IBM WORLD TRADE CORPORATION v HASNEM ENTERPRISES LTD

[2001-2002] 2 GLR 248

Division: SUPREME COURT, ACCRA

Date: 16 MAY 2001

Before: AMPIAH, ATUGUBA, AKUFFO, LAMPTEY AND ADZOE JJSC

Estoppel—Promissory estoppel—Reliance on representation—Prerequisites for successful reliance on principle—Failure by respondent to prove pre-sale maintenance agreement allegedly inducing it to buy appellant's machine—Reliance by Court of Appeal on more speculation to find agreement established—Whether conclusion of Court of Appeal sustainable—Evidence Decree, 1975 (NRCD 323) ss 14 and 26.

Contract—Breach of contract—Maintenance agreement—Parties entering "per call" arrangement for maintenance of respondent's machine by appellant—Whether appellant bound to service machine permanently—Whether any enforceable contract between parties.

Contract—Specific performance—Discretion of court—Failure to perform obligation under contract bar to relief—Failure by respondent to pay appellant's outstanding bill for servicing machine—Whether respondent entitled to specific performance of maintenance agreement.

Interest—Debts—Rate of interest exigible—Variation of order—Commercial debt—Trial judge awarding interest on respondent's debt up to date of judgment—Failure by respondent to pay judgment debt—Change in bank rate from 30 to 45 per cent and considerable depreciation in value of cedi over period—Whether order to be varied for respondent to pay 45 per cent interest on debt up to date of payment.

Law reform—Interest—Debts—Rate of interest exigible—Award of compound interest—LI 1295 empowering courts to award interest only at bank rate—Negative impact of provision on economy and workload of courts—Need to empower courts to award compound interest on debts—Courts (Award of Interest) Instrument, 1984 (LI 1295).

The defendant-appellant was the local branch of a multinational manufacturer of office machines. In 1977 the plaintiff-respondent, also a limited liability company, bought a photocopier from the appellant for its operations. For a number of years, the appellant maintained and serviced the machine for a fee any time it was invited to do so by the respondent. However, when the machine broke down in 1986, ie the end PC light would not go off, the appellant refused the respondent's call to repair it. The

respondent, claiming, inter alia, that: (a) before it purchased the machine it had entered into an oral agreement for an exclusive after sale service of the machine for a fee "on call basis" with the appellant

and correspondence between them confirmed that agreement; (b) from the course of dealing between them there was a binding contract compelling the appellant to repair the photocopier; and (c) there was an inscription on the photocopier to the effect that "if the light does not go off call IBM Service", brought an action at the High Court for, inter alia, specific performance of the oral agreement, damages and mesne profits against the appellant. The appellant denied the existence of any such agreement between them and contended, inter alia, in its defence that: (i) on the expiry of the warranty period on the machine the respondent declined to enter into a maintenance agreement with it and therefore each call service it made on the respondent was on independent request for service which was honoured on the basis of availability of spare parts and appropriate manpower; and (ii) the respondent had failed to settle the bill it submitted to it for the last service call it made on it and it was therefore entitled to refuse to respond to any further calls from the respondent. The trial judge held, inter alia, that: (1) the mere purchase of a product did not render the manufacturer liable to service it in the absence of a separate contract for that purpose and therefore the words on the machine did not create an unequivocal binding maintenance agreement between the parties; and (2) correspondence relating to supposed obligations did not create binding obligations and therefore the correspondence between the parties did not purport and were not intended to create any service agreement between the parties. He therefore dismissed the plaintiff's claim. But since he found that the appellant's bill of ¢58,213.04 was still outstanding, he gave judgment for that amount plus interest at the prevailing bank rate up to the date of judgment. Dissatisfied with the judgment, the respondent appealed from it to the Court of Appeal. By a two to one majority decision, the Court of Appeal on the grounds, inter alia, that the appellant was the manufacturer of the machine, which was expensive, and new on the Ghanaian market, and carried the inscription "call IBM Service" held that the sales manager of the appellant was likely to have assured prospective purchasers of exclusive after sales service and could not have enticed them without such assurance, allowed the respondent's appeal. The court however upheld the appellant's counterclaim for its outstanding bill. Aggrieved by that judgment, the appellant appealed against it to the Supreme Court and also sought a variation of the trial judge's order in respect of the outstanding bill and have the interest on the judgment debt calculated to the date of final payment at the prevailing bank rate.

Held, allowing the appeal (Lamptey JSC dissenting, Ampiah JSC dissenting in part):

(1) it was clear on the authorities that a party relying on the principle of promissory estoppel would only succeed if he proved that the promisor intended his representation to be binding and to induce him to act on it and in fact he was induced to act on it and in the result altered his position in reliance on that promise or representation that it would be inequitable to allow the promisor to act inconsistently with the promise. Although the promise or

representation did not need to be express, it had to be clear or unequivocal, or precise and unambiguous; it might be implied only where the facts or course of negotiations between the parties justified it. The promise or representation could not be a matter of mere speculation. In the instant case, since the respondent's claim that it was the pre-sale agreement which induced it to buy the machine was denied by the appellant, section 14 of the Evidence Decree, 1975 (NRCD 323) imposed a burden on, it to prove that fact. However, an examination of the letters it sought to reply on, and the entire set of correspondence that passed between them did not make out any agreement or promise or representation by the appellant to provide an exclusive maintenance service for the copier machine which could form the basis for the operation of the doctrine of promissory estoppel as decided by the authorities or as provided by section 26 of NRCD 323. The heavy reliance of the

majority of the Court of Appeal on the fact that the appellant was the manufacturer of the machine, it was new on the Ghanaian market, it was expensive, and the direction "call IBM Service" to conclude that the respondent must have been assured of after sales service before it bought the machine, was merely speculative. Since the respondent failed to establish the pre-sale promise, the conclusion of the Court of Appeal was not supported by the evidence and was therefore wrong. Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130; dictum of Lord Denning in Combe v Combe [1951] 1 All ER 767 at 770, CA and Evenden v Guildford City Football Club [1975] 3 ER 269 at 273, CA; and Societe Italo-Belge [1981] 2 Lloyd's Rep 695 at 701 applied.

(2) Under the "per call" arrangement between the parties, contract negotiations could only start when the respondent called on the appellant to come and repair the machine. That call would only be an offer. And depending on the negotiations with regard to such matters as the cost involved, availability of materials and other charges, the appellant might agree or not to do the job. It would be only when the parties had agreed on all essential issues and the appellant had agreed to do the work that there would be acceptance which would constitute the negotiations into a contract. Thus each offer and acceptance would be a separate contract; and none of such contracts would bind the appellant to continue servicing the respondent's machine permanently. Accordingly, the appellant was not in breach of any contract. Accordingly, the majority of the Court of Appeal erred when they reversed the finding of the trial High Court that there was no enforceable contract between the parties. Dictum of Lord Buckmaster in May and Butcher v R [1934] 2 KB 17 at 20 cited.

(3) Specific performance was an equitable relief exceptional in character and was granted by the court in exercise of its discretion but on fixed principles. One of those principles was that a plaintiff who sought specific performance of a contract had to show that he was ready and willing to perform his own obligation under the contract, and any failure on his part or breach of his own obligation was a bar to his claim. Accordingly, the failure of the respondent to

pay its outstanding bill disentitled it to the relief of specific performance

(4) Since the appellant's claim for interest related to a commercial debt owed by the respondent which still remained unpaid, it stood to reason that the interest should continue until the date of final payment because on the evidence the bank rate of interest of 30 per cent applied by the trial judge had changed to about 45 per cent as at present, and the exchange rate of the cedi to the United States dollar had changed from ¢275 to ¢7,200. That clearly demonstrated the extent to which the value of the appellant's money had eroded over the eleven- year period it had been deprived by the respondent of not only the ownership but also the use of it. Since the trial judge gave no specific reason for his order that the interest should sum up to the date of judgment, by virtue of its powers under section 2(4) of the Courts Act, 1993 (Act 459) to exercise all the powers vested in the High Court, the court would vary that order and order that the interest on the amount owed must run up to and inclusive of the date of final payment. And in order to give the appellant a just and equitable recompense for the respondent's unlawful withholding and use of its money, the rate of interest must be that currently prevailing. However, since the Bank of Ghana no longer fixed a specific rate of interest and the benchmark that influenced the interest charged by individual banks was the rate of interest payable by the Bank of Ghana on its 91-day treasury bills, presently at 45 per cent, that rate would be applied.

Obiter per Akuffo JSC. Given the fiscal realities that have prevailed in this country over the past two decades and the recalcitrance of too many debtors in the fulfilment of their obligations, it would augur well for the country if the Courts (Award of Interest) Instrument,1984 (LI 1295) were amended to give the court the power to award compound interest. Compounding interest on debts is, perhaps, the only effective mechanism, which will allow the amount due to grow in line with inflation, provided the correct rate of interest is also employed. Economic development depends, to a large extent, on healthy financial interaction and transaction; these, in turn, cannot exist without credibility. It is only when participants in business live up to their legal obligations, and cease using the processes of the courts to evade financial responsibilities that this country can finally launch itself firmly on the road to economic success. Where money is unjustly withheld, then the creditor must be seen to have been justly recompensed by the debtor for the unjust use of other people's money. Any system that tends to encourage debtors to shirk their responsibilities benefits no one but such delinquent debtors, and poor debt servicing in the business sector only fans, further, the flames of inflation. It seems to me that if the consequences of delinquency were made less appealing than they are now, then the attraction of needless protracted litigation would be significantly reduced.

CASES REFERRED TO:

(1) Holland West Africa v Pan African Trading Co [1976] 2 GLR 179.

(2) Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd [1970] 1 QB 447; [1970] 1 All ER 225; [1970] 2 WLR 198, CA.

(3) Jefford v Gee [1970] 2 QB 130; [1970] 1 All ER 1202; [1970] 2 WLR 702, CA.

(4) London, Chatham & Dover Railway Co (The) v South Eastern Railway Co [1893] AC 429.

(5) Attieh v Koglex Ltd, Supreme Court, 9 May 2001; [2001-2002] SCGLR 000.

(6) Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130; [1956] 1 All ER 256.

(7) Evenden v Guildford City Association Football Club Ltd [1975] QB 917; [1975] 3 All ER 269; [1975] 3 WLR 251, CA.

(8) Societe Italo-Belge [1981] 2 Lloyd's Rep 695.

(9) May and Butcher Ltd v R [1934] 2 KB 17, CA.

(10) Hussey v Horne-Payne (1879) 4 App Cas 311, HL.

(11) Sowah v Bank for Housing & Construction [1982-83] GLR 1324, SC.

(12) Heilbut, Symons & Co v Buckleton [1913] AC 30.

(13) Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741; [1972] 2 All ER 271, [1972] 2 WLR 1090, HL.

(14) Combe v Combe [1951] 2 KB 215; [1951] 1 All ER 767. CA.

(15) Hughes v Metropolitan Railway Co (1877) 2 App Cas 439, FIL.

(16) Durhan Fancy Goods Ltd v Jackson (Michael) (Fancy Goods) Ltd [1968] 2 QB 839; [1968] 2 All

ER 987; [1968] 3 WLR 225.

(17) Quist v George [1974] 1 GLR 1.

APPEAL by the defendant-appellant company, IBM World Trade

Corporation, from the majority decision of the Court of Appeal, allowing the plaintiff-respondent-company's appeal from the judgment of the High Court, wherein the respondent's claim for, inter alia, performance of an oral contract between them was dismissed. The facts are sufficiently stated in the judgment of Adzoe JSC.

N Kuenyehia for the appellant.

Aduama Osei for the respondent.

Akuffo JSC. I have been privileged to see beforehand the erudite opinion of my brother Adzoe JSC and, for the reasons stated therein, I am in full agreement with him that the appeal must succeed and the decision of the Court of Appeal be set aside.

I will therefore limit this opinion to the issue raised in paragraph (c) of the additional grounds of appeal, regarding the proper period over which the interest awarded should remain exigible. In its amended counterclaim filed on 4 May 1988 the appellant claimed an amount of ¢58,213.04 as the sum due for maintenance services previously rendered to the respondent, together with interest thereon at the bank rate prevailing at the date of judgment, ie from 20 December 1984 up to the date of final payment. The trial court, after finding the said amount as being justly due and payable by the respondent, however awarded interest thereon up to the date of the judgment, ie 18 May 1990. According to the appellant, taking into account the time lapse between the judgment of the trial court and that of the Court of Appeal, the latter, in upholding the counterclaim, ought to have varied the trial court's order and awarded the interest to be calculated from 20 December 1984 to the date of final payment at the prevailing bank rate.

Since there was no contract between the parties stipulating the payment of interest on any amount arising from the services of the appellant, the trial judge, correctly, based his order on the provisions of the Courts (Award of Interest) Instrument, 1984 (LI 1295), which reads:

> "Where in any civil cause or matter the Court makes an order for the payment of interest on any sum due to the plaintiff other

> than any sum claimed by a plaintiff under Order 13 Rule 3 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) the rate at which such interest shall be payable shall be the Bank rate prevailing at the time the order was made by the Court, but no compound interest shall be awarded."

However, it is clear that the only factor governed by this statute is the rate of interest to be applied to the sum due. Thus the time span over which the interest should be calculated is left to the discretion of the court and should, therefore, be determined by the dictates of the circumstances of the matter. As was stressed by Brobbey JA, in his dissenting opinion in the Court of Appeal; discretion must be exercised judicially and whether or not discretion has been properly exercised must be ascertainable from the reasons given for the exercise or the basis for the discretion. In deciding to order the interest to be payable

up to the date of the judgment, the trial judge appears to have relied upon the decision of the High Court in Holland West Africa v Pan African Trading Co [1976] 2 GLR 176, wherein Edusei J (as he then was) awarded interest with effect from the date the cause of action arose up to the date of the judgment of the trial court. That case, however, had nothing to do with ascertainment of the date on which the calculation of interest ceases and the learned Edusei J (as he then was), like the trial judge in the matter herein, did not give any particular reason for deciding that the interest should cease on the date of the judgment.

The underlying principle for the award of interest is now well settled and was spelt out by Lord Denning MR in the celebrated case of Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225 at 236, CA as follows:

> ". . . the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

See also Jefford v Gee [1970] 1 All ER 1202, CA wherein the English Court of Appeal was guided by this principle. In the earlier case of

London, Chatham and Dover Railway Co v South Eastern Railway Co [1893] AC 429 at 437, HL. Lord Herschell LC had put the matter even more graphically as follows:

> ". . . when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events."

Clearly, this is the same principle guiding LI 1295. That being the case, since the appellant's claim for interest related to a commercial debt owed by the respondent, which debt, as far as the record shows, remains unpaid up to now, it stands to reason that such interest continue at least until the date of final judgment, if not the date of final payment. Otherwise, if the respondent does not settle the amount due immediately after the entry of judgment, what justice will the appellant have received from the courts for the respondent's unjustifiable withholding and use of the money all these years?

Moreover, in May 1990 when the trial judge made his order, the prevailing bank rate of interest applied by the court was 30 per cent per annum and the average rate of exchange between the cedi and the US dollar was ¢275 to US$1. Eleven years down the line, the applicable rate of interest may be put at 45 per cent per annum and the average rate of exchange is ¢7,200 to US$1. These factors clearly demonstrate the extent to which the value of the appellant's money has eroded over the period that it had not only been deprived of the ownership of the money but also the use of it. In his dissenting opinion in the Court of Appeal, Brobbey JA, who was of the view that the interest be exigible until the date of final judgment, expressed himself on this issue as follows:

> "Another policy reason why interest should be ordered exigible to the date of final judgment is this: In a country like ours with rapid rate of inflation, if a person is ordered to pay money and payment is not made immediately, or within a reasonable time, the value of the amount ordered to be paid will trifle

into insignificance with the effluxion of time, for instance a debt of ¢5 million in 1988 which was not paid till 1995 will be worth about half that amount in 1995. A ruling that interest should be paid only up to the date of judgment of the trial court will amount to this: If the debtor can avoid the creditor for some time after that judgment has been delivered, he will be better off. A ruling to that effect will therefore encourage debtors not only to be evasive and therefore bad debtors, but will do injustice to the creditor who will not only continue to be deprived of his money and the use of it, but also cause that creditor to suffer unduly from the effects of inflation resulting in reduction of the value of the money, for as long as the debtor can put off payment of the trial court's judgment. An effective means of putting off payment of the amount ordered is to pursue litigation in our courts. However seemingly hopeless the appeal may be, the debtor will be encouraged to pursue it because knowing how lengthy appeals in this country take to be concluded, by the time the case reaches the Supreme Court, the debt would have been swallowed by inflation. . . It is my view that the courts owe it as a duty to discourage litigation and encourage the debtors to honour their obligations or pay their debts but not to encourage them to be evasive and litigious."

I wholeheartedly endorse this view. However, it is my humble opinion that we must go even farther, in order to give full effect to the aforesaid underlying principle. Consequently, since the trial judge gave no specific reasons for his order, the same may be varied and I believe this court owes it as a duty to the appellant, and to creditors in a similar position, to order, first, that the interest on the amount owed must run on the amount due, or the reducing balance thereof, up to and inclusive of the date of final payment. Secondly, by virtue of section 2(4) of the

Courts Act, 1993 (Act 459) this court has all the powers vested in the High Court by the Constitution, 1992 and any other law, which includes LI 1295. In the circumstances, therefore, it stands to reason that, in order to give the appellant a just and equitable recompense for the respondent's unlawful withholding and use of its money, the rate of interest applicable to the amount due must be that currently prevailing. I am fortified in this view by the recent decision delivered by this court in the case of Attieh v Koglex Ltd, Supreme Court, Accra, 9 May 2001, wherein interest was awarded "at the current bank rate" from 1 May 1990 up to the date of final payment.

It needs to be noted, however, that the Bank of Ghana no longer fixes a specific bank rate of interest. As such therefore, these days, the prevailing rate of interest differs from bank to bank. The only benchmark that influences interest charged by individual banks, is the rate of interest payable by the Bank of Ghana on its 90-day treasury bills; presently, this is 45 per cent. Clearly, therefore, this is the rate of interest that must be applied in this case. At the end of the day, the appellant, as creditor, must be seen to have been placed in the same position it would have been in had the respondent, as debtor, settled its debts in due time.

Finally, I wish to add that, given the fiscal realities that have prevailed in this country over the past two decades and the recalcitrance of too many debtors in the fulfilment of their obligations, it would augur well for the country if LI 1295 were amended to give the court the power to award compound interest. Compounding interest on debts is, perhaps, the only effective mechanism, which will allow the amount due to grow in line with inflation, provided the correct rate of interest is also employed. Economic development depends, to a large extent, on healthy financial interaction and transaction; these, in turn, cannot exist without credibility. It is only when participants in business live up to their legal obligations, and cease using the processes of the courts to evade financial responsibilities that this country can finally

launch itself firmly on the road to economic success. Where money is unjustly withheld, then the creditor must be seen to have been justly recompensed by the debtor for the unjust use of other people's

money. Any system that tends to encourage debtors to shirk their responsibilities benefits no one but such delinquent debtors, and poor debt servicing in the business sector only fans, further, the flames of inflation. It seems to me that if the consequences of delinquency were made less appealing than they are now, then the attraction of needless protracted litigation would be significantly reduced.

Adzoe JSC. In July 1977 the respondent company purchased from the appellant company an IBM Copier II machine for an amount of ¢33,000. That same month, the appellant company installed the machine for the respondent in Cape Coast. It is quite clear that up to about 1984 the engineers of the appellant company serviced the said machine for the respondent, but thereafter the appellant declined to do any further servicing. The respondent claims that when the machine broke down again in February 1986 it made several demands on the appellant to effect the necessary repairs but the appellant wrongfully refused to do the repairs which resulted in the respondent's inability to function in its business. It claimed it suffered loss. Accordingly, on 17 March 1987 the respondent sued the appellant at the High Court claiming as follows: "Specific performance of an (oral) agreement between the plaintiff company and the defendant company made in 1977 for an after sale service of the plaintiff company's IBM Copier II machine 'on call basis.'" It also claimed ¢1,205,000 special damages representing loss of income, interest on the said amount at the rate of 25 per cent from 1 April 1986 to the date of final judgment, and also mesne profits, plus interest thereon.

The respondent took pains to set out in its statement of claim various particulars of the alleged oral agreement. I need to set out two paragraphs of the statement of claim in order to make for a clear appreciation of the basis of the respondent's claims. Paragraph (4) of the statement of claim reads:

> "(4) Previously to the supply of the said IBM copier machine by the defendant company to the plaintiff company, it was agreed that the defendant company would provide an exclusive maintenance service, designated as 'after sale

> service' and for a fee or 'on call basis' and also for a fee or both."

In paragraph (7) of the statement of claim the respondent alleged as follows:

> "(7) The plaintiff company avers that it accepted the offer to buy the said IBM Copier II machine upon the clear undertaking that it is trade policy of the defendant company that its products are serviced and maintained exclusively by the defendant company or its appointed agents for whom the defendant company on various occasions as shall be noted in paragraphs (11), (12) and (13) of the plaintiff company's letter dated 28 November 1985 and letter dated 30 June 1986."

The appellant denied having made any oral agreement with the respondent; it claimed that the respondent declined to enter into a maintenance service agreement with the appellant and insisted that whatever maintenance service it rendered to the respondent was on a case by case basis under a scheme described as "on call basis", which did not create any standing contract binding the appellant. In effect, the appellant claimed that it was not bound by any contract which the respondent could call upon it to specifically perform.

The trial High Court found that there was no enforceable contract between the parties and dismissed the respondent's claims. But the Court of Appeal reversed that judgment by a majority decision of two to one and held the appellant liable to the respondent's claims, and the appellant has therefore come before this court for a final determination.

The original grounds of appeal before us are:

> "(1) The judgment is against the weight of the evidence on the record.
>
> (2) The Court of Appeal erred in rejecting the findings of fact made by the trial High Court which had had the benefit of observing the demeanour of the witnesses, and substituting its own findings of fact and thereby occasioning

> substantial miscarriage of justice to the appellant."

Further grounds of appeal have been filed, but in my opinion the original ground (1) is enough to decide the matter. It pleads in relief that we set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court.

It is clear that the respondent based its claim on what is known as the principle of promissory estoppel. Some call it equitable estoppel. Denning J (as he then was) expressed it in the case of Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 where it was held, as stated in the headnote that:

> ". . . where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense . . ."

In the several decisions which followed the High Trees case (supra) the principle saw significant amplifications on its terms of application. And in the case of Evenden v Guildford City Football Club Ltd [1975] 3 All ER 269 at 273, CA Lord Denning MR (as he then was) reviewed the cases and observed:

> "In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself. He was sued for some other cause, for example, a pension or a breach of contract or possession, and the promise, assurance, or assertion only played a supplementary role though no doubt to an important one. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself."

It is thus clear from the authorities that a party who is relying on the principle of promissory estoppel must make out a clear case that such a promise was made intended to be binding, intended to induce

him to act on it and that he in fact acted on it. I think that such alleged promise or representation forms a vital part of the cause of action and must be proved. In all the decided cases in which the principle was applied the promise or representation is established as having been made. It is not a matter of conjecture and speculation. Where it is to be inferred, the facts must exist which justify the inference. *Chitly on Contracts* (25th ed), Vol 1, pp 119-200 is emphatic that to bring the principle into operation: "the promise or representation must be clear, or unequivocal, or precise and unambiguous." I am not be understood as

saying that the promise or representation must be express; it may be implied where the course of the negotiations between the parties justify it. But the promise or representation cannot be a matter of mere speculation.

It is also clear from the authorities that if the promise or representation was indeed made, the promisee must show that the promise or representation influenced his conduct. To my mind, it seems therefore that the principle will not apply if it is shown that a party's conduct was not influenced by the promise. As stated in the case of Societe Italo-Belge [1981] 2 Lloyd's Rep 695 at 701, for the principle to apply, the promisee must be shown to have altered his position in reliance on the promise so that it will be inequitable to allow the promisor to act inconsistently with it.

The case of Evenden v Guildford City Association Football Club Ltd (supra) to which the majority judgment in the Court of Appeal also referred, may give us a clear illustration of the points I have tried to highlight. The facts of the case can be stated briefly: Mr Evenden was employed as a groundsman at the football ground at Guildford. He was employed by the Guildford Supporters' Club and worked with them from August 1955 up to October 1968. The supporters, club paid him. In 1968 there was a re-arrangement whereby he ceased to be employed by the supporters club; instead of the supporters' club, the football club itself employed him to do the same job that he did for the supporters' club. During the changeover from the supporters' club to the football club, a definite agreement was made to the effect that Mr Evenden's service should be regarded as unbroken. In 1974 he was dismissed by

reason of redundancy and the question was whether he was entitled to redundancy payment from 1955 or from 1968 when the football club took him on. Lord Denning MR applied the doctrine of promissory estoppel and held that the football club was bound to pay the benefits from 1955. The case, he said at 273:

> ". . . falls within the principle of Central London Property Trust Ltd v High House Ltd. At the meeting of October 1968 there was a clear representation by the football club that Mr Evenden's employment would be treated as continuous. That representation was intended to be binding and intended to be acted upon. He did act on it. He did not claim from the supporters' club the redundancy payment to which he would otherwise have been entitled from the club. Six months later his claim against the supporters' club was barred by lapse of time. It would be most unfair for the football club to go back now on that representation. They must be bound by it in the Industrial Court and elsewhere."

Now, the question raised by ground (1) of the appellant's appeal could be put this way: Did the evidence before the trial court support the finding made by the Court of Appeal that the appellant was bound in law to repair the machine sold to the respondent within the framework of the doctrine of promissory estoppel? The appellant says that the finding made by the Court of Appeal is against the weight of the evidence.

The crux of the respondent's case as pleaded in the statement of claim is that before it purchased the machine "it was agreed that the defendant company would provide an exclusive maintenance service, designated as 'after sale service' for a fee or 'on call basis' also for a fee or both." The appellant denied this averment and contended in paragraph (16) of the statement of defence that it was "twelve months after the sale when the warrant period had expired" that it asked the respondent to enter into a maintenance service agreement with it but the respondent declined to enter into any such agreement. I understand the "warrant period" to mean that the appellant had undertaken or

guaranteed that for a period of twelve months after the delivery of the machine, it would repair or replace it, if necessary.

Certainly it does not appear that it is any such warranty which the respondent relies on because its case is that the agreement to repair the machine was for "life services" promised by the appellant. Its representative who testified before the High Court said in his evidence that he bought the machine from the company "because of the 'life service' it was to give to me and because of after sales services promised me by their sales manager with whom I had discussions prior to the purchase." On the other hand he also told the court that: "Before the machine was installed the defendants gave me two specific instructions with regard to its maintenance, namely 'maintenance agreement' or 'after call service." Thus apart from the promise before the sale and the supply, there was also an agreement after the supply but before the installation. According to the evidence, therefore, the respondent purchased the machine because it relied on the pre-sale promise by the appellant that it would service the machine throughout its full life span of operation, and when the machine arrived it was asked to choose between two options of agreement. On that evidence, the Court of Appeal rightly, in my view, came to the conclusion that:

> "The plaintiff's case is not dependent solely on the per call service per se, but more importantly, the pre-sale agreement or promise by the defendant's sales manager to the effect that the company would provide exclusive after-sale maintenance."

Let me deal first with the alleged pre-sale promise or agreement because it is the main issue which involves the doctrine of promissory estoppel which the respondent relies on. It says it is the pre-sale agreement or promise which induced it to buy the machine. Without that promise it would not have brought it. I am unable to find any evidence in support of the respondent's contention. It is one thing pleading a cause and repeating it in court, and another thing providing evidence in support of the causes so pleaded. It is a common rule of evidence that except in certain special circumstances, a party who relies on a fact must prove it. Section 14 of the Evidence Decree, 1975

(NRCD 323) provides that the burden of persuasion as to the existence of a fact lies on the party to whose case the fact is essential. In its effort to establish the pre-sale agreement or promise, the respondent sought to rely on certain letters, particularly exhibits 1 and B. Exhibit 1 was a letter dated 16 April 1986 and written by the appellant to the respondent. It was a reply to some letters from the respondent in which it (the respondent) had complained that the appellant did not serve it with a certain notice. The appellant in exhibit 1 simply sought to tell the respondent that it (the respondent) was not entitled to that notice. The relevant portion of that letter, exhibit 1, stated:

> "You complained you were not notified. I informed you that the letters were targeted to customers we had contracts with us for maintenance. You did not have maintenance agreement hence we did not have any agreement to cancel."

Exhibit B from the respondent also merely complained about the appellant's refusal to go to Cape Coast to inspect the machine. Its contents were to the effect that the machine had broken down and some instructions appeared on the key board which read: "If the light does not go out call IBM services." According to the letter, the respondent had telephoned the appellant on 30 July 1982 and expected the appellant to send an engineer; it was because the engineer did not go to the respondent that it was writing exhibit B to the appellant. Referring to the directive which appeared on the machine, exhibit B continued as follows:

> "This directive was the reason for our telephone call to your engineering department on Friday 30 July 1982 . . . The purpose of writing this letter is to inquire from you why we have to wait for your engineer to have another job in Cape Coast before our request is attended to. You will agree with us that we have promptly honoured all bills sent to us to enable us have your confidence in our 'call service' with you."

Quite clearly, these do not make out any agreement or promise or representation which can form the basis for the operation of the

doctrine of promissory estoppel as decided by the authorities or as provided for in section 16 of NRCD 323.

The Court of Appeal heavily relied on the fact that the appellant was "the manufacturers of the machine"; the fact that "it was new on the Ghanaian market"; the fact that "it was rare and expensive" and the direction "call IBM Service" as sufficient grounds for the conclusion that the sales manager of the appellant was likely to assure a prospective purchaser of exclusive after-sale services, and observed that "the defendant could not have certainly enticed its customers without such exclusive after-sale service assurance." That is stretching the law to a point of absurdity. What the law looks for is the outward manifestations of an agreement, not speculation. As is stated by Anson, in his book, *The Law of Contract* (25th ed) at p12:

> "Agreement is not a mental state but an act, and as an act, it is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done."

I hold that the respondent did not establish the pre-sale agreement or promise and that the conclusion reached by the Court of Appeal is not clearly supported by the evidence.

The matter does not end there, however. The respondent also relied on what the parties call "per call" service agreement and in my judgment I must examine the scope and legal effect of that agreement. This is how the respondent put it:

> "They explained 'maintenance agreement' to mean entering into an agreement whereby I pay a specific sum of money so that whenever the machine was faculty, they would come down and service it. The 'after-call service' meant whenever the machine was faulty, I would call upon them to come and service it and after the service I would pay them upon presentation of their bill."

The evidence indicates that the respondent did not enter into the maintenance agreement. It opted for the per call service agreement.

The appellant also admitted that it serviced the machine on per call basis. The trial judge held that the per call agreement did not constitute a standing or permanent contract binding on the appellant to attend to every call made by the respondent. I agree with the learned trial judge. As Lord Buckmaster observed in the House of Lords in the case of May and Butcher Ltd v R [1934] 2 KB 17 at 20, CA:

> "It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all."

It is unfortunate that the Court of Appeal ignored this aspect of the respondent's claim. My understanding

of the per call arrangement is that the contract negotiations under it will start when the respondent calls on the appellant to come and repair the machine. In contract law that will be an offer. The appellant might or might not agree to do the job depending on such negotiations as it might have with the respondent with regard to such matters as the cost involved, availability of materials and other charges. If the two parties come to an agreement on all essential issues and the appellant agrees to do the work, there is then in law an acceptance which will constitute the negotiations into a concluded bargain called a contract. Each offer and acceptance will be a separate contract and no one of such contracts will bind the appellant to continue servicing the machine until doomsday. If it is so, then the appellant has not been shown to be in breach of any contract and the respondent's claim must be dismissed. That is the inevitable conclusion on the facts and I do not see any justification for the conclusions reached by the Court of Appeal.

It may be observed that the respondent believed that the contract of promise it claimed to have been made by the appellant could be found in the letters exchanged between it and the appellant. It was not easy to find it. Most of those letters said very little in favour of the respondent's case, and rather cumulatively emphasised the appellant's denial of a contract. The rule is that where a court has to find a contract in correspondence, and not in any one particular document, the

entire set of correspondence which passed between the parties must be taken into consideration. In Hussey v Home-Payne (1879) 4 App Cas 311 at 316, HL, Earl Cairns, the Lord Chancellor said:

> "The second requisite in this case he proposes to supply through the medium of letters which passed between the parties, and it is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them."

I would uphold the appellant's contention that the conclusion reached by the Court of Appeal is not supported by the evidence and allow the appeal.

I find it necessary to make a brief observation about the additional ground (b) filed by the appellant. The argument urged on this ground is that even if there was an enforceable agreement in existence binding on the appellant to service the machine, it was wrong for the Court of Appeal to have granted an order of specific performance to the respondent who had failed to pay for services rendered to them by the appellant in fulfilment of that contract. The answer provided by the Court of Appeal to the appellant's contention is this:

> "Now, the defendants further contend that assuming the 'pel call' service was binding on them, the plaintiff breached, or released them of their obligation by first, their failure to settle the outstanding bill of ¢58,213.04. . . The trial judge held that [this] released the defendants of their obligations if even the per call service is accepted to be binding on the defendants. Now, the law is that a contract is not discharged automatically by breach unless the party not in breach elects to treat the breach as

> a repudiation of the contract."

The learned judges therefore held that the non-payment of the bill could not release the appellant from its obligation under the per call agreement.

With due deference to their lordships, I think their conclusion was in error. It must be borne in mind that specific performance is an equitable relief. It is exceptional in its character, and a court has the discretion either to grant it or to refuse it. That discretion is exercised on fixed principles. One such principle is that a plaintiff who seeks specific performance of a contract must show that he is ready and willing to perform his own obligation under the contract, and any failure on his part, or breach of his own obligation is a bar to his claim for specific performance: vide *Halsbury's Laws of England* (3rd ed), Vol 36, para 391. This principle of contract law is quite different from the principle of repudiation which the Court of Appeal relied on.

Finally, I would touch briefly on the issue of the interest exigible on the debt of ¢58,213.04 due from the respondent to the appellant. The appellant contends that the order to pay interest should have been valued by the Court of Appeal to run to the date of payment of the debt. In their counterclaim, what the appellant asked for was interest until the date of final judgment. The trial judge assessed it at ¢95,595.75 as at the date of the High Court judgment on 16 May 1990. The majority opinion of the Court of Appeal accepted that the High Court was right in awarding interest but did not consider varying it. They did not consider raising it because the point was not taken before them. The appellant now seeks a variation for an order that the interest be made to run up to the date of payment. It is strange that the respondent has not seen it fit to settle this indebtedness even after the Court of Appeal judgment. The debt is certainly of very little value to the appellant on today's financial market and it is my opinion that in order to do justice to the appellant, the variation sought by the appellant must be granted. I order that the interest be paid at the prevailing bank rate from 20 December 1984 up to the date of final payment. See the case of Attieh v Koglex Ltd, Supreme Court, Accra, 9 May 2001, unreported.

In the result, the appeal succeeds. The judgment of the Court

of Appeal is set aside. The High Court judgment is restored subject to the variation as to the exigible interest contained in this judgment.

Atuguba JSC. The facts of this appeal have been amply related by my brethren, I will therefore repeat them only where necessary.

The plaintiff-appellant-respondent's (hereinafter referred to as the respondent's) case was for:

> "(i) Specific performance of an (oral) agreement between the plaintiff/company and the defendant/company made in 1977 for an after sale service of the plaintiff company's IBM Copier II machine 'on call basis.'
>
> (ii) The sum of ¢1,205,000 special damages being loss of income for 200 working days at the rate of ¢5,000 per diem as from 24 March 1986 through 28 February 1987.
>
> (iii) Interest on the said sum of ¢1,205,000 at the rate of 25 per cent per annum from 1 April 1986 to the date of final judgment.
>
> (iv) Mesne profits as from 1 March 1987 up to the date of final judgment at the rate of ¢5,000 per diem."

(The emphasis is mine.) Paragraph (4) of the respondent's statement of claim avers:

> "Previously to the supply of the said IBM Copier machine by the defendant/company to the

plaintiff/company, it was agreed that the defendant/company would provide an exclusive maintenance service, designated as 'after sales service' and *for a fee* and/or 'on call basis' *and also for a fee*."

(The emphasis is mine.) I should have thought, subject to what I will hereinafter say, that the after sales service agreement, if otherwise certain as to its essential terms, constituted in itself another contract which was collateral to the sale agreement over the IBM Copier II machine: see Sowah v Bank for Housing and Construction [1982-83] GLR 1324, SC. The respondent must have regarded the after sale service agreement as a collateral contract; hence its indorsement on its

writ of summons for "Specific performance of an (oral) agreement … for an after sales service of the plaintiff/company's IBM Copier II machine 'on call basis.'" (The emphasis is mine.) That being so, I should have thought that notions of promissory estoppel did not arise

Indeed, the genesis of the doctrine of promissory estoppel was aimed at curing the defect of a promise made in the course of an existing contractual relationship which was not supported by consideration. In their erudite book, *Cheshire, Fifoot & Furmston's Law of Contract* (13th ed) at pp 100-101 the learned authors state, concerning the famous decision of Denning J (as he then was) in Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130, as follows:

"The reasoning of the learned judge is interesting. He agreed that *there was no consideration for the plaintiff's promise to reduce the rent. If therefore, the defendants had themselves sued upon that promise, they must have failed. Their claim would have depended upon a contract of which one of the essential elements was missing. But where the promise was used merely as a defence, why should the presence or absence of consideration be relevant? The defendants were not seeking to enforce a contract and need not prove one.* Was there, then, any technical rule of English law whereby the plaintiffs could be prevented from ignoring their promise and insisting upon the full measure of their original rights? At first sight, the doctrine of estoppel would seem to supply the answer. *By this doctrine, if one person makes to another a clear and unambiguous representation of fact intending that other to act on it, if the representation turns out to be untrue, and if that other does act upon it to his prejudice, the representor is prevented or 'estopped' from denying its truth. He cannot, as it were, give himself the lie and leave the other party to take the consequences.* The doctrine would meet admirably the situation in the High Trees case but for one difficulty. In 1854 in Jordan v Money [(1854) 5 HL Cas 185] a majority of the House of Lords held that estoppel could operate only on a misrepresentation of

existing fact. Upon this basis it was improper to apply it where, as in the High Trees case, a party sought to rely on a promise of future conduct.

To avoid this difficulty, Denning J sought to tap a slender stream of authority which had flowed in equity since the judgment of Lord Cairns in 1877 in Hughes v Metropolitan Railway Co [(1877) 2 App Cas 439]."

(The emphasis is mine.) I shall return to the question of promissory estoppel later.

Is the said collateral agreement enforceable? I should think not. It is trite law that for an agreement to pass for an enforceable contract it must be certain, at least, as to its essential terms. A collateral contract has no special status. As stated by Lord Moulton in Heilbut, Symons & Co v Buckleton [1913] AC 30 at 47, HL a collateral contract:

". . . is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract."

The agreement to provide the after sale service "for a fee", simpliciter, is ambiguous. Thus in the said *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed) at p 44 a reference is made to:

". . . *the tensions created by the law's demand for a minimal degree of certainty before it will classify an agreement as a contract. Since most contracts are not negotiated by lawyers, it is all too easy for the makers to fail this test, particularly as legal and commercial perceptions of certainty may well diverge. So a lawyer would regard an agreement that goods are to be supplied at 'a reasonable price' as prima facie sufficiently certain but would have much more doubt about an agreement 'for a price to be agreed between us.' Many businessmen would be much happier with the second agreement than the first*."

(The emphasis is mine)

Apart from the element of fee, it is quite clear that though the plaintiff claims that the agreement was concluded in 1977, the parties kept on haggling over its terms long afterwards. Thus in exhibit 6 the following is stated:

"IBM GHANA

28 June 1978

Hasnem Enterprises,

P O Box 500,

Cape Coast

Dear Sir,

REPAIR OF COPIER II

Thank you for your letter Ref HE/OE/1BM/78/9 of 27 June 1978. We wish to confirm that our conversation on the telephone touched to terms to be covered by your letter requesting us to come and service your machine, since you have elected to pay for services rendered on each occasion of such service.

Your letter is only asking us to come and render services that does not include your commitment to pay for parts used and expenses incurred such as travel, meals and accommodation (if it becomes necessary).

We are sorry that without this commitment we shall find it difficult to render the services required.

We hope to receive the requisite directives from you as early as possible to enable us undertake the services you require.

Yours faithfully/truly,

(Sgd) S A Coleman

OPCE Field Manager."

(The emphasis is mine.)

Then again exhibit 4 states as follows:

"HASNEM ENT LTD
P O Box 500
Cape Coast
25 February 1985.

The Branch Manager,
IBM World Trade Corp,
Mobil House,
Liberia Road,
P O Box 1507
Accra

Dear Sir,

We acknowledge receipt of your letter dated 7 January 1985, with the enclosure of your 1985 personal diary for which we thank you.

We have also received your invoice No 46124281 dated 19-12-84 for the sum of ¢58,213.04. Action is being taken to remit you our cheque in settlement of the invoice.

The undersigned called at your office twice on Wednesday, 13 instant but could not meet you for discussion on your DP Products.

We would be most grateful if you could please arrange to meet the undersigned on Wednesday 27 instant in your office

between 9. 00am and 9.45 am.

On the matter of our memory typewriter which you returned to us without service for lack of spare parts, we would be most grateful if in future you could please avail us with your overseas address from where we could be served when we place an order."

(The emphasis is mine.) It is clear therefore that the parties did not reach an enforceable agreement in 1977.

The principle of promissory estoppel does not dispense with the requirement of certainty either. This was made clear per Lord Hailsham LC in Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741 at 755, HL when he said:

"*. . . to give rise to an estoppel, representations should be clear and unequivocal, and that, if a representation is not made in such a form as to comply with this requirement, it normally matters not that the representee should have misconstrued it and relied upon it*."

(The emphasis is mine.) Founding themselves on this case, *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed) states at p 104 as follows: "Finally, it is settled that there must be a promise; either by words or by conduct, and that its effect must be clear and unambiguous." (The emphasis is mine.)

Apart from this, estoppel, including promissory estoppel, is a shield and not a sword. In Combe v Combe [1951] 2 KB 215 at 220, CA Denning LJ (as he then was) said:

> "*in none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension or a breach of contract, and the promise, assurance or assertion only played a supplementary role—an important role, no doubt, but still a supplementary role. That is, 1 think, its true function. it may be part of a cause of action, but not a cause of action in itself.*"

(The emphasis is mine.) I think it is in this sense that *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed) states at p 103 that: "The doctrine operates only by way of defence and not as a cause of action." (The emphasis is mine.) They however clarify this at p 104 to the effect that the metaphor in Combe v Combe (supra) that the doctrine must be used as a shield and not as a sword,

> "*. . . should not be sloppily mistranslated into a notion that only defendants can rely on the principle. There is no reason why a plaintiff should not rely on it, provided that he has an independent cause of action. So, if upon the facts of Hughes v Metropolitan Rly Co the landlord had gone into possession, putting the tenant into the position of plaintiff, the result would surely be the same. On such facts the tenant's cause of action would be the lease and the doctrine would operate to negative a possible defence by the landlord that he was entitled to forfeit. As Spencer Bower says: 'Estoppel may be used either as a minesweeper or a minelayer, but never as a capital ship.'*"

(The emphasis is mine.)

Now the facts in Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 at 448, HL were that, in October 1874 a landlord gave his tenant six months' notice to repair the premises. If the tenant failed to comply with it, the lease could be forfeited. In November the landlord started negotiations with the tenant for the sale of the reversion, but these were broken off on 31 December. Meanwhile the tenant had done nothing to repair the premises. On the expiry of the six months from the date of the original notice, the landlord claimed to treat the lease as forfeited and brought an action of ejectment. The action failed. Lord Cairns said at 448:

> " … *It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict*

> *rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.*"

(The emphasis is mine.)

The doctrine of promissory estoppel has undergone expansion and refinements. It is not limited to only contractual relationships. In Durham Fancy Goods Ltd v Michael Jackson (Fancy Good) Ltd [1968] 2 QB 839 at 847, Donaldson J commenting on the statement of Lord Cairns quoted, supra, said:

> "Lord Cairns L.C. in his enunciation of the principle assumed a pre-existing contractual relationship

between the parties, but this does not seem to me to be essential, provided that there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties."

(The emphasis is mine.) This principle was approved by Denning MR in Evenden v Guildford City Association Football Club Ltd [1975] QB 917 at 924, CA when he said:

"Mr. Reynolds referred us, however, to *Spencer Bower and Turner, Estoppel by Representation*, 2nd ed. (1966), which suggests at pp. 340-342, that promissory estoppel is limited to cases where parties are already bound contractually one to the other. I do not think it is so limited. See Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd. [1968] 2 Q. B. 839, 847. It applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it."

(The emphasis is mine.) And I should warn, not necessarily to his detriment.

But for all this, the doctrine of promissory estoppel has been liberalised into a cause of action in certain jurisdictions, such as the

United States and Australia: see *Cheshire, Fifoot and Furnston's Law of Contract* (13th ed), p 104, fn 4. It would however seem that in England and Ghana it can only be used indirectly as a cause of action where the plaintiff has an independent cause of action, as already stated supra, or as a direct cause of action in the limited situations of proprietary estoppel. Thus in Quist v George [1974] 1 GLR 1 where a wife allowed her husband, the defendant, to build a private hospital on her land, Abban J (as he then was) held at 14 in reference to the defendant's counterclaim:

"I have no doubt that the kind of estoppel which is available to the defendant in the present case, is more than a shield. In other words, it can also be a sword by which the person in possession may, in certain circumstances, compel the conveyance to him of the legal estate."

(The emphasis is mine.) Abban J (as he then was) however, on the facts of that case, declined the remedy of specific performance by conveyance of the legal estate to the defendant but rather gave him a lease of 25 years. Similarly *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed), p 104, fn 5 states as follows: "It seems that proprietary as opposed to promissory estoppel may in some cases support a cause of action. See Crabb v Arun District Council [1976] Ch 179, [1975] 3 All ER 865." (The emphasis is mine.) This is the position, even though, as stated in *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed), fn p 103, fn 1: "In Crabb v Arun District Council [1976] Ch 179 at 193; [1975] 3 All ER 865 at 875, Scarman LJ *did not find the distinction between proprietary and promissory estoppel valuable*." (The emphasis is mine.) Even if this view is accepted, it would still mean only a limited class of promissory estoppel, more conveniently known as proprietary estoppel, could be a direct sword rather than a shield.

There is no element of proprietary estoppel in this case and the agreement of after sales service being wholly collateral to the original contract of sale of the IBM Copier II Machine, the plaintiff could not and did not base its action in this case on the latter "as an independent

cause of action" to enable him use promissory estoppel, as a sword rather than a shield. His action therefore fails.

In conclusion, I hold that the plaintiff in this case ought to fail because in so far as its action can be said to sound in contract it lacks the requisite certainty of terms to qualify for enforcement by the courts, and in so far as it is said to be based on promissory estoppel it is also misconceived for uncertainty. It is further misconceived for being a sword rather than a shield.

For these reasons I concur in the allowance of the appeal.

Ampiah JSC. I have read beforehand, the opinion of my learned brother, Lamptey JSC and I am in agreement with him that in so far as the appeal relates to the claim of the plaintiff-respondent, it should fail. I would however agree with my learned sister Akuffo JSC whose opinion on the counterclaim I have had the privilege to read beforehand, that the appeal should succeed on the question of interest and that on the counterclaim, the appellant should be entitled to interest on its claim from 20 December 1984 to the date of final payment of the judgment debt.

Lamptey JSC. On 17 March 1987 Hasnem Enterprise Ltd (hereinafter referred to as the respondent) sued IBM World Trade Corporation (hereinafter referred to as the appellant) and claimed in particular "specific performance of an oral agreement between Hasnem and IBM made in 1977 for an after sale service of Hasnem's IBM Copier II machine on call basis." The respondent also claimed consequential reliefs against the appellant. The claim was resisted by the appellant in its statement of defence, the appellant counterclaimed against the respondent the sum of ¢58,213.04 being amount due to it in respect of maintenance services it had rendered the respondent its Copier II machine." On the pleadings before the trial court, the substantive issue the court was called upon to determine was whether or not there was concluded in 1977 an oral agreement between the respondent and the appellant to the intent and effect that the appellant should service and maintain the respondent Copier II machine on call

basis.

The trial judge dismissed the case of the respondent and entered judgment for the appellant on its counterclaim. Aggrieved and dissatisfied by the judgment, the respondent appealed to the Court Appeal. The main complaint made by the respondent against the judgment of the trial judge was that it could not be supported by the evidence on record.

The Court of Appeal by a majority two to one decision set aside the judgment dismissing the claim and case of the respondent Judgment was entered for the respondent. The court dismissed the appeal by the respondent against the counterclaim and affirmed the judgment in favour of the appellant on its counterclaim. The appellant was dissatisfied with the majority decision of the Court of Appeal and appealed to this court on the following grounds:

> "(a) the judgment was against the weight of the evidence on the record; and
>
> (b) the Court of Appeal erred in rejecting findings of fact made by the trial court which had the benefit of observing the demeanour of witnesses, and substituting its own findings of fact and thereby occasioning a substantial miscarriage of justice."

In due course, solicitors acting for the appellant filed additional grounds of appeal and argued them to form part of the statement of case.

The first observation I must make is that the respondent did not claim a "legal" contract or agreement.

The claim was founded on a rule of equity; in this particular instance, "specific performance." The Constitution, 1992 provides in article 11(2) as follows:

> "(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the *rules generally known as the doctrine of equity* and the rules of customary law including those determined by the Superior Court of Judicature"

(The emphasis is mine.) In my view, it would be palpably wrong to

apply principles or rules or both other than those generally known as the doctrines of equity in considering the case of the respondent. The majority of the Court of Appeal adverted to this issue when Acquah JA (as he then was) stated the law to be applied as follows:

> "The principle has been described as a principle of justice and equity, and is extended to cover conduct. Thus in Morgate v Twitchings [1975] 3 All ER 314 at 323 Lord Denning explained.
>
> > 'When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

The learned judge went further to explain the true position of parties in such circumstances as follows:

> "The principle is that a promise intended to be binding, intended to be acted upon, and in fact acted on should be binding. This principle which Lord Denning prefers to call promissory estoppel in a number of his cases including Evenden v Guildford City Association Football Club Ltd [1975] 3 All ER 269, CA applies:
>
> > 'Whenever a representation is made whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it.'"

The statement does not admit of any ambiguity. I must point out that the conditions or terms of the promise need not be put down in writing. The operative words are promises made and, further, evidence of conduct which unequivocally and incontrovertibly are consistent with the promises.

In arguing original ground (1) on the notice of appeal, learned counsel for the appellant submitted that the respondent failed to prove the existence of the oral agreement between it and the appellant on the evidence before the trial court. He reproduced extracts selected from the documents tendered in evidence and sought to establish that the claim of the respondent was not proved by these. In reply, counsel for

the respondent contended that the evidence adduced by the respondent proved and established a contract for service and maintenance of the machine. He argued that the contract was not one for the supply of goods. He recited the pieces of evidence in support and proof of the respondent's case.

In the address filed by counsel for the appellant before the trial judge, the thrust of the case for the appellant as put forward was founded on and proved by exhibit 1. This was how the argument was presented by counsel for the appellant:

> "Submits that the plaintiff's claim fails altogether so long as the same is stated on exhibit 1. Then he proceeded to the conclusion—'submits that the fact that the defendants were from time to time servicing the plaintiff's machine does not lead irresistibly to an enforceable contract between the parties."

I note that in his address in reply, counsel for the respondent did not advert to the evidence contained in

exhibit 1, nor did he comment on it. The trial judge dutifully heeded the invitation by counsel for the appellant and seriously considered the evidential value of exhibit 1. In considering the case of the respondent, the trial judge expressed himself as follows: “Now to the plaintiff’s claim against the defendants, I shall take the numerous correspondence between the parties which the plaintiff relied on as constituting binding legal agreements.” After due and critical examination and evaluation of the “numerous correspondence”, he concluded that the numerous correspondence did not create a binding contract between the parties.

The majority of the Court of Appeal considered and evaluated all the evidence, including the evidence of the first plaintiff witness and the first defendant witness and held that the respondent proved the oral agreement it entered into with the appellant in 1977. In his judgment, Acquah JA (as he then was) recited in great detail the pieces of evidence which weighed with him in arriving at his decision when he expressed his opinion as follows:

> “Now, there is no dispute that the plaintiff did buy the IBM Copier II machine from the defendant and that the defendants are

> the manufacturers of the said machines. There is also no dispute that the only maintenance services offered by the defendants to their customers are either maintenance agreement or per call service; *and that from 1977, when the plaintiff bought the machine, the defendants provided per call service maintenance to the plaintiff up to at least 1984*.”

(The emphasis is mine.) The above passage drew attention to evidence on the record, which the trial judge failed or omitted to advert to in his judgment. In addition to the above matters, the trial judge had before him evidence from the first plaintiff witness which dealt at great length with oral communication in 1977 between the first plaintiff witness and a Mr Osei before he, the first plaintiff witness, agreed to buy and Mr Osei agreed to place an order from outside Ghana for the IBM Copier II machine for Hasnem.

The case of the appellant was concluded without evidence which contradicted or disputed the oral agreement of 1977. Mr Osei was not called to assist the trial court. The omission or failure of the trial judge to advert to this incontrovertible evidence from the first plaintiff witness destroyed the finding he made. The Court of Appeal was right in examining the evidence before it and coming to its own conclusion.

The opinion of Brobbey JA on this issue, expressed in his dissenting judgment, cannot be supported in law because it was not based on evidence on the record. On this issue he stated as follows: “Assuming that there was any oral contract for call service, the agreement came into being in 1977 when the machine was bought.” (The emphasis is mine.) In my humble opinion, the appellate judge was not called upon to make an assumption or to guess anything or do both. His plain duty was to evaluate the evidence on the record and make findings of fact. Again the appellate judge fell into error when he expressed the following opinion: “A contract to repair that machine must have a definite time limit. It could not be argued that the agreement was permanent when the machine itself did not have a permanent life.” With great respect to the appellate judge, the case of the respondent was a fairly simple one, namely an oral agreement entered into in 1977 to the effect that so long as the IBM Copier II was

serviceable and unless and until it was written off as useless and counter-productive, the appellant would

service and maintain it, and payment made after servicing. The trial judge and the appellate dissenting judge, with respect, misdirected themselves when they considered evidence which was not on the record and relied on and made assumptions in this matter. They each erred in the view they expressed that:

> "*such an agreement which was not specific as to the period of termination was determinable after a reasonable notice . . . In his (trial judge's) estimation ten years was reasonable.* That ten years suggestion was point of time in respect of which the parties or at least the appellants' witnesses should have testified."

(The emphasis is mine.) I have not understood the case of the respondent to be that it had sought an order of specific performance of an oral agreement for a duration of ten years between the parties commencing in 1977. The evidence on the record does not support the finding by the trial and dissenting appellate judges, namely that the contract or agreement, the subject matter in dispute was for a period of ten years. The findings by the dissenting appellate judge expressed as follows:

> "*I am of the view that the appellant's claim for specific performance failed because if that claim were valid the question understandably arose was how long would that specific performance last, forever*?"

(The emphasis is mine.) was not supported by evidence on the record. I have sought to show that both the trial judge and the dissenting appellate judge misdirected themselves on the evidence before the court; in particular, the essential terms and conditions of the oral agreement entered into in 1977 between Hasnem and IBM. In my view, the oral evidence of the first plaintiff witness in relation to what transpired in 1977, which was not controverted nor disputed by evidence from the first defendant witness, proved and established the

case of the respondent.

Learned counsel for the appellant submitted that since the respondent sought an equitable relief, it must come to equity with clean hands, mindful of the maxim that he who comes to equity must do equity. I agree that that is a correct statement of the law. He agreed with Brobbey JA in his dissenting opinion expressed as follows:

> "The respondent (IBM) was a business organisation. Having performed services which had not been paid for how on earth did the appellant expect it to continue to render more service? The point of relevance is that until the appellant paid for the services already rendered, the respondent had no reason to believe that future services would be paid for."

I am amazed at the view of the evidence taken by the appellate judge. At paragraph (7) of the amended statement of defence the appellant averred in part as follows: ". . . each service call could only be considered as an independent request for services and the same was fulfilled on the basis of availability of spare parts and the appropriate man power." The defence put forward did not include the term or condition "subject also to the payment for outstanding bills." It is rather the honest business managing director, the first plaintiff witness who stated that payment for bills for services rendered was a term and condition of the oral agreement. In any case, the evidence before the court was that the appellant had stopped offering the service from 1984 and was not prepared and in a position to offer service and maintenance on the IBM Copier II machines. I find that the opinion expressed by the dissenting appellate judge was not supported by the evidence on the record. He fell into grave error when he stated that the appellant could justifiably refuse to offer service and maintenance to the respondent on the ground that the respondent failed or refused or both to pay the appellant's bills remaining unpaid. The defence put

forward was that the appellant would attend to service and maintain the machine of the respondent "on the basis of availability of spare parts and the appropriate man power." The appellate dissenting judge failed and omitted to consider this important defence put forward by the appellant

and came to the wrong decision on this issue.

Before the trial court, the parties put in evidence numerous documents. The trial judge as well as the appellate judges examined and considered some only of these documents. Since a ground of appeal complained about the weight the majority judges attached to these documents, I must address the issue raised here. It is important in doing so to pay attention to the dates on each document and relate it to the evidence on the record touching upon the oral agreement entered into between the respondent and the appellant in 1977. The exercise will assist the court in appreciating and understanding the case of each party. I start with exhibit 1 which in part reads:

"June 11, 1982

The Country Manager,

IBM

Dear Sir,

As you are aware our IBM Copier II machine was delivered to us on Tuesday, 16 August 1977.

We write to kindly arrange for your Copier Engineer to be in Cape Coast on Monday, 16 August 1982 to service the copier machine thoroughly for us . . .

We are by this letter asking you to kindly note the following dates as our standing order dates for your Copier Engineer to be in Cape Coast to service our machine.

November 16: February 16:

May 16: August 16

of every year . . ."

In his testimony before the trial court, the first plaintiff witness, the managing director, repeated the contents of exhibit A. I note that the appellant failed or omitted to put in evidence or both the reply it sent to the respondent. In my opinion, exhibit A was evidence of an earlier and prior arrangement or agreement between the parties as to dates on

which the respondent expected the appellant to attend on it to service and maintain the Copier II machine. I am of the view that the appellant should have obliged the respondent with the common courtesy of a reply to exhibit A stating clearly that the appellant was under no obligation to the respondent in the matter.

The second letter the respondent wrote to the appellant is exhibit B dated 14 August 1982. I reproduce the following passage from exhibit B:

"August 14 1982

On Friday, July 30 1982, the undersigned . . . reported to your Engineering Department indications on our IBM Copier II machine. The indications were—

(1) The end PC light was on.

(2) After moving the PC switch to 2, the call key operator and end PC lights were still on.

(3) The instruction on your 'Key Operator' Instruction reads

'If the light does not go out, call IBM Service.'"

From the material, it cannot be disputed that the "Key Operator Instructions" imposed a binding undertaking given to every purchaser of that machine that the appellant in the circumstances in which the respondent found itself, that is, "if the light does not go of" to promptly send an employee with the requisite expertise to attend Hasnem or the purchaser. This instruction would be deemed breached by the respondent or a purchaser if that company called on a person other than an engineer from the appellant. The reply from the appellant to exhibit B was put in evidence as exhibit 2. It reads in part as follows:

"All calls placed with our engineering department as scheduled and our customers are handled on 'first come first served.' As a remote customer without maintenance agreement, you are expected to pay all charges for calls made on you."

I do not understand this reply to mean that the respondent was not a customer of the appellant. The reply made it clear beyond dispute that

the respondent was a customer. That the respondent must take its place in the queue in the matter of servicing and that the respondent must pay for services after the same had been rendered. This reply, exhibit 2, from the appellant did not advise the respondent to look elsewhere for an engineer for purposes of carrying out the repair occasioned by the fact that "the lights did not go off" on its machine. The letter, exhibit 2, was written and signed by the branch manager of the appellant, a Mr J E A Quansah. On this same giving evidence for the appellant, Mr Abraham Amoah, the first defendant witness, stated as follows: "We were servicing the plaintiff's Copier II machine. When they called us on the telephone or sent somebody we received the request and depending on the resources available we undertook to honour the invitation or call." The first defendant witness thus confirmed the existence of the oral agreement. The first defendant witness did not provide any evidence to support the claim that on particular occasions the appellant refused or rejected a call from the respondent to service its Copier II Machine.

At this point it is desirable to advert to exhibit 6 which was referred to in his statement of case for the appellant. Learned counsel argued as follows:

"… in fact the evidence on record supports the defendant's position that there was no binding standing agreement between the parties and that each service call was considered and accepted or rejected by the defendants on its own merits."

I therefore looked for evidence on the record including exhibit 6 in the light of the submission that between 1977 and 1984 the appellant rejected calls from the respondent to attend and service the Copier II machine. The evidence before the trial court was that the appellant did not breach the oral agreement to service and to maintain the Copier II machine entered into between the parties in 1977. There was no evidence on the record that the appellant rejected any call from the respondent and failed or neglected to attend to service and maintain the Copier II machine. In my view, learned counsel for the appellant misconceived the case before the court when the based himself on

exhibit 6 and argued as follows:

> "There is for example exhibit 6, which. . . stated: Your letter is only asking us to come and render services; *that does not include commitment to pay for parts used and expenses incurred such as travel, meals and accommodation (if it becomes necessary)* …"

(The emphasis is mine.) This argument does not and cannot support and prove the submission that the appellant had a right or power to reject a call by the respondent on the appellant to offer service and maintenance of the customer's machine. The clear and plain position of the appellant was a readiness and a willingness to attend all calls of the respondent subject only to the conditions clearly spelt out above. Indeed, the case of the respondent was not that the appellant must service and maintain the Copier II machine free of charge. I therefore find that the evidence contained in exhibit 8 does not support the case and claim of the appellant on that issue.

On this issue, the evidence of the first defendant witness left the trial court in no doubt as to the real reason or excuse from the appellant for its refusal to service a customer's machine in the following words. "If a customer fails to pay our bills we refuse to honour his calls for service in future, though we make effort to collect the money." This is an admission that the appellant was willing and ready to provide maintenance services. According to the first defendant witness this policy of the appellant was made clear to its customers. The first defendant witness put in evidence exhibit 7. I must necessarily draw attention to the fact that exhibit 7 bears the date 14 October 1983 and was not referable to an event in 1977. In the instant action, the respondent sued IBM for breach of an oral agreement entered into between the parties in 1977 and not one entered into in 1983. In any case and indeed exhibit 7 contained the statement: "Please be assured of our prompt attention at all times" which in my opinion was further evidence supportive of the existence of the contract to offer service and maintenance to Hasnem. This was an undertaking given to the respondent by the Customer Engineering Manager of the appellant, a Mr Abraham Amoah in 1983, namely the readiness and willingness of

the appellant to offer prompt service to the respondent and all customers, subject always to payment for the service so rendered.

The above conclusion is also supported by evidence contained in exhibit C dated 30 June 1986 sent by the respondent to the appellant which in part reads as follows:

> "When the machine was purchased, we were given an assurance of 'after sale service' or operated on 'per call' service with your outfit, the said IBM Copier II machine has always been maintained by your outfit."

I must point out that exhibit C is consistent in substance with exhibit 7 which as I have indicated elsewhere in this opinion was written in October 1983. I reproduce the following evidence from exhibit C:

> "The points raised in your letter (dated April 16 1986) under reply are indeed very interesting. *One fact we would want you to bear in mind is that Hasnem Enterprises Limited bought an IBM Copier II machine from your outfit. Whether the Copier II engineer has left IBM or not that is not Hasnem Enterprises limited concern. Our concern is that our IBM Copier Machine is maintained . . .*"

(The emphasis is mine). The evidence contained in exhibit C was completely and totally ignored by the trial judge, especially when the respondent did not offer any evidence to contradict the serious statements

of fact supplied by the respondent for due consideration by the trial court. Indeed, the respondent expressed what it believed was the agreement between it and the respondent in exhibit C as follows:

> "*If at the time of purchase of the IBM Copier II machine you have made us to understand that at a certain stage we shall have to maintain the said IBM Copier II machine ourselves, we are sure to have discarded the idea of buying it … As you are fully aware, IBM machines are serviced by specially trained people with specialist tools and parts provided by IBM World Trade Corporation*. Please tell us the wayside or street side mechanic who will easily and expertly service IBM Copier II machine."

(The emphasis is mine.) The above piece of evidence from the respondent in my opinion established its case that there was at the date of the purchase an agreement by the respondent to service and maintain the machine. I have not found evidence from the respondent that it turned down or refused to service and maintain the Copier II machine between 1977 and 1986. The evidence of the first defendant witness, Abraham Amoah, was not in my view, an answer to the hard facts stated by the first plaintiff witness. The first defendant witness stated as follows:

> "Sometime in 1977 the plaintiffs bought an IBM Copier II machine from the defendants. *I am not aware the defendants told the plaintiff that they (the defendants) would be exclusively responsible for the servicing of the plaintiffs' machine*."

(The emphasis is mine.) The first plaintiff witness in his evidence named one Mr Osei, the sales manager of the appellant as the person who negotiated the sale and purchase with him. It does not lie in the mouth of Amoah to give the evidence he gave above. He did not say he was present when the respondent bought the machine even though he stated that he had worked for the appellant since 1968. In 1977 the first defendant witness was not the sales manager of the appellant. The first defendant witness described himself as Customer Engineering Manager. The first defendant witness did not claim he had worked as a sales manager for the appellant in 1977.

Be that as it may, the first defendant witness testified on 22 March 1990 as follows: "The plaintiffs did not enter into any service maintenance agreement of any form, oral or written, with the defendants." The case of the respondent was that it entered into an oral agreement with the appellant. The trial court should have rejected the above piece of evidence as worthless, since the first defendant witness was not present to witness that transaction, namely the evidence of the first plaintiff witness dealing with and concerning the pre-purchase discussion; that is to say, the placing of the order for the machine; the delivery and fixing of the machine in Cape Coast and the verbal guarantees and assurances made to the respondent at that time in 1977.

I agree and accept the trial judge's rejection of the first defendant witness's answer on the issue of the "green light not going off." This was what the first defendant witness told the trial court under cross examination:

> "Note: Witness shown exhibit B and under 3 'if the light does not go out, call IBM service'; he explains it means the person should call a service engineer, that is somebody who is knowledgeable about the IBM product/machine. And apart from IBM, there are other individuals who are trained and knowledgeable about the produce."

Clearly, this answer was on the face of it dishonest. From 1977 up to 1986 the evidence before the trial

court was that only the appellant had serviced and maintained the machine the respondent bought from the appellant. In my view, the first defendant witness was not truthful to the court in the matter of what a purchaser of a Copier II machine should do if the lights on the machine do not go off. The clear and simple instruction from the manufacturer was "call IBM engineer." A reasonable, prudent purchaser and owner would and must call the IBM engineer. I totally reject the interpretation of the trial judge when he stated thus:

> "But the crucial question is, did this (call IBM Engineer) per se create a binding contract legally enforceable against IBM? *Therefore I am of the view that 'call IBM Service' should be read to mean that if the user has an existing maintenance agreement or service agreement with IBM* he should call on IBM if the lights do not go off. That will do justice to the parties' case."

(The emphasis is mine.) The instruction indicated on the machine is plain and does not require interpretation by the trial judge. The trial judge erred when he introduced and added a fresh term and condition to the instruction, that is "that the user of the machine must have an existing maintenance agreement or service agreement" with IBM. In my view, it would be unwise for the respondent not to call upon the

appellant's engineer if the light fails to go off. The instruction was directed at any and every person who owned a Copier II machine whether or not such an owner had any agreement written or oral with IBM. If IBM failed or neglected to respond to a call to attend on any person whose Copier II machine experienced a fault that the lights do not go off, the conduct would no doubt give the owner a cause of action against IBM.

In the majority judgment of the Court of Appeal, Acquah JA (as he then was) stated his opinion as follows:

> "*If the trial judge had critically adverted his mind to his prior promise by Mr Osei of exclusive after-sale service vis-á-vis the indications the IBM Copier II machine itself gives in the event of a fault, to wit call IBM Service Engineer, he would have discerned the source of the binding nature of the per call service*."

(The emphasis is mine.) He concluded thus:

> ". . . it does not lie in the mouth of the defendant to go back on that promise. As Apaloo JA (as he then was) said in Sasu v Avaduala [1973] 1 GLR 221 at 225: 'A party should be held to any act or statement which it would be unconscionable to permit him to deny."

The learned judge also cited section 26 of the Evidence Decree, 1975 (Act 323) to buttress his conclusion. He was right in doing so.

I find further support for my conclusion that the trial judge misdirected himself on the case put forward by the respondent from the following passage from his judgment:

> "It is the case of the plaintiff that IBM, products are exclusively maintained and serviced by IBM, or their appointed agents. That is a trade policy or custom. The defendants denied these facts."

I have carefully read through the statement of claim filed by the respondent I did not find that the respondent would rely on "trade

policy or custom" of the appellant. The case of the respondent before the trial judge was in part to be found in the evidence of first plaintiff witness thus:

> ". . . I expressed an interest to purchase the machine called IBM Copier II from IBM. Because of its high cost IBM's Sales Manager by name Mr Osei told me they would have to order for one from the United Kingdom for me and I agreed."

I have found evidence on record that indeed and in truth the appellant placed an order for the said machine. The first plaintiff witness told the trial court that:

> "They (IBM) placed an order for me and when the machine arrived the defendants came and installed it in my office in Cape Coast."

What first plaintiff witness related to the court was what actually took place in 1977. In order not to leave the court in any doubt, the first plaintiff witness testified further as follows:

> "Before the machine was installed the defendants gave me two specific instructions with regard to its maintenance. They explained maintenance agreement to mean entering into an agreement whereby I pay a specific sum of money, so that whenever the machine was faulty I would call upon them to come and service it. The after call service meant whenever the machine was faulty I would call upon them to come and service it and after the service I would pay them upon receipt of their bills."

The above constituted what the first plaintiff witness understood to be the obligations respectively of the seller and the purchaser. This evidence was not disputed by the appellant. Indeed, the first plaintiff witness explained further in his evidence in-chief the true position in 1977 at the date and time the Copier II was installed when he stated as follows.

> "*. . . they (M Osei) told me that irrespective of which option I took, they would give me satisfactory after sales service because it was a very expensive machine costing ¢33,000 at the time (1977)* and that I was the fifth person in the country to have purchased one in Ghana"

(The emphasis is mine.) In order to complete the course of dealing between the respondent and the appellant in the matter of the maintenance of Copier II beginning August 1977, the first plaintiff witness testified as follows:

> "I started using the machine and anytime it broke down I either telephone or sent somebody to tell them defendants and immediately they came and repaired it and sent the bills which I satisfied . . ."

In my view, the undisputed and unchallenged evidence from the respondent proved and established its case; that from 1977 up to 1984 the appellant, pursuant to the oral agreement entered into with it in 1977 serviced and maintained the Copier II machine the respondent purchased from that company. I must also point out that the respondent did not produce a shred of evidence before the trial court to establish that a company, other than the appellant, also serviced and maintained the respondent's Copier II machine during the period 1977 and 1984. I find that the trial judge misdirected himself on the issue for determination when he formulated same thus:

> "There are issues involved here namely whether or not *IBM products* are exclusively maintained and or serviced by IBM or their accredited agents . . ."

With great respect to the trial judge, the subject matter before him was an IBM Copier II machine. He was not entitled to consider and determine an oral agreement about "IBM products." His conclusion expressed

in the language following:

> "The plaintiff's own admission makes it abundantly clear and I find that it is not a trade practice or policy of defendants or is

> there any custom or usage whereby products of defendants are exclusively maintained and or serviced by them,"

cannot therefore be supported. The appellant's letter dated 23 April 1982 and written by Mr J E A Quansah and put in evidence as exhibit 2 destroyed the conclusion reached by the trial judge on the issue of trade policy or custom of the appellant. The judgment based in part on this finding cannot be supported.

I cannot conclude this judgment without pointing out that in my humble view the trial judge misdirected himself on the defence put forward. In fine, the appellant denied and disputed that it agreed orally with the respondent to service and maintain the Copier II machine. The case it put forward was in conflict with the pleading in the statement of defence. The evidence of the first defendant witness illustrated his conclusion:

> "I work with defendants as its General Manager in Ghana. In 1986 the defendants were not servicing IBM machines any longer . . . The last time we officially worked on plaintiff's machine was in September 1984."

The evidence in my view is an admission of the case of the respondent that up to 1984 the appellant serviced and maintained its copier machine but stopped and neglected to do so because as a company it had stopped that particular business for good. Briefly put, the appellant was no longer in that time of business. But before this close down, the appellant had continued to service and maintain the copier II machine brought by the respondent from it. This in 23 April 1982. Mr Quansah wrote in his capacity as the appellant's branch manager to the respondent in part as follows:

> "As a remote customer without Maintenance Agreement *you are expected to pay all charges for calls made on you … We endeavour to treat all our valuable customers equally … Please be assured that despite the constraints on human material resources we will endeavour to provide an indis-*

> *criminate level of service.*
>
> Yours faithfully,
>
> JEA Quansah
>
> Branch Manager."

(The emphasis is mine.) Thus evidence painted the true picture of the business relationship between the respondent and the appellant from 1977 up to August 1982.

In his statement of case, counsel for the appellant lamented the fact that the Court of Appeal imputed dishonest conduct to the appellant when it stated that:

> ". . . it would be the height of dishonesty on the part of the defendants to fault the plaintiff from seeking services from Mr Amoateng, if Mr Amoateng was IBM on his own. He argued that the IBM refused to the services rendered by CTS as evidence confirming the absence of any binding exclusive agreement,

and the freedom of Hasnem to service their machine whatever they chose. The argument of counsel for IBM overlooked the pieces of evidence on record. These are (1) that up to 1984 IBM serviced and maintained the Copier II machine the subject matter before the court; (2) that IBM sent a circular sometime in 1984, that it no longer would service and maintain Copier II machines; (3) that the Copier II machine on the face of it warned and instructed the owner in possession of Copier II machine 'to call IBM Engineer'; and (4) that the refusal of IBM to service and maintain Hasnem's Copier II machine provoked the instant action."

I agree entirely with the conduct of the respondent in the effort it made to mitigate its financial loss by resorting to CTS for its services. That conduct is consistent with that of reasonable and shrewd businessman By that conduct, the respondent must not be understood

as having abandoned its right to sue the appellant for breach of an oral agreement entered into between the parties in 1977. When the evidence on the record is examined in this light, it will be seen that the fact that the respondent in its hour of desperation and frustration turned to CTS to service and maintain its machine contract was not to be seen as not entered into the 1977 oral between it and Mr Osei acting for and with full authority for the appellant. I am satisfied that the decision of the majority of the Court of Appeal was supported by the evidence on the record.

The appellant to whom the respondent owed ¢58,213.04 for service and maintenance sought to defend the action on the other ground that the respondent owed it. I think that the fact that the respondent owed the appellant is not a lawful excuse for it to refuse to service and maintain the said machine for the simple reason that failure to pay for services rendered was not an agreed term for terminating the oral agreement. The undisputed evidence on the record was that the respondent would pay for service and maintenance of the machine. The appellant did not adduce evidence before the court to show and establish that it the appellant had the legal right to withhold service and stop maintenance of Copier II machine in respect of which there was unpaid bill or bills. In this case, the reasons for the failure or inability on the part of the appellant to service and maintain were as I have recited above. In the special circumstances and on the uncontroverted evidence the respondent proved and established its case. It was entitled to judgment on its claim. I will accordingly dismiss the appeal. I will affirm the majority decision of the Court of Appeal.

Appeal allowed.

D R K S