IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

[COMMERCIAL DIVISION]

HELD IN CAPE COAST ON 5TH MAY, 2023

BEFORE HIS LORDSHIP JUSTICE EMMANUEL A. LODOH, J.

BFS/03/2022

AGRICULTURAL DEVELOPMENT BANK LTD. **PLAINTIFF**

ACCRA FINANCIAL CENTRE

3RD AMBASSADORIAL DEVELOPMENT AREA

RIDGE-ACCRA

VRS

ANTHONY ANNAN **DEFENDANT**

PLOT NO. E 20

ABURA VILLAGE EXTENSION

CAPE COAST

JUDGMENT

The jurisdiction of this court has been invoked by the Plaintiff bank to determine whether or not they are entitled to recover monies unpaid by the Defendant arising out of a loan facility contract and additionally monies allegedly inadvertently paid to the

Defendant by the Plaintiff bank. Thus per a Writ of Summons taken out of the Registry of the High Court, Commercial Court Division dated 17th December, 2021 the plaintiff seeks the following specific reliefs against the Defendant.

a. The recovery of the sum of Four Hundred and Seventy-Three Thousand, Eight Hundred and Sixty-Two Ghana Cedis, Seventy-Nine Pesewas (GH¢ 473,862.79) being outstanding balance on Term Loan of Fifty Thousand Ghana Cedis granted the Defendant on 26th March, 2012.
b. Interest on GH¢ 473,862.79 at the contractual default compound interest rate of 36% from 1st October 2021 to date of final payment.
c. The recovery of Four Hundred and Fifty-Five Thousand, Five Hundred and Ninety-Eight Ghana Cedis, Eleven Pesewas (GH¢ 455,598.11) being outstanding balance on Fifty Thousand Ghana Cedis credited to the Defendant's account on 9th May, 2012.
d. Interest on GH¢ 455,598.11 at the contractual default compound interest rate of 36% from 1st October, 2021 to date of final payment.
e. Legal Cost.

Synopsis of Plaintiffs' Case

The Plaintiff's case is succinctly outlined in their Statement of Claim filed on 17th December, 2021. The Plaintiff describes herself as a limited liability company engaged in banking activities. The unchallenged pleading of the Plaintiff is also that the Defendant is a customer of the Plaintiff Bank. The case of the Plaintiff is that it had disbursed an aggregate amount of One hundred thousand Ghana Cedis (GH¢100,000.00) in two separate transactions to the Defendant.

According to the Plaintiff Bank the first transaction was a term loan facility extended to the Defendant on 26th March, 2012 in the amount of Fifty thousand Ghana Cedis

(GH¢50, 000.00) at an interest rate of twenty-six per cent (26%) per annum calculated at a compound interest rate. The Plaintiff further contended that it was agreed that the interest rate to be applied in the event that the Defendant defaults in the payment of the loan facility was thirty –six per cent (36%).

The Plaintiff further states that a second disbursement of GH¢50, 000.00 was inadvertently made out as another loan facility to the Defendant on 9th May, 2012. That the Defendant promised to refund the inadvertent disbursement to him by the end of January, 2013, but he had since failed to do so. They further contend that the defendant has similarly failed to liquidate the loan facility granted him on 26th March, 2012.

Finally, the Plaintiff avers in paragraph 8 and 9 of their Statement of Claim in respect of the outstanding debt standing against the defendant and collateral as follows:

8. The Plaintiff says that as at 10th May, 2021, the principal sum together with the interest on the first facility disburse in April, 2012 stood at GH¢473, 862.79 while that on the second facility disbursed in May, 2012 stood at GH¢455, 598.11.
9. That Plaintiff says that the Loan was secured with Plaintiff's property located at Plot No. E20, Abura Village Extension Layout in Cape Coast in the Central Region of the Republic of Ghana.

Case of the Defendant

The Defendant case is set out in his Amended Statement of Defence filed on 3rd February, 2022. The Defendant admitted that he procured a loan facility in the amount of GH¢50,000.00 from the Plaintiff. He further admitted his default in the liquidation of the said loan facility in paragraphs 9 and 10 of his amended statement of Defence as follows:

9. The Defendant did not honour his obligations by paying the monthly instalments due to the disastrous flooding at Gomoa Okyereko in June 2012 which washed away his fishes from the ponds leading to a total collapse of his business.
10. This led to the unavoidable default by the Defendant on the first monthly payment and thereafter and the loan repayment became enforceable upon default.

The Defendant further contended in respect of the said loan facility that the interest rate was agreed to be calculated was at simple interest and not at compound interest.

The defendant also denied the plaintiff's attributions in respect of the GH¢50, 000.00 alleged inadvertent payment to him by the Plaintiff bank. He pleaded further that he did not execute any loan in respect of the so called inadvertent payment in paragraph 5 and 6 of his Amended Statement of Defence as follows:

5. Paragraph 5 and 6 of the statement of claim are denied and the Plaintiff shall be put to strict proof thereof.
6. The Defendant states that he has never executed any loan agreement with the Plaintiff in relation to all the alleged inadvertent disbursement of GHS50, 000.00 by the Plaintiff.

The Defendant finally pleaded limitation of action in paragraphs 11 and 12 of his Amended Statement of Defence as follows:

11. The Defendant states that the cause of action of the Plaintiff accrued since 2012 and therefore having waited to institute the present action on 17/12/2021, the

Defendant contends that the Plaintiff is statuted [sic] barred from instituting this action to recover the loan amount by virtue of Section 4 of the Limitations Act, 1972 (NRCD 54) since the cause of action accrued more than 6 years ago.

12. **The Defendant also state that even if the Plaintiff inadvertently disbursed GHS 50,000.00 to the Defendant in May 2012, which is denied, then the Plaintiff's cause of action on that amount accrued in 2012 and it is also statute barred from instituting this suit by Section 4 of the Limitations Act, 1972 (NRCD 54) since the cause of action accrued more than 6 years ago.**

Issues for Trial

The pre-trial judge in an order dated 4th April, 2022 set down the following issues for determination at trial. The issues were:

1. Whether or not the Plaintiff's Claim is statute barred.
2. Whether or not the Plaintiff is entitled to recover from the Defendant the balance of Four Hundred and Seventy-Three Thousand, Eight Hundred and Sixty-two Ghana Cedis, Seventy-Nine Pesewas (GH¢473,862.79) outstanding on term loan granted on 26th March, 2012 together with compound interest till date of final payment.
3. Whether or not the Plaintiff is entitled to recover from the Defendant the balance of Four Hundred and Fifty-Five thousand, Five Hundred and Ninety- Eight Ghana Cedis, Eleven Pesewas (GH¢455,598.11) outstanding on Fifty Thousand Ghana Cedis credited to the Defendant's account on 9th May, 2012 together with compound interest till date of final payment.
4. Any other issue(s) which may arise out of the Pleadings.

The Trial

During the trial Joshua Ntow Dade, who described himself as the UCC Branch Manager of the Plaintiff Bank, testified on behalf of the Plaintiff Bank. He relied on his witness statement filed on 13th June, 2022. The Plaintiff did not call any witnesses to their aid. The Defendant also testified and relied on his witness statement filed on 10th June, 2022 and supplementary witness statement filed later on 17th June, 2022. He similarly did not call any witness to his aid.

Issue 1

Whether or not the Plaintiff's Claim is statute barred.

The first issue I will deal with is whether or not the action is statute barred. The reasons for taking this as a preliminary issue is obvious and begets no elaboration, except to say that this issue is potentially dispositive of the case without going into the merits. There is a plethora of judicial decisions to the effect that it is procedurally proper for such issues when raised in the pleadings to be dealt with before the merits of the case is considered, if necessary. In the case of now reported case of **Jean Hanna Assi vs. Attorney-General & ors [DCSC Civil Appeal No. J4/17/2016** dated 9 November 2016], on the question whether or not the Plaintiff's action was statute barred, the court emphasised that: *"If indeed it is, then there is no need to look at the merits of the case since the statute of limitation is a venerable shield that can be used to ward of indolent and piece meal litigators".*

This condition is underpinned by the purpose of the Limitation Act, 1972 (NRCD 54) as clearly stated in the Court of Appeal case of **Amoa and Another v Abeka [1976] 1 GLR 441** as follows:

> **"The object of the Limitation Acts was to limit the periods within which legal proceedings could commence and being a time limiting factor, it had to have a certain or ascertainable starting point".**

In **Burkett v James [1977] 2 All ER 801 at 815**, Lord Edmund Davies reiterated the reasons for statutory provisions imposing periods of limitation. He said:

> *"…Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is reasonably possible for them to do so …. Thirdly, the law is intended to ensure that a person may with confidence feel that after a given period he may regard as finally closed an incident which might have led to a claim against him; and it was for this reason that Lord Kenyon described statutes of limitation as statutes of repose".*

The first question though to determine is which party is saddled with the legal burden in establishing issue of limitation of statutes. My view as expressed in case law is that the burden is on the Plaintiff to dislodge a plea of statute of limitation raised in the defence. In the case of **Bogoso Gold Ltd v. Ntrakwa & Another [2011] 1 GLR 415** the court held in respect of who bears the burden of proof has follows:

"In our view, having regard to the rule on pleadings, it is the defendant's responsibility to raise the defence of statute of limitation even if it appears on the face of the pleadings that the action is caught by the statute of limitation. When such a defence is pleaded then the burden of dislodging it shifts to the plaintiff".

It is trite law that the limitation period within the context of bringing an action commenced by Writ simply means the period beyond which a person cannot bring an action in court from the date the cause of action accrued. In the case of **Ghana Commercial Bank Ltd v Commission on Human Rights and Administrative Justice [2003-2004] SCGLR 91**, the court held that:

"Under section 4 of the Limitation Decree, 1972 the complainant had six years to institute action to enforce his rights. He took action by lodging the complaint with the commission in 1993, nine years later. Therefore, by the time he took action on his complaint at the commission and the commission made its decision or recommendation and referred it to the High Court for enforcement, section 4 of the Decree had barred the enforcement by the High Court. The remedy barred by law could not by any stretch of the imagination or strength of argument be described as remedy available in a High Court of Justice such as the instant case. The enforcement of the instant decision on recommendation by the commission was not available in any High Court."

This is an action for the recovery of debt based on contract. Indeed section 34 of NRCD 54 defines statute barred debt as a debt in respect of which the period fixed by the Act for bringing an action to recover it has expired. So the predicate question is to determine when the cause of action accrued? In determining this issue, I will decouple the two transactions alleged by the Plaintiff for a better rendering and understanding of my reasons.

Undisputed Loan Facility

The threshold question however is whether or not there is evidence to support the plaintiff claim that they extended a loan facility of GH¢50,000.00 to the Defendant on 26th March, 2012. The pleadings will show that no issues were joined in respect of this averment. In paragraphs 5, 6, and 7 of the witness statement of Joshua Ntow Dede as follows:

5. On 26th March, 2012 the Plaintiff granted the Defendant a term loan of Fifty Thousand Ghana Cedis (GH¢ 50,000.00) which he had explained he would use to finance his purchase of fingerlings and fish feed to rear tilapia. A copy of the loan agreement is attached as Exhibit "A".

6. The interest rate per the terms of the loan agreement was twenty-six percent (26%) per annum calculated at a compound interest rate but where the client defaulted in repaying the loan, the rate was to increase by ten percent in this case to thirty-six percent (36%) per annum.
7. The principal together with the interest was supposed to be paid in fourteen (14) equal monthly instalments.

Clause 4 of the Term Loan Contract dated 26th March, 2012 (Exhibit "A") provides as follows:

4. The Loan is to be repaid in 14 equal monthly principal instalment of GHC3,571.43 each, plus interest thereon payable on the last business day of each month, commencing 5 calendar months from the date of first draw down.

The Plaintiff admitted that he procured the said loan facility from the Defendant in his pleadings. In paragraph 7 of the Defendant's Amended Statement of Defence he states as follows:

7. The Defendant in response to paragraph 7 states that the loan agreement for the GHC50,000 was to the effect that some will be repaid in 14 equal monthly principal instalments of GH¢ 3, 571.43 each payable on the last business day of each month and payment commencing 5 calendar months from the date of first draw.

In his book **"Essentials Of The Ghana Law Of Evidence", 2014 ,** S.A. Brobbey at page 112-113 comments on the importance of admissions thus;

"The importance of admissions lies in the fact that the court can act on them without proof of the facts constituting the admissions. Admissions therefore constitute the second category of matters which require no proof. The rationale for this rule is obvious. If a person admits or concedes to facts which are against his interest, there is no need to proceed further to prove those facts before he would be bound by the terms of those facts".

The legal effect of admissions is explained in the case of **Kai vs. Amarkye [1982-83] GLR 817** as follows:

"Failure to deny either specifically or by implication allegations of facts amounted to admission of them and no further proof of that was required."

My understanding of the evidence of the Plaintiff and the admissions by the Defendant is that the Defendant had contracted to complete the repayment of the loan with interest in fourteen (14) months.

The unchallenged evidence of the Plaintiff in respect of the contents of the Defendant's Bank Statement (Exhibit "B") is that the said loan was disbursed into the Defendant's bank account on 27th April, 2012. This to all intent and purposes would mean that the Defendant was expected to commence the repayment of the loan (per the first draw down clause) in September, 2012. Further per the terms of the contract, the repayment of the loan ought to have been completed on or about November, 2013 (that is fourteen months from date of first draw down). Indeed the evidence on the Plaintiff is that the first demand notice was made on the Defendant on 5th April, 2013.

From these pieces of evidence I find evidence has been put before the court by the Plaintiff to ground and inference that the cause of action to recover the debt inclusive of the interest from the defendant in respect of Exhibit "A" accrued in the November 2013.

The record will show that this action the writ was issued on 17th December, 2022 which translates into a period of about nine (9) years between the time the cause of action accrued and the time the instant writ was issued.

Applicable Law

I will now proceed to determine the applicable law in the light of the circumstances of this case regarding the limitation of actions. It is trite law that the Limitation Act, 1972 (NRCD 54) provides the legal framework under which such issues are positioned. The argument of counsel for the plaintiff in her written submission filed on 27th April, 2023 is that since the loan amount and interest recoverable was secured by mortgage the applicable provision is section 13 of NRCD 54. On the other hand the submission of counsel for the Defendant on the question is that the cause of action is based on a simple contract and therefore section 4 of NRCD 54 was is rather the applicable law. Counsel for the Plaintiff in her defence of her position stated at page 3 of her as follows:

> **"My Lord, It is the case of the Defendant that the right of the Plaintiff accrued in June 2012 and thus failure to recover the debt till December 2021 when the writ was issued meant that it had been over six (6) years and so the claim was statute barred. The Plaintiff has denied this. In respect of this, the Limitations Act 1972 (NRCD 54) provides in section 5 as follows:**
>
> > ***A person shall not bring an action after the expiration of twelve years from the date on which the cause of action accrued, in the case of (a) an action on an instrument under seal, other than for the recovery of arrears of an annuity charged on movable property, or a principal sum of money or arrears of interest in respect of a sum of money secured by a mortgage or any other charge...***

In the instant case, the Plaintiff stated in the Statement of Claim that the loan was secured with the Defendant's property situate at Plot No. E20 Abura Village Extension Layout at Cape Coast. This was repeated in paragraph 21 of the Plaintiff's Witness statement and supported by Exhibit H which is a mortgage executed by the Plaintiff and Defendant. This was never challenged under cross examination or denied by the Defendant. From here, it is clear that because the loan was a mortgage and not a sum due under a simple contract, the claim for the sum is generally not statute barred after six (6) years but rather after twelve (12) years. Thus, assuming that the date of accrual was indeed June 2012 then the expiry of the period should have been May 2024. However, section 13(3) of NRCD 54 provides that in respect of mortgages, recovery of interest becomes time barred after six (6) years and not twelve (12). Meaning that the time limit for the principal would be 12 years while that of the interest would be 13 years. This would mean that should the accrual period for the loan be June 2012, it would be statute barred by May 2018".

Counsel for the Defendant in his defence submitted in his submissions filed on 28th April, 2023 as follows:

> **"In the case of the Defendant per the Writ of Summons initiated and filed on 17th December, 2021 the Plaintiff's action is caught by the Limitations Act 1972 (NRCD 54), specifically 4(b).**

Both lawyers have shown by their submissions that they are at cross-purposes in respect of which law should be applied. A synthesis of the submissions of both lawyers will disclose an invitation to the court to determine whether the applicable law in this case regarding the limitation of actions is sections 4 or section 13 of NRCD 54.

It is trite knowledge that the NRCD 54 is couched in a manner that creates limitations for specific subject matter areas and accordingly provides specific timelines in respect of the subject matter of the litigation. That being the case it is necessary that an analysis of the factual antecedents of this case be conducted in order for the court to determine the law applicable.

The undisputed evidence of the plaintiff is that the loan was secured by a mortgage of a property belonging to the Plaintiff, that is, Plot number E20, Abura Village Extension Layout in Cape Coast. An examination of Clause 6 of the contract (Exhibit "A") will disclose the following terms under the heading "Security":

6.1. Security Held

First ranking legal mortgage in favour of ADB over property situate at Plot Number E.20 Abura Village, Cape Coast, Central Region

The Security

6.2. ADB requires the Security to cover the loan and all the other banking facilities granted to the Borrower, whether direct or contingent and howsoever arising.

Again the Plaintiff tendered the mortgage instrument (Exhibit "H") executed between the parties on 11th April, 2012 with a preamble as follows:

"This mortgage is made 11th day of April, 2012 between ANTHONY ANNAN OF P.O. Box 1395, Cape Coast in the Central Region of the Republic of Ghana (hereafter called "the Mortgagor"…) ….and Agricultural Development Bank…(hereafter called "the Mortgagee"…)

1. **At the request of the Mortgagor the Mortgagee has agreed to lend the Mortgagor the sum of GHS50,000.00….together with interest and charges thereon as may be agreed by the parties from time to time,…"**

From the pieces of evidence adumbrated earlier, I find as the case that this action is to all intent and purposes is a mortgage action for the recovery of debt secured by mortgage. My reasons for describing the instant action as a mortgage action is underpinned by some relevant laws. Section 1 (1) of the Mortgages Act, 1972 (NRCD xxxx) explains a mortgage as follows:

1. (1) A mortgage for the purposes of this Act is a contract charging immovable property as security for the due repayment of a debt and the interest accruing on the debt or for the performance of any other obligation for which it is given, in accordance with the terms of the contract.

Again Order 59 rule 2 defines a mortgage action as follows:

> "mortgage action"' means an action in which there is a claim by the plaintiff for any of the following relief's
>
> **(a) payment of moneys secured by a mortgage or charge**; (emphasis is mine).
>
> (b) sale of the mortgaged property;
>
> (c) appointment of a receiver;
>
> (d) delivery of possession to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person who is or is alleged to be in possession of the property;
>
> (e) release of the property from the security;

(f) delivery of possession by the mortgagee

The record will show that the Defendants did not controvert the evidence of the Plaintiff in relation to the antecedents of this case as stated supra, particularly the execution of the mortgage deed as security for the repayment of the loan amount. I therefore find that the case is circumscribed in mortgages and therefore I do not accept the submission by counsel for the defendant that this is an action founded on simple contract. My decision is further fertilised by the *Generalis Specialibus non Derogant* rule which provides that **s**pecial law is given superiority over general law. This principle was explained in the **Halsbury's Laws of England 4th edition volume 44 paragraph 785** as follows:

> *"Whenever there is a general enactment in a statute which if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the ports of the statute to which it may properly apply."*

Indeed under section 4(b) of the NRCD 54, I do not believe that the definition of a "simple contract" was intended to include mortgages, which to my mind goes beyond a simple contract. Thus I find that the applicable law is section 13 (1) and (3) of NRCD 54 is the applicable law in respect of the recovery of the principal amount and interest respectively.

Section **13 (1) and 3 of NRCD 54** provides as follows:

> 13. (1) A person shall not bring an action to recover a principal sum of money secured by a mortgage or charge on property, whether movable or

immovable, other than a ship, after the expiration of twelve years from the date when the right to receive the money accrued.

(3) A person shall not bring an action to recover arrears of interest payable in respect of a sum of money secured by a mortgage or charge on movable or immovable property, other than a ship, or to recover damages in respect of the arrears, after the expiration of six years from the date on which the interest became due.

From the earlier finding that nine years has elapsed since the cause of action accrued for the recovery of the debt, I agree with counsel for the plaintiff that the action for the recovery of the principal amount has not been extinguished. I will now deal with the question of whether or not the action for recovery of interest has been stature barred. The law as I have stated earlier, is that the money the length of time between the time the cause of action accrued and time of issuance of the writ is 9 years. Thus applying section 13 (3) to the evidence, it does appear on the evidence per se that time has long elapsed for court action for the recovery of the interest.

My understanding of the Reply and the evidence of the Plaintiff is an admission that more than six years had elapsed before the action was filed. They however denied that the action was statute barred because the cause of action did not accrue in 2013. They pleaded and led evidence in respect of incidents which purports to postpone the accrual of the cause of action.

The Plaintiff in their Reply denied that the action was statute barred on the grounds that the Defendants made payment in 2019 and 2018. They pleaded in their Reply filed on 6th February, 2022 as follows:

8. The Plaintiff denies paragraph 11 and 12 of the Statement of Defence and says that the suit is not statute barred.
9. The plaintiff further says that it has been making diligent efforts to recover the debt and even in 2019 and 2018, the Defendant issued cheques for payment of part of the debt except that the 2019 cheque was dishonoured while the 2018 cheque was to be drawn on the Defendant's Account with the Plaintiff bank, which did not have enough funds.

The Plaintiff's representative also stated as follows in his witness statement:

10. Since the loans were disbursed, the Defendant has failed to pay the monthly instalments despite several notices from the Plaintiff to the Defendant in writing and via phone calls. Two of such demand notices dated 5th April 2013 and 10th February 2016 are attached as Exhibit "C" and Exhibit "C1" respectively.
11. Due to the calls and the demand notices, the Defendant made some attempts to pay the money by issuing cheques to the Plaintiff Bank.
12. One of such cheques issued was dated 31st March 2018 and had a face value of twenty thousand Ghana Cedis (GH¢ 20,000.00). However, this cheque could not be paid because it was to be drawn on the Defendant's account with the Plaintiff and at the time it was due, the Plaintiff had no money in his account. A copy of the said cheque is attached as Exhibit "D".
13. Later in 2019, the Defendant issued two more cheques to the Plaintiff. These cheques were issued in his own name from the account of his own company known as Antelli Agricon. Attached is Exhibit "E" which is a letter from the Registrar General's Department indicating that the Defendant owns the company.

14. The said cheques were Zenith Bank cheques numbered 000343 and 000344. Cheque numbered 000343 was paid into the Defendant's account on 19th September 2019.

15. The second cheque with cheque number 000344 with a face value of two thousand Ghana Cedis (GH¢ 2,000) was also paid into the account on 10th October 2019.

16. Both cheques were given to the Plaintiff for the purpose of defraying the debt owed by the Defendant and the Defendant used the monies to defray portions of both debts owed by the Defendant.

The record of evidence will show the Defendant did not cross-examine the defendant on these pieces of evidence. The record will further show that the Plaintiff tendered the said cheque as Exhibit "D", with the issuer of the cheque being the Defendant. Having failed to cross-examine the Plaintiff in respect of these pieces of evidence I find that the Plaintiffs evidence on the existence of the cheques issued as admitted. In the case of **FORI v. AYIREBI AND OTHERS [1966] GLR 627** the decision of the court on the legal effect of admissions was summarised in holding 6 of the report as follows:

"When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact"

Notices to Recover Debt

One of the reasons the Plaintiff gave for saying their action was not statute barred is that they have been issuing notices or making demands on the Defendant to redeem the loan. The Plaintiff's tendered these demand notices (see Exhibits "C" series). My view

on the legal effect of these demand notices on limitation of actions is that NRCD 54 does not provide for such scenarios. Thus unless these demands notices are acknowledged, I am of the view that sending demand notices does not stop the limitation period from running. Indeed in the case of **Fiaga vs. Ghana Cocoa Board [1992] 2 GLR 393** and, in rejecting that argument, the court held that in respect of negotiations as that:

> *"Where parties embarked on negotiations and eventually agreed on the issue of liability, a defendant, when sued out of time, could not plead a statute of limitation as a bar to the action. Where, however, there had not been an agreement, as in the present case; where no evidence to the effect that the defendants had accepted liability was tendered, the plaintiff could not be heard to say that he was negotiating with the defendant and accordingly should be allowed to commence his action outside the limitation period".*

I find from the evidence that the defendant denied knowledge of having received these demand letters. I also find that the Plaintiff failed beyond exhibiting the letters, to provide sufficient evidence to establish to the requisite degree of believe that these letters were received and acknowledged by the Defendant.

Plaintiff next leg of evidence was that the Defendant sent cheques for purposes of servicing the debt in 2018. Exhibit "D" is the undisputed copy of the cheque dated 31st March, 2018. Paragraph 14 and 15 of the unchallenged evidence in chief of the Plaintiff was also that cheques had been issued by the Defendant in September and October, 2019.

During cross-examination of the Defendant, when he was asked about the purpose of these cheques, he responded as follows:

Q. You agree with me that you even signed cheques at various times to pay off the loan

A. Not correct. Those deposits that are apparent in the statement of account that the plaintiff exhibited where prompts that I have to keep the account active because I have discussed with the manager that since the fish farm was practically defunct I will need to use my collateral that was already at the bank to access a future loan. So, he advised that I had to keep the accounts active one way or the other by making some deposits.

Firstly, I do not accept the evidence of the Defendant as reasonably probable. He does not deny that he was indebted to the Bank, so the question is whether a reasonable man's cause of action when faced with liabilities which was attracting interest on a monthly basis would rather decide to keep an account active by depositing monies as much as GH¢20, 000.00 instead of liquidating those debts. My view is that the explanation of the Defendant that these cheques were drawn for purposes of keeping the account active was not reasonably improbable, I rather have acceptance for the Plaintiff evidence that these cheques were deposited for purposes of liquidating the debt.

Section 17 (1) (a) of NRCD 54 provides as follows in respect of fresh accruals on acknowledgment.

17 (1). For the purposes of this Act, the right of action accrued on, and not before, the date of the acknowledgement, (a) where a right of action has accrued to recover a debt and the person liable for the debt has acknowledged the debt; or

19.(1) For the purposes of this Act, the right of action accrued on, and not before, the date of the payment, (a) where a right of action has accrued to recover a debt, and the person liable for the debt makes a payment in respect of the debt; but for the debt for the purposes of this provision payment of interest in whole or in part shall be treated as a payment in respect of the principal debt;

My understanding section 17 (1) (a) and 19 (1)(a) of NRCD 54 is that the time for the accrual of the cause of action is reset on the date that a debt is acknowledged or payments made in respect of the debt. Thus the question is whether evidence has been put before this court to evince that the Defendant acknowledged the debt or made payments in respect of the debt following which time will start to run.

Section 17 (2) and (3) of NRCD 54 further provides that:

17(2). An acknowledgment shall be in writing and signed by its maker.

S. 17(3) An acknowledgement under this section may be made by the agent of the person by whom it is required to be made, and shall be made to the person or the agent of the person whose right or claim is being acknowledged.

Firstly, the law does not provide a prescribed form in which the acknowledgement must be made, it simply states that it must be in writing. The unregulated form of an acknowledgement as required under section 17 of NRCD 54 was acknowledged in the unreported c High Court case of **First Atlantic Bank Ltd. v Sefos & Sons Ltd and Anor (suit no. BFS 201/2014 delivered on 20th June, 2019, by his Lordship Richmond Osei Hwere, J.)** which I find persuasive. Learned Judge opined as follows:

"Section 13(1) of the Statute of Limitation Act (NRCD 54) provides as follows:

> *"No action shall be brought to recover any principal sum of money secured by a mortgage or charge on property, whether movable or immovable after the expiration of twelve (12) years from the date when the right to receive the money accrued".*

Subsection 3 of the section 13 further provides:

> *"No action shall be brought to recover arrears of interest payable in respect of any sum of money secured by a mortgage or charge on movable or immovable property or to recover damages in respect of such arrears, after the expiration of six (6) years from the date on which the interest became due."*

From section13 of NRCD 54 it is easy to conclude that the current action is out of time since the loan facility was a short-term loan which was due in 2005. However, the right of the Plaintiff to institute the present action is revived by the exceptions provided in NRCD 54 such as acknowledgement or part payment of the debt. Section 17(1)(a) of NRCD 54 provides:

> *"In the following cases the right of action shall be deemed to have accrued on and not before the date of acknowledgement: (a) where any right of action has accrued to recover any debt and the person liable therefore has acknowledged the debt."*

The Black's Law Dictionary (8th edition, 2004) defines acknowledgement of debt as:

> *"A recognition by a debtor of the existence of a debt". The profound question is: What amounts to an acknowledgement of a debt?*

In Chitty on Contracts, 31st edition volume 1 page 2000, the author commented on the form an acknowledgement must take when it was stated as follows: "The

acknowledgement must be in writing and signed by the person making it…As to the requirement of writing, the following (inter alia) will qualify: correspondence, an account rendered, a recital in a deed, a company's balance sheet, an affidavit and a pleading"

From the foregoing my considered view is that in the absence of a prescribed form any document from which an acknowledgment of a debt can be inferred to all intent and purposes must be deemed to constitute an acknowledgement of the debt. Thus the issuance of a cheque in my considered view provides the requisite factual and qualitative basis to ground and inference that a step had been taken to acknowledge the debt by issuing the cheque for the payment of the outstanding amount. Therefore to my mind the cheque issued in March, 2018 by the Defendant and for that matter all the other cheques issued in 2018 and 2019 constitutes an evidence of acknowledgement of the debt and therefore an accrual of a fresh cause of action.

Again applying section 19 (1) (a) to the evidence, I find that the attempt to liquidate the debts through the issuance of the cheques impacts on the computation of the accrual of the cause of action. To my mind therefore, I find that the cause of action commence 2019 when the Plaintiff stated in his unchallenged evidence in paragraph 13 and 14 of his witness statement as follows:

13. Later in 2019, the Defendant issued two more cheques to the Plaintiff. These cheques were issued in his own name from the account of his own company known as Antelli Agricon. Attached is Exhibit "E" which is a letter from the Registrar General's Department indicating that the Defendant owns the company.
14. The said cheques were Zenith Bank cheques numbered 000343 and 000344. Cheque numbered 000343 was paid into the Defendant's account on 19th September 2019.

Accordingly I find that the action in respect of the recovery of the interest on the term loan facility agreement is not statute barred.

Inadvertent Disbursement

In respect of the inadvertent disbursement, and given the denials by the Defendant in his Statement of Defence, it is my considered view that before the question of limitation can be considered, it is imperative that the Plaintiff puts before this court evidence to show that indeed the inadvertent disbursement of GH¢50, 000.00 was credited to the Defendant. This finding is in line with the general duty of the Plaintiff to establish its allegations against the Defendant. The law of proof in civil cases is stated under section 10(1) (2) (b), 11(1) (4), 14 and 17 of the Evidence Act, 1975, NRCD 323. In the case of **Okudzeto Ablakwa (No. 2) vs. Attorney General & Another [2012] 2 SCGLR 845 at 867** the court explained the law governing proof when it stated that:

> *"If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish."*

Again in the case of **Takoradi Flour Mills vs. Samir Faris [2005-2006] SCGLR 882**, the court explained the burden cast by law on a plaintiff as follows:

> 7. *"It is sufficient to state that this being a civil suit, the rules of evidence require that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in section 12(2) of the Evidence Decree, 1975 (NRCD 323). In assessing the balance of probabilities, all the party in whose*

favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict"

Finally the nature of the evidential burden is discussed in the case of **Ackah v Pergah Transport Ltd [2010] SCGLR 728** as follows:

"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10(1) and (2) and (11(2) and (4) of the Evidence Act, 1975, (NRCD 323)".

The denial by Defendant was expressed in paragraph 5 of his Amended Statement of Defence as follows:

5. Paragraph 5 and 6 of the Statement of Claim are denied and the Plaintiff shall be put to strict proof thereof.

Before I deal with the evidence of the Plaintiff in respect of proof of their claim that they inadvertently disbursed an amount of GH¢50,000.00 to the Defendant for which they asked him to subsequently to return same, I cannot help but ponder why the defence of limitation of statute was raised in respect of the inadvertent payment when the

Defendant by his denial would be understand to mean that no disbursement were made to him. This is because my understanding of his defence of limitation is that the money was disbursed to him, he received same but the Plaintiff is statute barred to recover same.

Be that as it may, what evidence did the Plaintiff put before this court in proof of the inadvertent disbursement? I find from the Plaintiff's Exhibit "B", which is the bank accounts statement of the defendant that a disbursement of GH¢50,000.00 and described as "Loan Disbursement" was lodged into his bank account on 9th May, 2012. That is after the first loan disbursement had earlier been made on 27th April, 2012. During the trial the evidence regarding the disclosures made in the Defendant's Bank Statement (Exhibit "B") remained unchallenged.

During cross-examination of the Defendant on the issue of the second disbursement, he gave the following responses to question posed by counsel for the Plaintiff:

Q. You will agree with me that a second fifty thousand cedis was lodged by the plaintiff into your account

A. That is true. I usually go to the bank to withdraw money after asking for my balance and my balance will usually comprise of deposits by customers who pay for products in advance or creditors who will pay money into my account they know my account number so my balance was the only indication of how much I could take.

Q. When this GHS 50,000.00 was lodged into your account did you enquire from your client as to which of them had paid this GHS 50,000.00?

A. No. that was not necessary because they will usually come and collect the fish anyway

Q. Did you make any enquiry from the bank as to the source of this GHS 50,000.00?

A. No. I did not notice the GHS 50,000.00. I only noticed the reducing balance.

Q. I suggest to you that as at 2012, fifty thousand Ghana cedis was a substantial sum of money and you ought to have reported the lodgment to the bank.

A. No. The level of my operations does not make fifty thousand Ghana cedis a colossal amount

The responses given by the Defendant will show that even though the defendant was aware of the deposit of GH¢50,000.00 his explanation was that he did not find it necessary to trace the source of the funds. I find the explanation of the Defendant too incredible to be reasonably probable. The question is whether it is reasonably expected of a prudent and presumably educated businessman to conduct his relationship with his bank such a way that he did not find it material in his personal dealings to ascertain the sources of credit transactions made to his his bank account.

Indeed I find further the denial of the Defendant of the existence of the second disbursement not probable because by his own showing in paragraph 14 and 15 of his witness statement that he knew the source of the second disbursement of GH¢50,000.00. In the said two paragraphs the Defendant stated as follows:

14. The Plaintiff says that she inadvertently disbursed a loan of GHC50,000.00 into my account with them on 9th May, 2012.

15. The Plaintiff has no contractual obligation on me for the refund of this amount which I believe was done deliberately or with intentions of the staff officer to defraud the bank.

A synthesis of the Defendant's evidence is that of an admission that he was aware of the second disbursement of GH¢50,000.00, albeit to his mind a suspicious transaction by the officers of the bank to allegedly defraud the bank. My conclusion therefore on this issue is that the Plaintiff has established on the evidence that a disbursement of GH¢50,000.00 was made to the Defendant to the knowledge of the Defendant.

I will now deal with whether or not the recovery of this second disbursement was statute barred. In arriving at a decision I hold the considered view that it is immaterial whether or not the said second payment of GH¢50,000.00 was inadvertent or was posted with the intention to defraud the bank. The key question is whether or not the Defendant entitled to deny Plaintiffs title to the said amount by withholding it from them for such a long period, when he knew the said funds did not belong to him.

The evidence of the Plaintiff is that the said disbursement was converted into a loan facility. I agree with the defendant when he says that no such loan agreement was executed between the parties in respect of the so called inadvertent payment. This is because I find no evidence of such any such contractual loan agreement.

Given these finding, I further find that the Defendant having testified that he did not apply or contract to be disbursed with this amount was under a duty or for that matter obligated to return the said amount immediately had had knowledge of same or report his fears to the bank and not appropriate the amount. I daresay that by withholding the said amount from the Plaintiff amounts to a dishonest appropriation and therefore it was unlawful to withhold same from the Plaintiff.

As indicated earlier I find that the second disbursement of the GH¢50,000.00 was not the subject matter of any contract. Thus it is my considered view that since the second

disbursement of GH¢50,000.00 was not the subject matter of any contract and for that matter fall under any of the subject matter provisions of NRCD 54, this transaction is not subject to any limitations of statute, principally because the withholding of the said amount by the Defendant was coloured with unlawfulness. Accordingly, find that the defence of limitation does not apply to the Plaintiff's recovery of the second disbursement of GH¢50, 000.00

Issue 2

The next issue is to determine whether or not the Plaintiff is entitled to recover from the Defendant the balance of Four Hundred and Fifty-Five thousand, Five Hundred and Ninety- Eight Ghana Cedis, Eleven Pesewas (GH¢455,598.11) being outstanding on Fifty Thousand Ghana Cedis credited to the Defendant's account on 9th May, 2012 together with compound interest till date of final payment.

Firstly, it is not in dispute that the Defendant had failed to refund the entirety of the second disbursement which to my mind was due immediately it was paid but I recognise that the Defendant was asked to refund same by January, 2013. I therefore find that the Plaintiff is entitled to recover the outstanding balance. I further find that the Plaintiff is entitled to recover interest on the said outstanding balance.

As indicated earlier, even though the Plaintiff described the transaction as a loan facility I find no evidence of same, and it is unclear why they claim it is a loan when they have described it an inadvertent disbursement.

Be that as it may, even though the second disbursement was not a subject matter of a contract, it is my considered view that the Plaintiff is entitled to recover interest on the withheld amount. In the case of **GHANA COMMERCIAL BANK v. BINOO-OKAI [1982-83] GLR 74,** the court held that **"The basis of an award of interest was that the**

defendant had kept the plaintiff out of the use of his money, and the defendant had had it, so he should compensate the plaintiff".

However, since there is no evidence of an agreement on the interest rate, it is my considered view that the interest rate to apply is that which is contained in the interest rate regime as contained under Rule 1 of the Rule 1 of COURT (AWARD OF INTEREST AND POST JUDGEMENT INTEREST) RULES 2005 (C.I. 52) which provides as follows:

> **If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated**
>
> **(a) at the bank rate prevailing at the time the order is made, and**
>
> **(b) at simple interest**
>
> **but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner the court shall award that rate of interest calculated in that manner**.

Consequently, I find no merit in the figures contained in Exhibit "F1" since it will be presumed that the Plaintiff may have calculated it using the same formula it was inviting the court to apply. Accordingly, I hold that the Plaintiff is entitled to recover in respect of the second disbursement, the principal amount minus the amount already paid, from January, 2013 at the prevailing bank rate and at simple interest to date of final payment.

Issue 3

The next issue is to determine whether or not the Plaintiff is entitled to recover from the Defendant the balance of Four Hundred and Seventy-Three Thousand, Eight Hundred and Sixty-two Ghana Cedis, Seventy-Nine Pesewas (GH¢473,862.79) outstanding on term loan granted on 26th March, 2012 together with compound interest till date of final payment.

Again it is not in dispute that the defendant had failed to liquidate the loan facility. The only dispute arising from this transaction is whether or not the interest rate claimed by the Plaintiff is that which was agreed upon.

It is the general rule that parties are bound by the contract they enter into. In the case of **Inusah v D.H.L Worldwide Express [1992] 1 GLR 267** the court held as follows on the question:

"The general rule was that when a document containing contractual terms was signed, then in the absence of fraud or misrepresentation, a party of full age and understanding was bound to the contract to which he appended his signature. In such a case it would be immaterial whether he read the document or not".

The Plaintiff and the Defendant both tendered the Term Loan facility agreement. Clause 5.1 provides for the payment of interest as follows:

5.1 **Interest**

5.1.1. 9.25% per annum above ADB's Base Rate prevailing from time to time (currently 16.75% per annum);

5.1.2 ADB's Base Rate is the publicly quoted rate per annum for the Ghana Cedi ruling from time to time, subject to change at ADB's sole discretion:

5.1.3 The Loan has an annual percentage rate of 31.88%.

5.1.4 ADB reserves the right to amend the interest and the method of calculating it at any time in line with market conditions. I ADB does so a written advice of the amendment and its effective date will be sent to the Borrower within a reasonable time prior to the change.

5.2 **Excess and Default Rate**

Should the Borrower fail to make repayment of any amounts due as stipulated in clause 4 above, or should the Borrower exceed the limit on the Loan (whether this has been agreed to by ADB or not), interest will be charged at 10% per annum above the interest rate payable by the Borrower under clause 5.1 herein, provided that this rate does not exceed the legal maximum permissible rate, if applicable. Such additional interest shall be charged from the date on which such amounts fell due or from the date of excess, to the date on which such amounts are actually paid or such excess is repaid.

The Plaintiff explained these provisions in paragraph 6 of his Witness Statement as follows:

6. The interest rate per the terms of the loan agreement was twenty-six per cent (26%) per annum calculated at a compound interest rate but where the client defaulted in paying the loan, the rate was increased by ten percent in this case to thirty-six percent (36%) per annum.

Unfortunately, no contrary interpretation was put to the above provision by the Defendant. My reading of the combined effect of clause 5.1.1 and 5.2 of the contract aligns with the evidence of the Plaintiff that the chargeable interest rate was 26% per annum and upon default the outstanding unpaid balance will attract an interest rate of

36%. What I do not find in the contract is proof of the claim that the interest was to be at compound interest. This is because same is not expressed in the contract. Therefore as indicated earlier, per C.I 52, the interest rate to be charged will be at simple interest.

I further find that the Plaintiffs per the unchallenged Statement of Account (Exhibit "F1") had not applied 36% default rate since 31st July, 2013 before arriving at the GH¢473, 862.79 sum in September, 2021. They rather on the face of the document applied the interest rate of 26% over the tenure of the unpaid duration.

Conclusion

In conclusion I find that the Plaintiff has put before this court evidence to ground a finding in their favour that they have satisfied the court on the balance of probabilities that they are entitled to the reliefs sought, albeit with some modifications. I accordingly enter judgment for the Plaintiff as follows:

a. The recovery of the sum of Four Hundred and Seventy-Three Thousand, Eight Hundred and Sixty-Two Ghana Cedis, Seventy-Nine Pesewas (GH¢ 473,862.79) being outstanding balance on Term Loan of Fifty Thousand Ghana Cedis granted the Defendant on 26th March, 2012.
b. Interest on GH¢ 473,862.79 at the contractual default interest rate of 36% from 1st October 2021 to date of final payment at simple interest
c. The recovery of Fifty thousand Ghana Cedis (GH¢50,000.00) from the Defendant credited the Defendant's account on 9th May, 2012.
d. Interest on the said GH¢50,000.00 from January, 2013 at the prevailing bank rate and at simple interest to date of final payment.
e. Cost of GH¢50,000.00 against the Defendant in favour the Plaintiff.

(SGD)

Emmanuel Atsu Lodoh, J

(Justice of the High Court)

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