IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA, AD. 2016

CORAM: **ATUGUBA, JSC. [PRESIDING]**
ANSAH, JSC.
BENIN, JSC.
AKAMBA, JSC.
PWAMANG, JSC.

CIVIL APPEAL:
NO.J4/9/2015

22ND MARCH 2016

ANDREAS BSCHOR GMBH & CO. KG **PLAINTIFF/APPELLANT /RESPONDENT**

VRS

1.BIRIM WOOD COMPLEX LTD **DEFENDANTS/RESPONDENTS**
2.BIRIM TIMBERS LTD **/APPELLANTS**

J U D G M E N T

PWAMANG, JSC.

In 1988 the parties herein, who were in timber business in Ghana, entered into a business transaction worth about DM1.2 million for the supply and installation of a saw-mill for the defendants/respondents/appellants, hereafter referred to as the defendants, to be paid for with the supply of timber products to the plaintiff/appellant/respondent, hereafter referred to as the plaintiff. The transaction was not covered by a properly drawn up and executed contract document as the parties must have placed trust in each other. Unfortunately, events shortly after the installation of the sawn mill proved that trust alone, without properly executed contract, was not enough to ensure a smooth business relationship and they ended up in litigation which has lasted for about twenty years.

The litigation commenced in 1994 in the High Court at Akim Oda where defendants are based and after judgment there was an appeal to the Court of Appeal. This is an appeal against the decision of the Court of Appeal dated 3rd April 2008 which set aside part of the judgment of the High Court. The High Court had in its judgment granted the counterclaim of the defendants.
After the installation of the saw-mill plant in 1991, defendants experienced some technical problems, some of which the plaintiff rectified and the others defendants had to repair by themselves. Contrary to what was agreed, the defendants initially did not supply timber products to the plaintiff in payment for the saw-mill so plaintiff demanded payment of the amount as stated in the pro forma invoice it had sent to defendants. Defendants then paid DM30, 000 but afterwards they supplied plaintiff some timber products as further payment. The timber products supplied did not fully settle the claim of plaintiff but defendants stopped further payments so plaintiff sued for its balance. When defendants were served they filed defence and counterclaimed for damages in diminution.

After a full trial the High Court gave judgment on 20th December, 1999 and held that the plaintiff did not deliver all the machinery listed in the pro forma invoice. The court further held that plaintiff breached an implied condition of the contract of sale by supplying a plant that was not of the quality and fitness for a saw-mill. The court based its decision on the provisions of the **Sale of Goods Act, 1962, (Act 137).** The High Court judge therefore awarded damages to the defendants on their counterclaim to be deducted from the amount due to plaintiff as stated in the pro forma invoice. The trial judge refused to grant plaintiff interest on the sum allowed. The judgment failed to take into account the payments made by defendants before the case was filed in court so defendants applied for a review of the judgment for those payments to be deducted from what was due plaintiff.
When the Arithmetic was done to set off what was awarded defendants on their counterclaim with what was allowed for plaintiff on its claim, the plaintiff became the judgment debtor in sum of about DM80, 074.58. Being aggrieved, plaintiff appealed against the judgment.

The Court of Appeal allowed the appeal and dismissed defendant's counterclaim in its entirety. The court held that, per the pro forma invoice tendered in evidence, defendants bought reconditioned, used and second hand machinery and having retained it for 20 months, they were not entitled to avoid the contract and refuse to pay. The Court of Appeal also held that plaintiffs did not sell the sawmill plant to defendants in the normal course of its business so the provisions of the **Sale of Goods Act** were not applicable to the contract in this case. The court further held that, in any case, the defendants did not strictly prove the special damages they claimed so the High Court was wrong in awarding special damages to defendants.

One week after the judgment of the Court of Appeal the defendants appealed to this court setting out 7 Grounds of Appeal as follows:

i. The Court of Appeal erred in law and caused a miscarriage of justice when the Court of Appeal Judges failed to advert their minds to the defects admittedly contained in the machinery supplied by the Respondents.

ii. If the Judges of the Court of Appeal had adverted their minds to the fact that the first breakdown occurred after 11 days and not 20 months they would definitely have concluded that there had been a breach of a fundamental obligation.

iii. The Appellate Court erred in law when the Court of Appeal set aside the lower court's finding of fact on the breach of the fundamental obligation as well as conditions and warranties without adequate reasons.

iv. That the Court of Appeal's decision that there could not be an implied condition or warranty where there is an express condition contained in the contract is wrong in law but it disabled the Court of Appeal from coming to the right conclusion on the question of breach of contract by the plaintiff.

v. The judgment of the Court of Appeal is against the weight of the evidence record.

vi. The Court of Appeal's negligent or deliberate refusal to acknowledge that Plaintiff failed to supply the goods they contracted to supply disabled the Court from arriving at the

correct conclusion that the Plaintiff/Respondent has breached the contract to supply the goods they contracted to sell. The respondent company has ceased to exist as it has been dissolved.

vii. The Court of Appeal erred in law and caused a miscarriage of justice when it failed to consider the legal effect of the Review of the judgment of the lower court by the said Court itself, even though the Court of Appeal had decided that the lower court had jurisdiction to review its own judgment.

viii. Additional grounds of Appeal shall be filed on the receipt of the record of proceedings.

No additional grounds of Appeal have been filed. We shall consider all the grounds of appeal together.

It is well-settled that an appeal is by way of rehearing and this means an appellate court is required to review the whole evidence on the record of appeal and come to its own conclusion whether the findings both of law and facts by the court below were properly made. Where the appellate court comes to the conclusion that findings of fact by the court below are not supported by the evidence on the record or where the findings are perverse, then it may set those findings aside. Another ground on which an appellate court will set aside findings and conclusions arrived at by a lower court is where the findings and conclusions are based on a wrong proposition of law.

See the cases of **ACHORO AND ANOR V. AKANFELA [1996-97] SCGLR 209and KOGLEX LTD (NO.2) V. FIELD [2000] SCGLR 175**

As we consider this appeal it bears reminding ourselves that the **Sale of Goods Act, 1962** is the main source of our law as far as contracts for Sale of Goods are concerned and that the rules of the common law and equity are subservient to the statutory provisions.

The Sale of Goods Act contains some implied terms that must be read into any contract of sales of goods in Ghana. These terms are promises which are deemed by law to be made by the parties to a contract of sale and are classified into three categories, namely; fundamental obligations, conditions and warranties. These categories are also applicable in general Law of Contract. The consequences of a breach of a promise under the Act depends on

the category the promise comes under. A breach of either a fundamental obligation or a condition entitles the party not in default to repudiate the contract of sale, and if it is the seller who is in breach, the buyer can reject the goods. However the breach of a warranty cannot lead to repudiation or rejection of goods, but will entitle the party not in breach to only damages. But a party who is entitled under the Act to repudiation and rejection of goods may, nevertheless, waive that right and opt for damages instead. See Sections 49 and 55 of Act 137.

Defendants in this case contend that though plaintiff breached a fundamental obligation and a condition stated in **Sections. 8(1) and 13(1) (b)** of the Act respectively, they did not reject the goods but opted for damages. Whether the claim of defendants is an afterthought, as contended by plaintiff, or not can only be determined upon an evaluation of the merits of the case.

Sections 8 (1) and (3) and 13(1) (b) of Act 137 are as follows;

> ***S. 8. Duties of the Seller (Fundamental Obligations of the Seller)***
>
> ***(1) In a sale of specific goods the fundamental obligation of the seller is to deliver those goods to the buyer.***
>
> ***(3) Any provision in a contract of sale which is inconsistent with, or repugnant to, the fundamental obligation of the seller, is void to the extent of the inconsistency or repugnance.***
>
> ***S.13 Quality and Fitness***
>
> ***(1) Subject to the provisions of this Act and any other enactment there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows—***
>
> ***(b) Where the goods are of a description which are supplied by the seller in the course of his business and the buyer expressly or by implication makes known the purpose for which the goods are required there is an implied condition that the goods are reasonably fit for that purpose.***
>
> ***(2) The condition implied by paragraph (a) of subsection (1) is not affected by any provision to the contrary in the agreement where the goods are of a description which***

are supplied by the seller in the ordinary course of his business and the condition implied by paragraph (b) of subsection (1) is not affected by any provision to the contrary in the agreement unless the seller proves that before the contract was made the provision was brought to the notice of the buyer and its effect made clear to him.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Specific goods as defined in Section 81, the interpretation section, of Act 137, is "goods identified and agreed upon at the time a contract of sale is made," In this case there is consensus by the parties that the Pro Forma invoice, Exhibit "A" constitutes the basis of the contract of sale of the saw-mill machinery and contains the list of goods to be supplied. It therefore means the contract is one for the sale of specific goods so Section 8(1) is applicable in this case. Consequently the fundamental obligation of plaintiff was to deliver all the machinery listed in Exhibit "A". Defendants claimed that plaintiff did not deliver in strict accordance with that list. Plaintiff on its part stated that they supplied all the equipment on Exhibit "A". So it becomes a matter of proof and the burden is on defendants who made the allegation to prove that there was wrong or non-delivery.

Defendants claim that instead of a Brenta Band Saw 1800 that was listed in the pro forma invoice, plaintiff supplied and installed a Brenta Band Saw 1600. Plaintiff's managing director in his evidence-in-chief stated that it supplied all the machinery listed on the pro forma invoice. He tendered invoices, packing lists, the SGS reports and the bills of laden for each installment of machinery delivered. Mr. Joseph Mensah who testified on behalf of defendants stated in his evidence that plaintiffs delivered a Brenta Band Saw 1600 and not 1800. This witness had worked with the defendants for only five months prior to testifying and had no firsthand knowledge of what happened. It was therefore to be expected that he would tender some documents to support his testimony but he did not.

In their statement of case in this court, counsel for defendants has referred to a Barclays Bank foreign payment dated 24th January

1994 (page 42 vol 2 of record) in respect of Brenta Band Saw which the Managing Director for defendants referred to in his testimony. On its face, and from the record (pages111 to 114 vol 1) when defendant's lawyer sought to tender that document in evidence through plaintiff's managing director, an objection was raised and the court upheld the objection on 27/11/96 so it was rejected and marked "RJ2". It is noticed that the number '2" is also written on the document but Exhibit "2" is different. It is a Pro forma invoice of magnet valves, bolt blades etc. That document cannot be used as evidence.

Defendants called one Mohammed Ntim Kusi as DW1, apparently to corroborate their case that plaintiffs supplied and installed a Brenta Band Saw 1600 for defendants in 1991. His evidence does not in any way say that he was present and saw plaintiff's engineers install a Brenta Band Saw 1600 at defendant's Saw-mill. He said "I have gone to Birim Wood Complex on a visit." When was this visit? His evidence does not say. Then he said "The pulley at Sabbah is 1600. One Brenda has been installed at Birim Wood Complex." There are two Sabbah's in this case, DW1 and the Director of defendants. Which of them is the witness referring to?

Defendants' managing director in his testimony also claimed that plaintiff failed to deliver to them Hydraulic under table cross cut, Forklift, Exhaust system, and Electro cables and Circuit relays; which were all listed in Exhibit "A". Plaintiff rejected this contention at trial and relied on the invoices and parking list it tendered in evidence.

Exhibit 'U' is the letter dated 22nd July 1993 by Lawyer E. A. Oduro written on behalf of defendants in answer to plaintiff demand for payment before this suit was filed. That letter did not make any mention of a wrong supply of Brenta Band Saw 1600 instead of 1800 and a failure to deliver the Forklift and the other items. That letter strongly stated the case of defendants that the plaintiff was in breach of an implied warranty of quality and fitness. Since the dispute was eminent at the time that letter was written, one would have expected the letter to raise the issues of wrong and non-delivery if indeed they had had occurred.

More fundamental is the fact that in the amended statement of defence and counterclaim of the defendants filed on 7/3/97, apart

from the allegation of wrong-delivery of a Brenta Band Saw 1600, there is no pleading of non-delivery of any of the other items. This claim is in the nature of special damages and specific losses ought to have been specifically pleaded and strictly proved.

Having regard to the burden of proof which was on the defendants in respect of the averments of wrong-delivery of items covered by documents tendered by plaintiff at the trial, we hold that defendants failed to discharge the burden of proof on them so we affirm the holding of the Court of Appeal which set aside the awards of damages for wrong-delivery of Brenta Band Saw 1600 and the non-delivery of Forklift and other items.

We now turn to defendant's case based on **S. 13(1) (b) of Act 137.** The Court of Appeal in their judgment rejected the trial judge's application of that provision to the facts of this case and said a buyer of used goods has no remedy in law if the goods do not meet expected standards. As legal authority for that proposition of law, the Court of Appeal relied on the case of **Rockson v. Armah [1975] 2 GLR 166 CA,** which quoted Lord Denning in **Bartlett v. Sidney Marcus Ltd [1965]2 All ER 753 CA** as saying that;

> "a buyer should realise that when he buys a second hand car, defects may appear sooner or later **and in the absence of an express warranty, he has no redress."** (emphasis mine)

What the defendants are saying, and which we agree with, is that there is a condition as to fitness for purpose implied by law that applies even to sale of secondhand goods if the seller sells them in the ordinary course of his business and the buyer makes him aware of the purpose for which he requires the goods. With all due respect to the justices of the Court of Appeal, if they had read the case of **Bartlett v Sidney Marcus** closely, they would have realized that the court accepted that the seller in that case was under a statutory obligation pursuant to the English **Sale of Goods Act, 1893,** to ensure that the used car was fit for purpose, except that it was held on the evidence that the car met the fitness test.

In **Rockson v. Armah**(supra) the issue before the Court of Appeal was the right of a purchaser to repudiate a sale upon discovery of latent defects so Francois J A in his judgment discussed Sections 51, 52(b) and 13(1)(a) of Act 137 but not Section 13(1)(b) which is the provision relied upon by defendants in this case. In **Yirenkyi v**

Tormekpe [1987-88] 1 GLR 533 CA, the plaintiff bought a second-hand Toyota truck for ¢157, 000 from the defendant. He then spent ¢56,860 to make substantial repairs to rehabilitate the truck. In a subsequent action he brought against defendant to recover both sums and for damages for loss of use, he pleaded that after taking delivery of the truck he found that contrary to the warranty given to him, the truck was not roadworthy. The High Court entered summary judgment for him and held that the defendant was in breach of Section 13(1)(b) of Act 137 on the implied condition of fitness for purpose. On appeal, the Court of Appeal held that, whether the truck was fit for purpose or not was a question of fact and could not be determined without the taking of evidence.

It is therefore an erroneous statement of the law of Ghana, and of England, to say that in all cases a buyer of used or secondhand goods has no redress if the goods fail to meet the quality and fitness for the purposes for which the buyer required them. The grounds for the condition as to fitness for purpose to be applicable are that the seller should sell the goods in the normal course of his business and the buyer should have made the seller aware of the purpose for which he requires the goods.

The question that needs to answered is; what is meant by "*the goods are of a description which are supplied by the seller in the course of his business"* in **section.13 (1) (b) of Act 137?** In his submissions in the Court of Appeal, counsel for plaintiffs argued that the provision refers to goods sold as the main business of the seller. He did not refer to any legal authority but the Court of Appeal appears to have accepted that interpretation. In considering our judgment, we did not come across a Ghanaian case in which the provision was construed so we shall consider some English authorities for their persuasive effect.

In the case of **Ashington Piggeries Ltd v Christopher Hill Ltd [1972] A.C. 441,** the House of Lords, in an appeal considered the interpretation of Section 14(1) of the Sale of Goods Act, 1893 of England which is worded just like our Section 13(1)(b) as follows; "goods of a description which it is in the course of the seller's business to supply". The Court of Appeal had held that the provision referred to a dealer in the goods in question and since the respondent was not a dealer in mink food, the provision did not apply to it. The House of Lords overturned the decision, holding

that the interpretation of the provision by the Court of Appeal was wrong. This is what Lord Wilberforce said at page 494 of the report;

> *'I would hold that (as to subsection (1)) it is in the course of the seller's business to supply goods if he agrees, either generally or in a particular case, to supply the goods when ordered…… But, moreover, consideration with the preceding common law shows that what the Act had in mind was something quite simple and rational: to limit the implied conditions of fitness or quality to persons in the way of business, as distinct from private persons……I would have no difficulty in holding that a seller deals in goods 'of that description' if he accepts orders to supply them in the way of business and this whether or not he has previously accepted orders for goods of that description.'*

There have been other interpretations of similar provisions to the effect that the provisions do not only relate to situations where the goods are sold as an integral part of the business of the seller but include cases where there is a certain degree of regularity by the seller in the supply of goods of the description as distinct from a one off sale. See the cases of **Davies v Summer [1984] 3 All ER 831** and **R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party) [1988] WLR 321**.

The origin of the condition of merchantability and fitness for purpose is a statement by Best CJ in the case of **Jones v Bright (1829) 130 ER 1167 at 1171** where he gave the policy behind the law as follows;

> "It is the duty of the court in administering the law to lay down rules calculated to prevent fraud, to protect persons necessarily ignorant of the qualities of a commodity they purchase, and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. ... I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable — that is fit for some purpose. ... If he sells it for some particular purpose he thereby warrants it fit for that purpose."

So the purpose of the statutory condition of quality and fitness is to protect buyers when they rely on the skills and knowledge of business sellers. We will therefore broadly construe **Section13 (1) (b) of Act 137** and give effect to the purpose of the provision by

including any sale where there is an element of regularity showing the seller has been selling goods of that description as part of his business, whether it is his main business or not; or where the seller accepted an order from the buyer to supply goods of that description. Where the goods were sold on "where is" basis or as a private sale, the provision is not applicable.

The evidence in this case shows that as part of its timber trading business, plaintiff installed saw-mill plants for a number of timber companies in Ghana. In his evidence-in-chief, the Managing Director of plaintiff, Kimberly Michael, said as follows:

> *"Sabbah came to Germany to see us at our organization. There was a discussion on how we could find the necessary machines and the cost of same. He said he wanted machines in a practical way. He discussed how practical it would be for him. We had established machinery for four other companies in Kumasi – S.P.S., S.T.P. (Specialised timber products). He asked for a second hand reconditioned machines for his company. He had realised that new machines would cost three to four times and beyond. I agreed with defendant and I came here two or three times because of the agreement. We agreed to set sawmilling machinery for him. We sent him a pro forma invoice."*

Under cross examination plaintiff's Managing Director said as follows:

> *"Q. So you supply timber machinery to those who supply you with timber?*
> *A. Yes*
> *Q. Mention the names of timber companies you have supplied machinery?*
> *A. South B. S. Kumasi Wood Industries in Kumasi, Atwima Timber in Kumasi*
> *Q. Can you tell us the others you have dealt with?*
> *A. Western timbers at Takoradi, TDC Takoradi"*

He mentioned other companies they had supplied saw-mill machinery as; Birim Timber, Oda Sawn Mills, Fast Forest, W.S.I. Sawn Mills, S. B. S. All these supplies of sawn mills machinery were made between 1978 and 1991. That plaintiff had installed saw-mills for many timber companies was corroborated by the evidence of PW1.

In this case, plaintiff supplied the complete set of Saw-mill machinery and sent a team of engineers to install it and test run the plant for a few days. The circumstances show clearly that the defendants were relying on the knowledge and skill of the plaintiff in the acquisition of the machinery.

We have no doubt in our minds that plaintiff sold the Saw-mill machinery to defendants in the ordinary course of its business and we so find. The Court of Appeal made the finding that plaintiff did not sell the saw- mill in the ordinary course of its business without reviewing the evidence and properly construing Section. 13(1) (b) of Act 137. We therefore reverse that finding by the Court of Appeal.

The effect of our finding that plaintiff sold the machinery in the course of its business is that the machinery was sold on the condition that it will be fit for the purpose of saw milling. But the next question is; what is meant by the term fitness for the purpose as used in Section.13 of Act 137. If a seller sells used goods will the implied condition of fitness be the same as new goods?

We shall use two English cases to illustrate the principles the English courts have applied in determining fitness for purpose in respect of secondhand vehicles;

In **Bartlett v Sidney Marcus Ltd [1965] 1 WLR 1013**, the dealer's salesman told Mr Bartlett that the clutch of a second-hand Jaguar was not operating properly, but that he thought it could be put right by a minor repair. The price was reached on the understanding that the plaintiff would have the clutch repaired at his own garage. He drove it for about 200 to 300 miles over a period of four weeks and then took it to his garage, where it was found that the defect was far more serious and that the engine would have to be dismantled to repair the clutch system. The judge found that the clutch was not of merchantable quality. The defendants successfully appealed. Lord Denning said at page 1017 as follows:

> *"A second-hand car is 'reasonably fit for the purpose' if it is in roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car. Applying those tests here, the car was far from perfect. It required a good deal of work to be done on it. But so do many second-hand cars. A buyer should realise that when he buys a second-hand car, defects may appear sooner or later; and, in the absence of an*

express warranty, he has no redress. Even when he buys from a dealer the most he can require is that it should be reasonably fit for the purpose of being driven along the road. This car came up to that requirement"

In **Crowther v Shannon Motor Co. [1975] 1 All ER 30**, an eight-year-old Jaguar had a mileage of 82,165 at the date of purchase. The dealer commended it, saying "it would be difficult to find a 1964 Jaguar of this quality inside and out" and adding, that for a Jaguar "it is hardly run in". It passed an MOT test. Mr Crowther drove the car for three weeks and covered over 2,000 miles. He found that it used a lot of oil. The engine then seized up and the car came to a full stop. The engine was found to be in an extremely bad condition. So much so that it had to be scrapped and replaced by a reconditioned engine. At the trial in the county court, Mr Crowther called as a witness a previous owner of the car who had bought it from the same dealers about eight months before. He had used it for those eight months and then sold it back to the dealer. His evidence was that the engine was "clapped out".

Lord Denning MR after distinguishing the decision in Bartlett v Sidney Marcus said as follows at page 33 of the report: *"If the car does not go for a reasonable time, but the engine breaks up within a short time, that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold. On the evidence in this case, the engine was liable to go at any time. It was 'nearing the point of failure'; said the expert...The time interval was merely 'staving off the inevitable'. That shows that at the time of the sale it was not reasonably fit for the purpose of being driven on the road. I think the judge on the evidence was quite entitled to find there was a breach of section 14(1) of the Sale of Goods Act, 1893 and I would therefore dismiss the appeal. "*

What the authorities show is that a machine is said to be fit for purpose if it is able to perform the task for which it was acquired safely and for a reasonably period before major defects appear. What is reasonable period will depend on the condition of the machine, whether new or used, whether any defects were disclosed by the seller, the level of assurance given by the seller, etc. So it is a

question of fact to be determined by the court on a case by case basis. See **Yerinkyi v Tormekpe** (supra).

Though in the High Court defendants' case was that they contracted for the supply of new saw- mill machinery, their counsel in his statement of case in this court has submitted as follows;

> "The evidence justifies a finding that the parties agreed on the supply of **Reconditioned machinery generally, with some of the machines being new**, but certainly **NOT** on the supply of **used or secondhand** machinery simpliciter."

On its part, plaintiff has always maintained that they were required to supply reconditioned machinery. In a letter written by lawyer for the plaintiff tendered in evidence as Exhibit "Y", he described the transaction between the parties as a "Turn Key" agreement. It is therefore in order to apply the implied condition of fitness for purpose to the plant as one unit and to determine if it met the reasonable man's expectation of a Reconditioned Saw-mill. **The Longman Dictionary of Contemporary English, Third Edition** defines recondition as follows:

> "to repair something, especially an old machine so that it works like a new one."

In our considered view, the reconditioned plant that plaintiff contracted to supply was supposed to work as a saw-mill, even if not like a new one, but work effectively for a reasonable period before breakdowns would occur. The expectation is thus higher than what would be expected of a secondhand plant though it will not be as high as a new one. The evidence on record shows that within 10 to 11 days after the installation the whole plant ceased operating. Plaintiff's Managing Director made the following admissions under cross examination:

> *"Q. I put it to you that ten or eleven days after installation the machines ceased to be functional. This was communicated to you through Mr. Testling?*
>
> *A. Yes*
>
> *Q. Were you ever made aware of the fact that the main carriage drive also broke down barely two months after the installation?*
>
> *A. I don't know whether after two months.*
>
> *Q. It was communicated to you through Mr Testling*
>
> *A. No*

Q. Who did?
A. I myself was here.
Q. You directed that replacement should be sent from Cream Timbers, Takoradi
A. Yes
Q. The main carriage drive was second hand machine?
A. Not secondhand, reconditioned.

At pages 103 of the record, the cross-examination of plaintiff's representative continued as follows;

Q. It was communicated to you that the top pulley shaft of the bund mill broke into 2 and almost damaged the mill?
A. Yes, it was mentioned to me verbally by Mr. Fascaller."

The main carriage drive certainly is a critical part of the saw-mill and without it a saw-mill cannot operate as a saw-mill. In the expectation of a reasonable person, a reconditioned plant should not break down within 11 days of operation. In the same vein, for the main carriage drive of a reconditioned saw -mill to break down within two months of use is evidence that at the time of the sale it was not fit for the purpose of saw milling. The evidence on the record gives us the irresistible impression that the plant supplied by plaintiff did not meet the standard of a reconditioned plant. We accordingly find that plaintiff was in breach of the implied condition that the reconditioned plant it sold to defendants was fit for its stated purpose of saw milling timber logs.

PROOF OF DAMAGES

That brings us to a consideration of the part of the judgment of the Court of Appeal that set aside the trial Court's award of damages in diminution in the sum of DM700, 000.00 to defendants for breaches of the contract. We will like to quote what the Court of Appeal stated in its judgment on the issue of the damages in diminution;

> **"**In my opinion, I think that the learned trial judge was wrong in upholding the counter-claim of the respondents and awarding the sum of DM700, 000 since this was special damages and the Respondents should have been put to strict proof.
>
> They neither tendered any documents or receipts to support their claim that they had been put to extra expense in replacing broken down machinery supplied by the Appellants,

and that in order to replace the defective items, they had had to look to other well-established timber firms in the country.

It is trite law that a claim for special damages must be explicitly claimed in the pleading with full particulars of how it is made……

In the instant case, I find that the Respondents did not do any of these things. The only evidence on record alleges that as the machines broke down they needed to be replaced, and therefore the broken down parts were acquired from other sister timber firms e.g. saoud etc. **Prah vrs Okai** [1966] GLR 560 holds that "*special damages should be strictly proved*". Having failed to prove special damages, the learned trial judge should have dismissed the Respondents' counter-claim for special damages just as he did with the defamation."

We have perused the record and carefully considered the evidence of defendants and their witnesses and we fully endorse the above findings of the Court of Appeal that defendants did not sufficiently prove special damages. Defendants are nevertheless entitled to General Damages for plaintiff's breach of the implied condition that the reconditioned plant was fit for the purpose for which defendants acquired it.

The principles that guide the courts in the award of General Damages have been repeatedly stated by the Courts. In the case of **Attorney-General v. Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271 Dr. Twum JSC** stated as follows at page 290 of the Report;

"General Damages are such as the law will presume to be natural or probable consequence of the defendant's act. They arise by inference of the law and need not therefore to be proved by evidence."

The settled position of the law is that General Damages are at large, meaning the court will award a reasonable amount having regard of the circumstances of the case. A court may award nominal damages under General Damages where no real loss has been occasioned by the infringement of a right, or award substantial damages where actual loss has been caused to the plaintiff. In this case our job is cut for us by **s.56 of Act 137** which provides as follows;

S.56. Assessment of Damages under S. 55.

The measure of damages in an action under section 55 of this Act is the loss which could reasonably have been foreseen by the seller at the time when the contract was made as likely to result from his breach of contract.

S. 56 of Act 137 states the common law principle of remoteness of damages that limits damages to only losses that arise naturally from the breach of the contract and losses that can be said to have reasonably been within the contemplation of the parties as likely to be suffered in the event of a breach of the contract. The *locus classicus* on the principle of remoteness of damages is **Hadley v. Baxendale [1854] 9 Ex. 341, 156 ER 145**. In that case Alderson B. made an observation which is very much applicable to the facts of this case. He stated as follows at page 151:

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The evidence on record is that the plaintiff supplied the reconditioned plant for defendants to use as a saw-mill in processing their timber logs for export. The natural consequence of a failure of the plant to run smoothly is that defendants' production of saw timber from that mill will be adversely affected and they will lose sales. It is also a natural result that in order to put the mill back into operation defendants will incur expenditure on repairs and replacements. It is clear from the evidence that the operation of the Saw-mill was interrupted on a number of occasions due to breakdowns. There is evidence that on the eleventh day of operating the sawn mill it broke down in the presence of plaintiff's representative and plaintiff had to send spare parts in order for it to be repaired and production to resume. There is evidence that the main carriage drive broke down within two months in the presence of plaintiff's managing director. We have given consideration to the fact that plaintiff undertook this contract as a turnkey agreement and defendants placed total trust in them that what they supplied

and installed would meet their requirements for a reasonable period.

Having taken all the above circumstances into account, we award General Damages of DM250, 000 in favour of defendants against plaintiff for breach of the implied condition as to fitness of the plant they supplied and installed for defendants.

The defendants in their statement of case have called our attention to discrepancies on the record as to the correct amount plaintiff is entitled to by the decisions of the High Court and the Court of Appeal. Defendants have called on us to correct and clarify the amounts on the basis of the evidence on the record.
The trial judge in his judgment said as follows at page 305 of the record;

> "Of the plaintiff's claim (a) of DM1,172,654.76, DM 193,354.76 has been granted."

The judge did not expressly state in his judgment whether he had dismissed the claim for DM1,172,654.76 and awarded only DM 193,354.76, or whether that figure was arrived at after deducting the awards he made in favour of defendants on their counterclaim. The evidence on the record is that plaintiff tendered Exhibit 'A' in proof of his claim for DM1, 147,557.00. But in his evidence-in-chief he admitted that out of the invoice value, DM 30,000 was first paid and timber products worth DM273,429.34 was supplied to their subsidiary company by defendants. (See page 53 of the record).

When the payments acknowledged are deducted from the invoice value, we get DM 844,127.66. We therefore set aside the judgment of the High Court and in its place grant plaintiff the sum of DM844, 127.66 being the balance of the cost of reconditioned Saw milling equipment, Machinery, Spare Parts and Installation.
The amount of DM844,127.66 granted to plaintiff and the DM250,000 awarded to Defendants shall attract interests from the date of the judgment of the High Court i.e. 20/12/1999 to the date of this judgment at the prevailing bank rate of interest in Germany in line with this court's decision in **Royal Dutch Airlines & Anor v. Farmex Ltd (No.2) [1989-90]2GLR 682, SC**.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

COUNSEL

J. K. AGYEMANG ESQ. (WITH HIM OSMAN GYAN) FOR THE DEFENDANTS /RESPONDENTS/APPELLANTS.

JUSTIN AMENUVOR ESQ. FOR THE PLAINTIFF/APPELLANT/RESPONDENT.