enable it to purchase a similar land today. Thus, considering the fluctuations in the land property market, and the fact that the plaintiff cannot with the sum money today buy the same land it paid for in 2010, the compensation must be based on the current market value of similar acre of land.

6. The good public policy rationale directed by the Supreme Court in such compensations is to order a valuation of the property for the court to determine its current market value. This will give teeth to these contracts to enable them bite and bite very hard when such breaches occur and to emphasise the principle of stability of contracts.

Why should a person who pays money towards the purchase of land for a venture be denied the opportunity to decide what he wants to do with his investment when the venture has totally failed merely because another person desires for him not to have it? The evidence on record shows the defendant deliberately and conveniently breached the agreement thinking it may well gain for doing so. The courts would not lend support for such deliberate acts of wrongs.

It is my considered view that the Court of Appeal did not exceed or exercised its jurisdiction irregularly in reversing the decision of the court below by ordering that the disputed land be valued at the current market value and the plaintiff paid 70% of it.

In the light of all the facts and law expounded above, I will agree with the Court of Appeal that, the order by the trial judge for a refund of the plaintiff's contribution with interest plus damages of One Hundred Thousand Ghana Cedis (GH₵100,000.00) was a wrongful

exercise of the court's discretion and, therefore, woefully inadequate to restore the plaintiff to the position it would have been if the breach had not occurred.

On my part I will order the remaining portions of the 30.16 acre land at La East, La, behind the Ghana Trade Fair Company site and popularly called Tsaido that have not been affected by third parties' interest to be measured, and 21 acres which represents the plaintiff's interest be transferred to it. If the bare portions attached to Exhibit K does not make up the 21 acres, the defendant is ordered to pay up the remaining acres of land in monetary value at the present market value of the land.

In making these orders, I have considered the conduct of the defendant and the blatant breach of the agreement, the location and the value of the subject matter, the passage of time, the current market value of the disputed land and the equities of the case. Our courts are courts with complete jurisdiction when we sit to administer justice; our hands are not tied completely to the strict application of the law without recourse to the rules of equity.

It is for these reasons that I concurred with the lead dissenting view of my brother Kulendi JSC and agreed to dismiss the appeal and cross-appeal by the defendant but vary the award made by the Court of Appeal per the orders above.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

COUNSEL

ASSAD GBADEGBE ESQ. FOR THE DEFENDANT/RESPONDENT/ APPELLANT.

NANA BOAKYE MENSAH-BONSU ESQ. FOR THE PLAINTIFF/APPELLANT/ RESPONDENT.