IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: AKUFFO (MS), JSC PRESIDING
YEBOAH, JSC
BAFFOE-BONNIE, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/29/2016

31ST MAY, 2017

ABIVAMS LIMITED .... PLAINTIFF/APPELLANT/RESPONDENT

VRS

PLATUN GAS OIL GHANA LTD. .... DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

BENIN, JSC:-

This appeal brings into focus once more the scope and limit of the popular Order 14 of the High Court (Civil Procedure) Rules), 2004, C.I. 47. That Order has become so popular even among students of the law because we are made to believe that it is the shortest route to obtain judgment in liquidated claims in particular, without going through the travails of litigation. But to the unwary judge who falls into that trap, he may be tempted to dismiss a defence to a claim under this order, as it were, to save time, especially bearing in mind the fact that the court is required to adopt expeditious and less expensive means to dispose of a case before it. But we must not lose sight of the fact that rules of court are meant to regulate orderly proceedings and nobody should be made to suffer therefrom, without real or just cause. The rules of natural justice prevail in all proceedings, hence the requirement that a person should not be

made to suffer unless he has been heard in his defence, except by his own showing he does not want to be heard or clearly he has no defence to an action and should therefore not engage in a wild goose chase.

As a result, the courts have over the years provided guidelines for the invocation of the provisions under Order 14 which every trial judge must observe, lest a defendant should be denied a hearing on merits, without justification. It is necessary at the outset of this decision to recall the caution sounded by Denman J in the case of **Manger etc v. Cash (1889) 5 T.L.R. 271** when he said that: "*The jurisdiction is one to be exercised with great care, so as not to preclude a party from raising any defence he may really have. The judge is not to make the order if either he is satisfied that there is a defence, or that the defendant should be allowed to defend."* This case is one of those cases in which the defendant/respondent/appellant, called the appellant, should have been allowed to defend but was denied this right to be heard on merits because of the unjustifiable invocation of Order 14 in favour of the plaintiff/appellant/respondent, called the respondent. The reasons for this conclusion with which this decision has begun would become apparent very shortly.

Facts of the case

On or about 13th January, 2015, the respondent issued a writ of summons at the High Court claiming the following reliefs against the appellant:

a. An order for the recovery of the sum of USD522,010.06 or its equivalent in Ghana cedis at the prevailing commercial rate of exchange.
b. Interest of 10% per annum on the said amount from 5th December, 2014 till date of final payment.
c. General damages for breach of contract.
d. Costs assessed at 10% of the amount owed, including Solicitors' fees.
e. Any further order(s) that this Honourable court could deem fit.

For its full force and effect, we shall set out extensively the material contents of the accompanying statement of claim wherein the respondent averred as follows:

"3. The plaintiff says that pursuant to the Sales and Purchase Agreement (SPA) dated 18th July 2014, made between Omaroil Agency Limited as the seller of the one part and the Defendant herein as the buyer of the other part, Omaroil Agency Limited was to supply to the defendant 11,200 barrels of crude oil between the 23rd and 24th July 2014.

4. Plaintiff says that pursuant to the Sales and Purchase Agreement executed between Omaroil Agency Limited and the defendant it was agreed between the parties that an amount of USD87.10 per barrel was to be paid within 10 days of discharge to the plaintiff for its benefit for facilitating the supply of crude oil to the defendant.

5. Plaintiff says that a quantity of 8,149 barrels of crude oil was however actually supplied to the defendant on the 12th of August 2014 as a result of which it had to discount an amount of USD2.00 per barrel to the defendant as penalty for delay of 10 days, the discount of USD2.00 per barrel for the 10 days reduced the amount per barrel to USD85.10, thus bringing the total amount payable to USD693,479.90.

6. Plaintiff says that the defendant on 13th August 2014 through its bankers……..paid to it the Ghana cedi equivalent of USD120,000.00 out of the total amount of USD693,479.90 for the crude oil supplied to defendant.

7. Plaintiff also says that on the 18th August, 2014 it therefore issued the defendant with an invoice for the payment of outstanding balance of USD 567,479.90 for the quantity of oil supplied to defendant.

8. Plaintiff says that on the 2nd October, 2014 following the defendant's failure to pay its outstanding debt, a Memorandum of Understanding to the Sales and Purchase Agreement was executed between it, the defendant and Omaeoil Agency Ltd in which the parties agreed that the defendant shall pay the outstanding balance of USD567, 479.90 to the plaintiff within two months in three equal installments by the 31st of December 2014.

9. Plaintiff also says that per the Memorandum of Understanding executed, it was also agreed by the parties that due to the delay on the part of the defendant to pay the amount of USD567,479.90 which was due and owing under the contract, an interest rate of 10% per annum from the 18th of August 2014……was to be paid on the outstanding balance.

10. Plaintiff further says that the defendant subsequently paid to it cash of USD10,000.00 on 5th December, 2014 as well as a further payment of the Ghana Cedi equivalent of USD52,416.50 by swift through its bankers……..leaving the outstanding balance of USD505,063.40.

11. Plaintiff says that the interest accrued on the outstanding balance……is USD16,946.66 bringing the total amount due and owing by the defendant under the contract to USD522,010.06 as at 5th December 2014."

The respondent brought the action following the appellant's failure to pay the outstanding balance to it. The appellant entered appearance to the writ on 15th January 2015. On 22nd January 2015, the respondent caused to be filed a motion on notice for summary judgment under Order 14 of C.I. 47. In the affidavit in support deposed to by one Captain Michael Adu, the Managing Director of respondent-company, it exhibited a copy of the agreement made between the appellant and Omaroil, it was marked exhibit MA1. They also exhibited correspondence between the parties herein confirming that monies that were due under exhibit MA1 were to be paid to the respondent, marked as exhibits MA '2a', and MA '2b' respectively. They also exhibited the Memorandum of Understanding, as exhibit MA5. Furthermore, they exhibited evidence of payments made by the appellant and invoice issued by the respondent. Respondent also deposed to the fact that in their belief the appellant had no defence to the action.

In their affidavit in opposition deposed to by one Ivan Romanov, the Managing Director, the appellant relied on the statement of defence which he said raised "very serious and triable issues". Consequently, the appellant relied wholly on the statement of defence filed on 27th January 2015 wherein they made the following material averments:

"4. The defendant denies paragraph 4 of the statement of claim. In further denial, the defendant contends that the Sale and Purchase Agreement was executed between the defendant and Omaroil but Omaroil subsequently instructed defendant to transfer the purchase price to plaintiff on its behalf.

5……..Defendant shall contend that the agreement to transfer the purchase price to plaintiff's account on behalf of Omaroil does not transfer any liability of Omaroil onto defendant. Accordingly plaintiff has no cause of action against defendant.

8. Save that the parties executed a Memorandum of Understanding which merely confirmed the earlier position of defendant effecting payment on behalf of Omaroil to plaintiff without any definite amount stated therein, paragraph 8 of the statement of claim is denied and plaintiff is put to strict proof.

9. The defendant admits paragraph 9 of the statement of claim save that no amount was stated therein and the contents of the said MOU were mere understandings between the parties but is not binding and of no legal effect. Therefore the contention by plaintiff for payment of interest of 10% per annum is of no legal significance.

10. In the alternative, the defendant contends that it was at all material times agreed that all payments to plaintiff was (sic) for and on behalf of Omaroil and therefore, defendant cannot be made to pay any such interest on the amount. Accordingly, there is no contractual relationship or privity of contract between plaintiff and defendant.

12. Paragraphs 11-14 of the statement of claim are denied and plaintiff is put to strict proof.

13. Defendant shall contend that it had entered into another agreement with Omaroil on the 18/09/2014 in which defendant was to pay another entity, Dome Energy an amount of USD 240,000.00 and which said amount was to be used to offset from the defendant's liability or debt for the crude oil supplied by Omaroil.

14. The defendant will contend at the trial that it had to adhere to Omaroil's instructions as they were the suppliers of the crude oil save that defendant was instructed to pay to the plaintiff herein for their facilitating the supply of crude oil to the defendant.

15. The defendant says it had no option to pay Dome Energy as instructed by Omaroil as they were the actual suppliers of the crude oil and their liability was to Omaroil and not the plaintiff."

In a supplementary affidavit in support of the application, the plaintiff deposed that the defence put up by the defendant was a sham. They also deposed that the agreement between the defendant and Omaroil in favour of Dome Energy, if at all, was not binding on the plaintiff.

The defendant responded to this in a supplementary affidavit in opposition filed on 10th February 2015 by annexing the MOU in respect of the instructions to pay Dome Energy. It was marked OC1.

The defendant relied largely on its pleadings for the evidence in rebuttal of the facts in support of the application. Rule 3(1) of Order 14 entitles the defendant to do that, for the rule says a party may show cause either by affidavit or otherwise. The expression 'otherwise' includes the pleadings so far filed on record. On the same point, in the case of ***Ray v. Newton, (1913)1 K.B. 249 at 258*** Hamilton, L.J. held the view that a defendant's affidavit is not conclusive and does not preclude him from relying on defences not raised in it.

The defendant is given much latitude to introduce any plausible or credible defence to the claim, subject of course to the test of relevancy, in order not to be shut out. And he may do so in an affidavit or by reference to existing pleadings or other acceptable ways of introducing evidence to a court. And the court is bound to have regard to everything the defendant has to offer to guide it in making a determination.

Decisions of the courts below.

The trial court dismissed the application for the reason that triable issues were raised on the pleadings in two areas, namely (i) "whether the plaintiff could take benefit of the contract by the assignment" and (ii) "the priority of the plaintiff and Omaroil" The Court of Appeal thought otherwise and reversed the High Court's decision and entered judgment for the plaintiff, save for the relief for damages which it ordered the High Court to determine on merits.

The reasons given by the Court of Appeal may be summed up thus:

1. The fact that the defendant had made part payment to the plaintiff is an admission of liability.
2. The issue of priority of payment between the defendant and Omaroil as found by the trial judge is erroneous and non-existent.
3. The issue of privity as raised by the defendant is "not real, and not substantial or consequential" as defendant "is estopped by its own conduct in raising the said issue having previously made payments" to the plaintiff before the action giving rise to the appeal was commenced.
4. There was an assignment to the plaintiff by Omaroil under the SPA of 18th July 2014. Consequently "by virtue of section 7 of Act 25…….the assignment of legal rights and interest to an assignee extinguishes the rights and interest of the assignor"

Being dissatisfied with this decision, the defendant has appealed to this court on these grounds:

(a) The learned Justices of the Court of Appeal erred in holding that the provisions of the Sale and Purchase Agreement dated the 18th day of July, 2014, inured to the benefit of the plaintiff which at all material times was not a party to the said agreement.
(b) The learned Justices of the Court of Appeal failed to consider in detail the plaintiff's claim which was mainly for facilitation of the supply of crude oil to defendant and not for the actual supply of crude oil to defendant.
(c) The learned Justices of the Court of Appeal erred in granting the Plaintiff summary judgment without any proof of the amount due and in the face of triable issues raised on the pleadings and affidavits of both parties to this suit.
(d) The award of GH₵10,000.00 made by the Court of Appeal as costs in favour of the plaintiff is rather harsh and excessive.

Arguments by Counsel

The appellant's counsel argued grounds (a) and (b) together, followed by (c). However, he abandoned ground (d) on the question of costs. We would address all the grounds together for purposes of convenience since they all arise from the same facts and source/s of law. To begin with, Counsel for the appellant argued that the first two grounds of appeal are intended to raise for the consideration and/or determination by this court "whether triable issues were raised on the pleadings of the parties or otherwise to warrant a grant or refusal of an application for summary judgment under Order 14 of C.I. 47." Counsel cited this court's decision in the case of **Ballast Nedam Ghana BV vs. Horizon Marine Construction Ltd. (2010) SCGLR 435,** on the scope of Order 14. And for the same purpose, he also cited the dictum of Wood JA (as she then was) in the case of **Sadhwani vs. Alhassan (1999-2000) 1 GLR 19 CA** at p. 25. Counsel stated the fact that though the court below cited both of these authorities, yet it misapplied their *ratio decidendi,* thereby occasioning a grave miscarriage of justice.

Counsel then made this material assertion: "*Examining the statement of claim and affidavit in support filed by the respondent, alone, without comparing same with the processes filed by the appellant, should have convinced the lower court that the respondent is not entitled to summary judgment."*

Counsel proceeded to examine the plaintiff's case as pleaded, and pointed out two inconsistent or contradictory claims. The first one pleaded in paragraph 4 of the statement of claim, supra, is a claim based on payment of commission for facilitating the supply and delivery of oil to the defendant. The second is based on the actual supply of the crude oil contained in the contract, exhibit MA1. Counsel therefore stated that "*this apparent inconsistency of whether respondent was launching a claim against appellant as a facilitator entitled to commission or as the seller or supplier of the crude oil, was never resolved and still remains unresolved."*

On the issue of assignment, counsel contended that there is no evidence on record that the seller, Omaroil, ever expressly assigned its interest in the SPA to the respondent.

On the payments made by the appellant to the respondent, counsel contended that they were made to the respondent's account "because that was nominated by Omaroil in the contract, exhibit MA1" Thus the payment could not be construed as an admission of the appellant's liability to the respondent, counsel opined. Consequently, counsel submitted that the "contention by the appellant in its statement of defence that the respondent has no cause of action should have been interrogated to the hilt by the lower court before arriving at its decision. It is an issue arising from the pleadings of both parties to the suit."

In counsel's view, several questions remained unresolved through the summary procedure adopted, and it would be fair and just that all questions be addressed through a full trial.

In response to these arguments, counsel for the respondent said the respondent never pleaded that they were to be paid 'some commission' for facilitating the supply and delivery of the crude oil. Counsel stated that "it has never been the contention of the respondent that it was entitled to 'some commission' neither has it been in controversy, whether the respondent facilitated or actually supplied the crude oil. In fact, nowhere in the appellant's pleadings was the issue of whether the respondent 'facilitated' or actually supplied the crude oil raised as an issue for determination by the lower courts." According to counsel, the respondent's case has been that it "facilitated the supply of the crude oil" to the appellant, per paragraph 4 of the statement of claim, repeated in paragraph 8 of the affidavit in support of the motion for summary judgment. This is the basis for the respondent's claim, counsel contended.

Counsel stated that the question whether the plaintiff was basing his claim on commission for facilitating the supply of crude oil was a new matter as same was never raised before any of the courts below. Besides, counsel referred to the fact that the request to interrogate the issue of supply and delivery of the crude oil was also a new matter, which the trial judge did not find was a triable issue. It is too late in the day to raise such matter for the first time in the apex court, counsel submitted. The principle, in the words of counsel, was that "facts which were not canvassed as being the subject matter before a lower court cannot be raised for the very first time at an appellate court." He cited the authority of **Antie and Adjuwuah v. Ogbo (2005-2006) SCGLR 494,** holding 5. Further, counsel's view was that it would amount to accepting a case different from what the party had put forward, and that would be contrary to the decision in the case of **Dam v. Addo (1962) 2 GLR 200.** He also cited the case of **Aboagye v. Controller and Accountant-General & Another (2012) SCGLR 538,** where it was stated that it was not permissible under the Supreme Court Rules to introduce evidence by way of the statement of case.

On the specific questions of privity and assignment, counsel was of the firm opinion that if there was no assignment, there would have been no basis for the execution of the MOU, exhibit MA5, and also for the appellant to have paid so much money to the respondent. According to counsel, the respondent was designated as the beneficiary of the funds under the contract wherein it was stated to benefit assignees of the parties, inter alia. The respondent was named in Appendix A of the contract as the beneficiary thereof. He also cited the various correspondences on the subject which he said confirmed the respondent as the beneficiary of the proceeds. In concluding this

question, Counsel submitted that an attempt to distinguish between the assignment of the benefit and beneficiary "is of no legal consequence as to warrant a re-opening of this matter for trial. It is abundantly clear that the benefits of the contract had been unequivocally conferred on the respondents….."

On ground (c), the appellant is challenging the decision of the Court of Appeal that the provisions of the SPA inured to the benefit of the respondent when it was not a party thereto. The court below had stated that the appellant had acknowledged its indebtedness to the respondent and has pursuant thereto made part payments. It also stated that the seller had assigned its rights under the SPA to the respondent. The Court also stated that the respondent was the beneficiary of the SPA under Appendix A thereof. The appellant's view was that there was nothing in the SPA which suggested that the respondent was a beneficiary; merely using its bank account to receive payments under the SPA did not constitute the respondent into a beneficiary, counsel submitted. Counsel also made reference to the other exhibits and concluded that they did not conclusively make the respondent a beneficiary. Counsel also referred to the lower court's description of the respondent as an assignee of Omaroil and said the respondent could not be a beneficiary and an assignee at the same time. At any rate there was no evidence of an assignment. According to Counsel, what the court below did was tantamount to dealing with the matter on merits by the affidavits, contrary to the clear decision in the Sadhwani case, supra.

In his response, counsel for the respondent said the SPA was made to benefit the respondent; consequently, the provisions of sections 5 and 6 of Act 25 were applicable. Thus the appellant and Omaroil were not entitled to vary the terms of the contract or rescind same. Counsel stated that "by the combined effect of exhibits MA(1), MA 2a & b, MA(4) and MA(5), the appellant undertook to pay all proceeds to respondent. Having bound itself to such an agreement or undertaking, it is now not open to the appellant to contend that the court should have delved into the issue of whether or not it was bound by that undertaking to the respondent. In any case, it was not clear from the appellant's pleadings whether the said amount of US$240,000.00 allegedly instructed to be paid to Dome Energy was paid. What is clear from the appellant's affidavit in opposition and the submissions of his counsel…….is that, only an amount of USD183,000.00 was paid and even that, no evidence of payment was exhibited."

Consideration by the court

Starting from the last submission by Counsel for the respondent, he stated that the payment of USD183,000.00, even if made, should not affect the appellant's obligation to the respondent. In effect even if the appellant has paid part of the amount stated in

the SPA to the seller's credit as instructed in exhibit OC1, it is a matter of no consequence as far as the respondent is concerned. In effect without even interrogating the case, the court should overlook the apparent overpayment that evidence on record has thrown up. The court would not be entitled to ignore what appears to be double payment under the same contract, intended to benefit the seller and the respondent who claims to be the seller's assignee. They would be unjustly enriched thereby and the court could not close its eyes to it. This was a sufficient reason why judgment should not have been entered for the respondent, at least not for the entire claim.

We would next consider what counsel for the respondent referred to as new matters and/or evidence which have been raised for the first time in this appeal. It is observed that up to this point all arguments and decisions have been based on the pleadings and affidavit evidence filed before the trial court. Thus factually, nothing new has been introduced since then. It is clear all the submissions have been made pursuant to the facts on record. For that reason the submissions are admissible even if not canvassed in the courts below. What we understand counsel to be doing is placing different construction on the pleadings and affidavit evidence, especially the exhibits. This does not amount to introducing new matter or evidence. The court is entitled to draw inferences from accepted facts on record and for that reason a party may urge on the court a particular meaning or construction on the accepted facts even if the court below was not given such benefit. It does not violate any of the principles highlighted by counsel for the respondent in his submissions which have been outlined above.

Order 14 of C.I. 47 has the following relevant provisions:

Rule 1

Application for summary judgment

1 Where in an action a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or that the defendant has no defence to such a claim or part of a claim, except as to the amount of damages claimed.

Rule 2

(1) The notice of the application shall set out the reliefs sought by the plaintiff.
(2) The notice shall be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based, and stating that in the deponent's

belief there is no defence to that claim or part of a claim, or no defence except as to the amount of damages claimed.

Rule 3

Defendant may show cause

(1) A defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.

Rule 5

(1) On the hearing of the application the Court may
   (a) give such judgment for the plaintiff against the defendant on the relevant claim or part of a claim as may be just having regard to the nature of the remedy or relief sought, unless the defendant satisfies the Court, with respect to that claim or part of it, that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part of it.

Over the years the courts have expressed in different ways what considerations to apply in proceedings for summary judgment. Some of them are contained in the following authorities:

(i) In the case of **Ballast etc v Horizon Marine Construction,** supra, this court stated, per Gbadegbe, JSC, that "the court may only grant the application in cases where the defendant failed to set up a good defence or raise an issue which ought to be tried."

(ii) In **Sadhwani v. Alhassan,** supra, the court spoke of bona fide or good defence, that means a defence known in law, to entitle a defendant to defeat an application for summary judgment, and also that the court should not rely on affidavit evidence to dispose of triable issues.

(iii) In the case of **Jones v. Stone (1894) AC 122; 70 L.T. 174,** Lord Halsbury stated that the proceeding established by Order 14 is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment; and where it is inexpedient to allow defendant to defend for mere purposes of delay.

(iv) **in Daimler Co. Ltd. v Continental Tyre & Rubber Co. (Great Britain), Ltd. (1916) 2 A.C. 307; (1916-17) All E.R. Rep. 191,** the trial-provided of course there is no arguable defence to the action-nevertheless, facts, this

procedure was not appropriate. Among others, the defendant had alleged that the action was commenced without proper authorisation.

(v) "When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff", per Jessel MR, in **Anglo-Italian Bank v. Wells (1878) 38 L.T. 197 C.A.** at 201.

(vi) Even when there is a fair probability of a defence, leave to defend should be given; see **Ward v. Plumbley, (1890), 6 T.L.R. 198.**

(vii) It is important to note these significant words of Anin J.A. (as he then was) in the case of Wilson. V. Smith (1980) G.L.R. 152 at 161: "*While it is true that the rationale behind the summary procedure under Order 14 of L.N. 140A is to provide the plaintiff with a speedy mode of recovery of judgment in cases properly falling under it and thereby to prevent him from being delayed and put to an unnecessary and protracted trial-provided of course there is no arguable defence to the action-nevertheless, the Order was not intended as an engine for the suppression of the defendant. The Order is only intended to apply to cases where there is no substantial dispute as to the facts or the law.*"

It is observed that under both the old rules contained in Order 14 of the High Court (Civil Procedure) Rules, 1954, L.N. 140A (repealed) and the new rules under C.I. 47, also Order 14 thereof the provisions for summary judgment have been similar in content. Similar provisions apply under the English rules, thus the English authorities on this subject are quite germane and persuasive. These principles are also outlined in the Supreme Court Practice, 1967 edition at page 119 in these words: "***The defendant may show cause against the plaintiff's application....(2)on the merits, e.g. that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which required the taking of an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.***"

There are numerous cases which need not be cited, for the principles have become well-known and accepted and are briefly condensed in rule 5(1)(a) of Order 14. In summary, the court must be satisfied that on the facts and law the defendant ought to be given the opportunity to be heard on merits, where his defence raises reasonable and arguable points and is not intended merely to cause delay and is not a sham. A complete defence is not required at this stage; but as was held in **Wallingford v. Mutual Society (1880) 5 App. Cas. 685; 29 W.R. 81 H.L.** mere denial is

insufficient; the defendant must give sufficient facts and particulars to show that there is a bona fide defence.

We recount what counsel for the appellant said in his statement of case that "Examining the statement of claim and affidavit in support filed by the respondent, alone, without comparing same with the processes filed by the appellant, should have convinced the lower Court that the respondent is not entitled to summary judgment." In effect counsel is saying the plaintiff made no prima facie case in the first place to have warranted a consideration of the defence to the claim. Even though counsel did not expatiate on this, it is a true representation of the initial consideration of an application under order 14.

Rules 1, 2 and 3 are the heartbeat of Order 14 and complement each other and should thus be construed together. The starting point in an application under this Order is for the court to examine the endorsement on the writ, statement of claim and affidavit in support of the application and decide whether the plaintiff has made what is called a prima facie case to entitle him to the court's decision, even in the absence of a defence. Rule 1 entitles the plaintiff to make the application for summary judgment after entry of appearance; that is, even before the defendant has filed a statement of defence. This means that the court may proceed to examine only the material placed before it by the plaintiff. Hence the requirement that the court should be satisfied that the plaintiff has made a case, albeit prima facie. Where the court takes the view that the application is properly constituted, the burden is shifted to the defendant to show cause by affidavit evidence or otherwise, especially his statement of defence, if any has been filed, that he has a good, bona fide, reasonable, or fair defence to the plaint, in short that he has raised a legally cognizable defence to the claim or a part of it which ought to be tried as rule 5(1)(a) requires.

In the statement of claim, the respondent averred that an SPA was entered into between the defendant and Omaroil. The respondent was not a party to this contract. The pleading also stated that the respondent was to be paid some money for facilitating the supply of crude oil under the contract, per paragraph 4 thereof, supra, which is repeated for purposes of emphasis:

"Plaintiff says that pursuant to the Sales and Purchase Agreement executed between Omaroil Agency Limited and the Defendant it was agreed between the parties that an amount of USD87.10 per barrel was to be paid within 10 days of discharge to the Plaintiff for its benefit for facilitating the supply of the crude oil to the Defendant."

This particular pleading was the subject of two different constructions and given two different meanings. Taking the first construction or meaning which is espoused by counsel for the respondent, the payment due the plaintiff is covered by the SPA itself, wherein the seller was given the right to assign and the respondent was made a beneficiary. Following the second construction or meaning, Counsel for the appellant understands the respondent to be saying that besides the SPA there was another agreement between defendant and Omaroil which was made for the benefit of the respondent to the tune of USD87.10 per barrel payable by the appellant to the respondent within a period of 10 days of the supply or delivery. But Counsel for the respondent strenuously argued that there was no such discrepancy between the said paragraph 4 and the SPA in as far as the SPA was intended to benefit the respondent.

Since the arguments are based on the same pleading and facts, we would proceed to discuss the two viewpoints together. Having regard to the nature of the case put forward by the respondent, certain questions arose. Since the respondent is not a party to the SPA, was there an assignment of Omaroil's interest therein to the respondent? Or was the respondent a beneficiary of the SPA under its clear terms? What document evidences the other agreement, if any, referred to in paragraph 4 of the statement of claim? Is the appellant liable under both the SPA and the agreement, if any, mentioned in paragraph 4 of the statement of claim? Taking into account the averments in the statement of claim, these are legitimate questions which the trial court could raise even without regard to the defence. And if the court was not satisfied that there was a clear assignment, or that the respondent was a beneficiary under the SPA, he ought to refuse the application for summary judgment. In his view, Counsel for the respondent considered these matters to be trivial and inconsequential, but they are not. The party must be made to know the basis of the claim against him, for that will inform the nature of his defence.

The appellant pleaded that the respondent had no cause of action against it since the respondent was not a party to the SPA and was neither a beneficiary nor assignee thereof. It is observed that all the various correspondences exhibited in this application made reference to the SPA as the only contract. The respondent admits it is not a party to it; thus there was the need for evidence to be adduced to satisfy the court that there was an assignment to it or it was a beneficiary of the SPA which entitled it to sue under the SPA, in other words that it has a cause of action under the SPA in its own right. When the issue is raised as to a cause of action, it ought to be interrogated first before any further step is taken in the action for it goes to the foundation of the matter before the court. For in a case founded on contract, the principle applicable, as stated in Halsbury's Laws of England, 5th edition Vol 11, paragraph 208 at page 206 is that "*the*

proper claimant is the person with whom or on whose behalf the contract was made, or in whom the rights under the contract are vested."

The Court of Appeal answered these questions in favour of the respondent, for reasons which have been summarized above. It is clear there was no privity between the respondent and Omaroil as far as the SPA was concerned. But lack of privity could be defeated by a successful plea of assignment as an exception to the rules on privity. On the other hand, he could succeed if it established that it was a beneficiary of the contract. All the other matters arising in this case are ancillary to a resolution of the key questions of whether the respondent is an assignee of Omaroil or a beneficiary under the SPA. These two concepts, namely assignment and beneficiary under a contract, have different connotations in law so it was inappropriate for the Court below to have treated them together as one legal concept.

What is required to be established in a case founded on assignment of an interest under contract? The elements applicable for the consensual transfer of rights under a contract are equally applicable to assignment under a contract, since it also entails a transfer of right/s. Thus to be legally effective, an assignment of rights under a contract must establish four elements. These elements have statutory backing in subsections 1 and 2 of section 7 of the Contracts Act, 1960, (Act 25). These are:

i. The assignor must have the original right to the subject-matter; in this case the sum mentioned in the SPA. *Nemo dat quod non habet* applies.
ii. The assignor must have expressed or exhibited clear intent to divest itself of its title or right to the subject-matter. This is a requirement under consensual transfer of right under contract as well as the Statute, namely section 7(1) of Act 25.
iii. The assignor must have taken steps to effectuate that intention by an act of transfer or an agreement to assign recognized in law or equity. Section 7(2)(b) of Act 25 requires it to be in writing signed by the assignor or his agent. This does not exclude the principles of equity against fraud and unjust enrichment; if the court finds it unconscionable to allow an assignor to resile from his action which has caused detriment to the assignee, it will enforce it even in the absence of writing.
iv. The subject-matter of the assignment, in this case, the amount of money, must be known and certain.

The facts relied upon by the Court of Appeal were the SPA itself, the MOU, the various correspondences and the payments made by the appellant to the respondent. It is noted that the MOU as well as all the various correspondences made reference to, and

relied on, the SPA. Thus the parties had no doubt that the SPA reigned supreme. If the respondent was the beneficiary under the SPA, why was Omaroil a party to the subsequent MOU? If the respondent was the assignee of Omaroil's rights since 18th July 2014, why was Omaroil's consent subsequently required for any transaction in relation to the SPA? Counsel for the respondent sought to answer by stating that the Appendix A took its roots from article 24 of the SPA, and when read together they made the respondent the beneficiary of the contract. But it does not answer the question why Omaroil's consent was still required after making the respondent the beneficiary of the contract. Let us quote these provisions of the SPA and discuss their import. They provide:

"24. **Appendices:** There is one (1) appendix in this contract: Banking Coordinates (Appendix A)

APPENDIX (A)

SELLER'S BANKING DETAILS

BANK NAME	**ECOBANK GHANA LIMITED**
BANK ADDRESS	**TEMA MAIN BRANCH**
ACCOUNT NAME	**ABIVAMS LIMITED**
BENEFICIARY	**ABIVAMS LIMITED**
SWIFT CODE	
IBAN ACCOUNT NO.	
CURRENCY	**USD**
A/C OFFICER	
A/C OFFICER CONTACT	

BUYER'S BANK DETAILS

BANK NAME	**UT BANK LTD**
BANK ADDRESS	**25B MANET TOWERS, AIRPORT CITY**
ACCOUNT NAME	**PLATON GAS OIL GHANA LTD**

BENEFICIARY **PLATON GAS GHANA LTD**

ACCOUNT NO

CURRENCY **USD**

ACCOUNT OFFICER

TELEPHONE NO.

Article 24 of the contract upon which Appendix A hinges only makes provision for bank account, and in this context bank account to be named by both parties. The use of the expression 'Beneficiary' appears under Appendix A in both the buyer and seller's account. It could bear more than one meaning, having regard to (i) the express words used and (ii) the subsequent conduct of the parties. On the face of the document, it could mean that the account holder is the same person who is the beneficiary of the account, in other words there is no other beneficiary of the account, like a trust or client or joint account which have other beneficiaries. It could also mean, as described by the respondent that it meant the money was for the benefit of the respondent. It could also mean that despite the designation of the respondent's bank account to receive the payment, the money remains that of the seller hence the description in the contract as the "Seller's Banking Details" and not the Beneficiary's Banking Details. And from the subsequent conduct of the parties in involving Omaroil in signing MOU etc in respect of the SPA it appeared the contract does not mean what the respondent ascribes to it. In short, there was no clear intent from the face of the SPA and subsequent dealings or conduct of the parties that Omaroil had ceded its right to the money to the respondent. The lack of intention is buttressed by the fact that Omaroil also contracted with the appellant to pay part of this amount to another named person in exhibit OC1 dated 18th September 2014. A key element in assignment appears to be missing upon reading the SPA, MOU and exhibit OC1. Certainly intent may be established through the writing required by section 7(2) of the Contracts Act if indeed there was one.

It is also significant to note that there is nothing in the express terms of the SPA that an assignment has been made to the respondent by Omaroil. The agreement only permitted Omaroil to assign its interest, meaning that it could be done by a separate agreement subsequently.

On the question of whether the respondent was a beneficiary under the SPA, the respondent recounted Appendix A of the SPA and relied on Sections 5 and 6 of Act 25 the relevant of which which provide thus:

"**5. Provision in contract for benefit of third party**

(1) A provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to this section and sections 6 and 7, be enforced or relied on by that person as though that person were a party to the contract.

6. Rights of third party

Where under section 5 a person who is not a party to a contract is entitled to enforce or rely on a provision in the contract,

(a) a variation or rescission of the contract shall not prejudice that person's right to enforce or rely on the provision if that party has acted to the prejudice of that party in reliance on the variation or rescission, unless that party consents to the variation or rescission; and

(b) subject to paragraph (a), a party against whom the provision is sought to be enforced or relied on is entitled to rely on or to plead by way of defence, set-off, counterclaim or otherwise a matter relating to the contract which that party could have so relied on or pleaded if the provision were sought to be enforced or relied on by the other party in the contract.

The applicable statutory provisions have been correctly cited by the respondent. However, these provisions apply only where the contract clearly confers a benefit on the third party. But as earlier pointed out, from article 24 and Appendix A of the SPA, one cannot conclude positively, without further extraneous evidence, that it conferred a benefit on the respondent. The SPA referred to the seller and not a facilitator of the sale as paragraph 4 of the statement of claim talks about. The seller as used in the SPA is not synonymous with a facilitator as used in the pleadings. If they are one and the same, let there be evidence to prove it. Based on the available evidence we hold that these provisions do not apply and the court below was wrong in concluding that those provisions under the SPA conferred a benefit on the respondent.

What must be noted now is that at this stage it is not a full blown trial, the defendant only needs to show that he has a reasonable defence to the claim and his defence is not a sham or intended to delay payment. The defence raises for the court's consideration key legal issues of assignment and enforcement of contract. If indeed exhibit OC1 is valid, the court's decision would mean the appellant would have been compelled to over pay what was contracted for.

To get over the issue of intent to assign and the effects of exhibit OC1, the Court of Appeal relied on section 7 of the Contracts Act and concluded that Omaroil could not validly enter into another contract exhibit OC1 when it had already assigned its interest under the SPA to the respondent. Section 7 of Act 25 provides that:

(1) Subject to the relevant rule of law, and subject to any contrary intention appearing from a transaction giving rise to legal rights, a person may, after the commencement of this Act, assign a legal right to another person as specified in this Act.

(2) An assignment, whether given for consideration or not, of a vested right, transfers the right and interest in the assignment to the assignee and extinguishes the right and interest in the assignment of the assignor if-

(a) it is absolute and not by way of a charge only; and

(b) it is in writing and is signed by the assignor or the agent of the assignor; and

(c) written notice of the assignment is given to the debtor or any other person against whom the right is enforceable.

(3) A purported assignment of a conditional right operates as a promise to assign the right if and when the condition occurs.

(4) An assignment, whether given for consideration or not, is valid although it does not comply with all or any of the requirements of subsection (2) but-

(a) a right so assigned shall not be enforced or relied on against the debtor or other party against whom the right is enforceable unless the assignor is a party to the proceedings in which it is sought to be enforced or relied on, or unless the Court is satisfied that it would be impossible or impracticable so to join the assignor; and

(b) the assignment shall not prejudice the debtor or any other person against whom the right is enforceable unless the debtor or the other person has written notice of the assignment.

(5) Where there are two or more assignments in respect of the same debt or right, a later assignee has priority over an earlier assignee if the debtor or other person liable had not received written notice of the earlier assignment at the time when the later assignment was made.

(6) A debtor or other person against whom a right is enforceable is entitled as against a person to whom the debt or the other right is

assigned, to rely on or plead by way of defence, set off, counterclaim or otherwise, a matter relating to the right which the debtor or that other person could have relied on or pleaded against the assignor at the time when the writtten notice of the assignment was received by the debtor or that other person.

Section 7 applies when it is established that there was an assignment in terms of the elements set out above, meaning there was an intent to assign, and there was writing identifying the subject-matter and specifically naming an assignee and bringing it to the notice of the debtor. As earlier stated, the SPA does not unequivocally create an assignment in favour of the respondent. The conduct of the purported assignor in signing exhibit OC1 seems to suggest that under the SPA it meant to retain ownership of the amount stated therein and this gives more credibility to the suggestion that article 24 of the SPA and Appendix A only chose the respondent's bank account to receive payments from the appellant. When the MOU and the various correspondences are read together with the SPA, there is no doubt that the parties were still relying on the provisions of the SPA to which the respondent was not a party and which on the face of it did not make it an assignee. Evidence is required to unearth the Omaroil's intention in signing both exhibits OC1 in September 2014 and then exhibit MA5 in October 2014, vis-a-vis the earlier documents signed in July 2014.

In summary, the court has to consider the fact that the SPA, MOU and the various correspondences did not appear to have specifically made the respondent a beneficiary, neither do they appear to have created an assignment of Omaroil's rights, except that payments were to be made to the respondent per its stated bank account. It also has to consider the fact that the defence has raised very critical issue of cause of action, and the probability that it might face payments under two different contracts on the same subject-matter resulting in over payment. At this stage it is unwise in as much as it is unreasonable to reject exhibit OC1 when a clear intent to assign and actual assignment of Omaroil's rights under the SPA have not been fully unearthed.

The Court of Appeal undertook to construe the documents exhibited by the parties in coming to its decision. That would have been justified if the documents were conclusive of the matter. The respondent denies any knowledge of exhibit OC1 and the payment/s that were made under it. Therefore, the appellant would be required to provide evidence at a trial to prove the validity of exhibit OC1 and the payments made pursuant thereto. The appellant would also have to satisfy the court that it was entitled to deduct the amount contained in exhibit OC1 from whatever the balance is in the SPA. The respondent would be required to prove that it was either a beneficiary or assignee of

the SPA, which is not easily deducible from the totality of the documentary evidence at this stage.

The principle is that where, on an application for summary judgment, the issue raised was a pure point of construction which could be as well determined on summary application as at a trial, because it would not be affected by evidence, the court had jurisdiction to grant summary judgment, on the basis that a trial would have no realistic prospect of causing it to reach a different judgment. That was so stated in the case of **BBC Worldwide Ltd. v. Bee Load Ltd., t/a Archangel Ltd. (2007) T.L.R. 86.** But this matter does not depend on pure construction of documents, as at least exhibit OC1 and payments made under it have to be established at the trial, and moreover the exhibits are capable of more than one plausible construction and will thus require some form of evidence to assist the court determine the issues. Most importantly, the very basis of the respondent's action is reasonably being challenged for if it is neither a beneficiary under the SPA nor an assignee of Omaroil, the respondent might not have a cause of action against the appellant.

It is for these reasons that we conclude that the appellant was unjustifiably shut out of the trial. We therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the decision of the High Court. We must state that except on matters of law stated herein which are binding on the courts below, nothing stated herein should be taken as a finding of fact by this Court; all the issues are at large and the trial court is unfettered in its decision to conduct a 'full blown' trial.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

S. A. B. AKUFFO (MS)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

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