The Management of Ecobank Liberia Limited, by and thru its President, **Morenike Adepoju** of the City of Monrovia, Liberia, APPELLANT Versus **The Management of Kakata Holding Company, Inc.** by and thru its President/CEO, **Amadu Jalloh** of the City of Kakata, Margibi County and **Mutual Benefits Assurance Company** represented by its General Manager/ECO, **H. Momo Fortune** of the City of Monrovia, Liberia, APPELLEES

LRSC 2

APPEAL

Heard: October 17, 2012 Decided: January 3, 2013

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

The co-appellee, the Kakata Holding Corporation, Inc., is corporate entity resident in the City of Kakata, Margibi County, engaged in general merchandise business, wrote the appellant, Ecobank Liberia Ltd., stating that it had a commitment from the Ministry of Education, Republic of Liberia to supply ordinary Portland cement for the construction of two hundred schools throughout the country and co-appellee had identified a supplier who was ready to supply the co-appellee within thirty days, with 25,000 metric tons of cement valued at United States Dollars 2.3 million. The supplier however required that in order to consider loading the cement, it had to be in receipt of the co-appellee's bank verified payment instructions, which were acceptable, agreed upon and confirmed to the seller and its bank. In other words, the co-appellee Kakata Holding Corporation, Inc. was to provide its supplier an irrevocable letter of credit. Co-appellee Kakata Holding Corporation negotiated with the appellant Ecobank and reached an understanding with the bank for the granting of the letter of credit.

On October 29, 2008, Ecobank wrote Mr. Amadu Jalloh, CEO of the co- appellee company, informing him that it had approved Kakata Holding's request for a letter of credit.

The records reveal that the process of finalizing the establishment of the letter of credit required Kakata Holding, the co-appellee, to put forth certain collaterals with the bank. It was also required that to consummate the cement transaction, the appellee open an escrow account and deposit therein twenty-five percent (25%) cash contribution of the US$2.3 million and provide an additional two percent (2%) to offset charges and other related fees. Mutual Benefits Assurance Company who was later joined as a party in this proceeding, and is co-appellee herein, consented to assist co-appellee Kakata Holding facilitate the importation process by putting forth the cash contribution of 25% and 2% which were to be deposited in an escrow account held at the appellant bank. Consummating the arrangement, the three parties, entered a Tripartite Memorandum of Understanding as follows:

TRIPARTITE MEMORANDUM OF UNDERSTANDING

THIS THREE PARTY MEMORANDUM OF UNDERSTANDING made and entered into this 22nd day of January, 2009, by and between ECOBANK LIBERIA LIMITED, a financial institution organized and existing under the laws of the Republic of Liberia with its registered office at Ashmum and Randall Streets, represented by and through its Managing Director, Mrs. Morenike Adeopju of the City of Monrovia, County of Montserrado, Republic of Liberia hereinafter known and referred to as ECOBANK which term shall extend to and include its assigns, agents, representatives and successors-in-business, Kakata Holding Inc. a general merchandise business, duly registered and existing under the laws of Liberia with its registered office Oldest Congo Town, Monrovia, Liberia, represented by its Managing Director Mr. Amadu A. Jalloh of the City of Monrovia, County of Montserrado, Republic of Liberia which term shall extend to and include its assigns, agents, representatives and successors-in-business, Mutual Benefits Assurance Company and insurance company, duly registered, licensed and existing under the laws of Liberia with its registered office located between the 17th and 18th Streets, represented by its Assistant General Manager Mr. Mohammed Mamadi Turay of the City of Monrovia, County of Montserrado, Republic of Liberia which term shall include its assigns, agents, representatives and successors-in-business, hereby

WITNESSETH

WHEREAS, Ecobank LIBERIA is licensed under the laws of the Republic of Liberia to engage in all banking activities within the sovereign borders of the Republic of Liberia;

WHEREAS, Kakata Holding Inc. has presented itself as having the capacity, expertise, and ability to import in Liberia 25,000 metric tons of cement valued at 2.3 million United States Dollars, to be sold to the general populace.

WHEREAS, Mutual Benefits Assurance Company has consented to facilitate the importation process by putting forth 25% as cash contribution in an escrow account, and 2% for charges and other related fees in the main account domiciled at Ecobank.

WHEREAS, the Parties agreed to and executed a Tripartite Memorandum of Understanding dated January 22, 2009.

NOW THEREFORE, the parties hereto mutually agree as follows:

ECOBANK Shall:

1. Open an escrow account for the deposit of 25% cash contribution and 2% charges and other related fees. Said account shall also be used to receive deposits from the entire cement transaction.

2. In the event the transaction is not consummated, Ecobank shall return the full sum of the 25% constituting the cash contribution to Mutual Benefits and Assurance Company.

3. In the event that the transaction is consummated the bank shall ensure that Kakata Holding Inc. shall not access the funds from the sale of the cement transaction until the following are executed in the order of priority:

a. Settle all financial obligations to the bank

b. Pay Mutual Benefits the 27%

c. Pay Mutual Benefits up to USD400, 000 (Four hundred thousand United States Dollars) in the event of surplus funds.

4. That said amount of USD 400, 000 and 27% shall be credited to Mutual Benefit Investment account domiciled with the Bank and advise the Company accordingly.

Mutual Benefits and Assurance Company Shall:
1. Provide cash contribution of 25% of the amount needed for the consummation of the cement transaction.

2. Provide additional 2% to cater to charges and other fees.

Kakata Holding Inc. Shall:
1. Finalize arrangement with the supplier for the importation of the cement.

2. Ensure that the supplier provides a five percent performance bond to activate the Letter of Credit.

3. Use best effort to ensure that the supplier loads the vessel.

4. Coordinate the entire transaction from inception to conception.

All other terms stated in the MOU dated January 22, 2009 shall remain valid.

This Tripartite Memorandum of Understanding shall be governed by the laws of Liberia. It shall be binding upon the parties, their successors-in-business, legal representatives, agents, and assigns, etc. as if they were the original signatories.

WITNESS WHEREOF, the parties hereto have set their hands and affixed their signatures and have caused this Tripartite Memorandum of Understanding to be executed this 22nd day of January 2009:

Thereafter, the process for the importation of the cement began. Unfortunately the transaction never materialized, and the appellees have attributed the default to the failure of appellant to live up to its part of the agreement. The appellees alleged that the first arrangement having failed due to the failure of the appellant bank to transfer the funds, appellees managed to secure

another sales contract with the 21st Century Global Corporation who was prepared to supply Kakata Holding with the cement products against the deadline of July 10, 2009. They again approached the appellant bank and made further negotiations for reissuance of the letter of credit to 21st Century Global Corporation in the U.S.A, and appellant agreed to expedite the reissuance of said letter of credit to enable Kakata Holding take advantage of a loading which was scheduled for July 10, 2009. The appellees alleged that the appellant Ecobank again defaulted by delaying in submitting the letter of credit at Wells Fargo Bank, and the letter of credit when sent was fraudulent, in that the Field 40B of said document specifically stated that the letter of credit was without confirmation. In an email to Kakata Holding, appellees said, they were informed that a Senior Official at appellant bank, Mr. Sandei Cooper, Jr., specifically asked appellant's oversea bank not to confirm the letter of credit.

On January 29, 2010, co-appellee, Kakata Holding Company, filed an action of damages for breach of contract against the appellant Ecobank. The appellees complaint stated that as a consequence of the fraudulent letter of July 15, 2009, to 21st Century Global and the refusal of the appellant to transfer the needed money to VYCO, Sa of Switzerland, both sale contracts of Kakata Holding were terminated; as a result of this, the Company stood incapable of honoring its cement sale contract with the Ministry of Education. This led to the abrogation of the company's entire cement transaction quite to the loss of income and profit in the total sum of US$285,000.00, same being interest or profit of the anticipated 500,000 bags of cement at an interest rate of US$0.57 per bag. Kakata Holding attached a photocopy of the bill of particular/income or profit and loss statement from May, 2009 to April, 2010, indicating the quantity and price thereof to its complaint.

Kakata Holding complained further that notwithstanding the loss sustained by it, the appellant Ecobank unconscionably and illegally deducted and withheld the sum of US$162,569.00 from its deposit or account of US$617,948.49; that the deduction made by the appellant was in direct violation of count 2 of appellant's responsibilities as provided in the Tripartite Memorandum of Understanding herein quoted:

In the event the transaction is not consummated, ECOBANK shall return the full sum of the 25% constituting the cash contribution to Mutual Benefits Assurance Company.

TheKakata Holding Company contented that the appellant was the breaching party due to its failure to secure an irrevocable and transferable letter of credit; that the Bank is legally liable to Kakata Holding Company for damages for Breach of Contract and that the company finds it irrational for the bank to effect the aforesaid deduction against the non-defaulting party to the contract.

The appellant, Ecobank, filed its answer denying the allegation in the complaint.Co-

appellee Kakata Holding filed its reply reiterating its complaint. The issues having been joined, the court proceeded to hear the matter with the trial judge requiring the parties to file their legal memoranda on the law issues.

However, before the hearing on the law issues, co-appellee Kakata Holding Company, on April 16, 2010, filed a motion for summary judgment, seeking a judgment on the issue of
the alleged illegal withholding of a portion of the deposit made in the escrow account. The co-appellee Kakata Holding said this withholding was contrary to its agreement with the Bank. It therefore sought to recover, by this motion for summary judgment, the total amount of US$162,569.00 deducted by the appellant bank and which the bank said was consolidated expenses on the transaction.

When the motion for summary judgment was filed, Mutual Benefits Assurance Company, co-appellee herein, filed an application to the court below to be joined as co-plaintiff. It stated that it was an indispensable party in the case; it having facilitated the contract between Kakata Holding and the appellant, Ecobank, signing the tripartite agreement as one of the parties and deposited the sum of Six Hundred Seventeen Thousand, Nine Hundred Forty-nine United States Dollars and Forty-Eight cents (US$617,948.49) into a joint escrow account in the names of Kakata Holding Company and Mutual Benefits Assurance Company to be maintained by the Bank for the importation of the cement. The movant asked to join in order to protect its own interest, and to collaborate with its client Kakata Holding Company, Inc. to recover the US$162,569.00 and/or the twenty-five percent (25%) said to be illegally deducted from the escrow amount deposited by appellees. Co-appellee Mutual Benefits Assurance Company also affirmed all the averments of both the action of damages and the motion for summary judgment filed by co-appellee Kakata holding Company.

The motion to join was granted by the court, making Mutual Benefits Assurance Company co-plaintiff in the suit before the trial court and co- appellee in this appeal before us.

Below is the appellees' amended motion for summary judgment which ruling thereon is the subject of the appeal before us:

AND NOW COME, Movants praying this Honorable Court for Summary Judgment against the Respondent, to wit:

1. That movants filed an action for damages against respondent in which movant sought to recover the sum of US$162,569.00 (United States One Hundred Sixty Two Thousand Five Hundred Sixty Nine Dollars), as special damages, representing (25%) twenty-five percent of the sum of US$617,948.49, (United States Six One Seventeen Thousand Nine Hundred Forty

Eight Dollars, Forty-Nine Cents), which respondent illegally withheld from movant's money.

2. That the agreement between movants and respondent clearly states that in the event that the transaction is not consummated, the full amount of US$162,569.00 (United States One Hundred Sixty-Two Thousand Five Hundred Sixty-Nine Dollars) shall be returned.

3. That respondent filed an answer and admitted to that portion of the complaint respecting the illegal deduction and withholding of the US$162,569.00 (United States One Hundred Sixty-Two Thousand Five Hundred Sixty-Nine Dollars) from movants, from which admission Summary Judgment will lie in so far as it relates to the US$162,569.00 (United States One Hundred Sixty Two Thousand Five Hundred Sixty Nine Dollars).

Portion of the agreement is hereunder quoted:

In the event the transaction is not consummated, Ecobank shall return the full sum of the (25%) twenty-five percent constituting the cash contribution to Mutual Benefits Assurance Company.

4. That the transaction having not been consummated as per the agreement the deduction by the respondent was therefore unlawful and the sum so deducted and withheld by the respondent must be returned to the movants consistent with the agreement.

Wherefore and in view of the foregoing, movants pray for Summary Judgment against the respondent in the sum of US$162,569.00, (United States Dollars One Hundred Sixty Two Thousand Five Hundred Sixty Nine), representing amount illegally withheld by respondent; and further grant unto movants such relief justice, and right may demand in the premises.

Our Civil Procedure Law, §11.3(1)(3) states that a party seeking to recover upon a claim or to obtain a declaratory judgment may, at any time after the expiration of ten days from the commencement of the action after service of the answer if the answer is served before the expiration of such period of ten days or after service of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in his favor upon all or a part thereof. The court shall grant summary judgment if it is satisfied that there is no genuine issue as to any material fact and that the party in whose favor judgment is granted is entitled to it as a matter of law.

In resisting the motion for summary judgment, the respondent bank, appellant herein, admitted to deducting the US$162,569.00 from the escrow account. This deduction, according to appellant was done pursuant to and in keeping with the Tripartite Memorandum of Understanding which allowed it to withdraw 2% of the deposit made in escrow as the appellant's charges and other related fees incurred under the transactions and after the failure

and refusal of the second supplier, 21st Century Global Corporation to supply the consignment of cement under the reissued letter of credit. Relevant portion of the appellant's resistance to the motion is quoted hereunder:

4. That also as to counts one (1) through three (3) above, respondent submits that consistent and in keeping with the Tripartite Memorandum of Understanding (Exhibit D/1 attached to the Answer), respondent established an account in the name of co- movant Kakata Holding Company to carry into effect the herein mentioned Tripartite Memorandum of Understanding, pursuant to which Co-Movant Mutual Assurance Benefit deposited US$617,984.49 (United States Six Hundred Seventeen Thousand Nine Hundred Eighty Four Dollars, Forty Nine Cents) into said escrow account. Respondent says that the escrow account was established by respondent in the name of co-movant, Kakata Holding Company pursuant to the herein-mentioned Tripartite Memorandum of Understanding. Accordingly, co-movant Mutual Benefit Assurance Company made a one trenche payment for the posting and issuance of the Letters of Credit, as per the Tripartite Memorandum of Understanding. Respondent submits and says that co-movant Kakata Holding Company is financially impotent; if not, co-movant Mutual Benefit Assurance Company would not have executed the Tripartite Memorandum of Understanding for the payment of the twenty-five percent (25%) and two percent (2%) charges required by respondent for the posting of the Letter of Credit.

5. That further as to counts one (1) through three (3) above, respondent says that co-movant Mutual Benefit Assurance Company, which deposited the amount US$617,984.49 (United States Six Hundred Seventeen Thousand Nine Hundred Eighty Four Dollars, Forty Nine Cents), pursuant to and in keeping with the Tripartite Memorandum of Understanding, withdrew its funds, less 2% two percent bank charges and other related fees in the amount of US$162,569.00 (United States One Hundred Sixty Two Thousand Five Hundred Sixty Nine Dollars) after the failure and refusal of movant's second potential supplier, 21st Century Global Corporation, to supply the consignment of cement under the re-issued Letter of Credit. Respondent prays Your Honor to take judicial notice of respondent's Exhibit "D/8" attached to the answer, which was addressed to the General Manager of co-movant Mutual Benefit Assurance Company and the statement of the escrow account created for the cement transaction, in substantiation of the averment contained therein.

Having heard the arguments by the parties on the motion, the Judge stated that the only issue for determination of the motion for summary judgment was whether or not the appellant bank was required by the Memorandum of Understanding to return in full the money deposited?

We quote hereunder the Judge's ruling which provides the basis for appellant's contentions:

The records before this Court show that, on the 22nd day of January 2009, the plaintiff/movant herein, Kakata Holding Company, Inc. and Mutual Benefit Assurance Company, and defendant Ecobank Liberia Ltd. entered into a tripartite Memorandum of Understanding. According to the Memorandum of Understanding herein known as MOU, Kakata Holding Company has the capacity, expertise, and ability to import to Liberia, twenty-five thousand (25,000) metric tons of cement which value 2.3 million United States Dollars to be sold on the Liberian market. The Co-Plaintiff, Mutual Benefit Assurance Company, agreed and consented to facilitate the importation process by contributing 25% as cash contribution to their escrow account and 2% for charges and other related fees consistent with the terms and conditions of the MOU. Mutual Benefit Assurance Company complied with the provision of this tripartite agreement with the defendant bank 25% as cash contribution totaling 575,000 United States Dollars plus 2% flat rate of the total facility of 2.3 million United States Dollars which equals to forty-six thousand United States Dollars (US$46,000) thereby totaling a deposit into the escrow account of the defendant bank the sum of US$621,000.

The relevant provision of the tripartite MOU as found in clause two (2) of the said MOU, is very relevant for the determination of this case. It provides "in the event the transaction is not consummated, Ecobank shall return the full sum of the 25% constituting the cash contribution to Mutual Benefit Assurance Company.

On the 29th day of January 2010, the plaintiff filed an action of damages for breach of contract against the respondent bank. Plaintiff alleged that the defendant bank breached the transaction and demanded its 25% cash deposited with the bank.

Plaintiff alleged that the defendant bank continued to withhold the 25% cash contribution and the 2% despite its failure to consummate or complete the transaction contrary to the agreement. Count eleven (11) of the complaint is very relevant. This Court quotes hereunder: "That notwithstanding the loss sustained by plaintiff as stated supra, the within named defendant unconscientiously and illegally deducted and withheld the sum of US$162,569.00 from plaintiff's deposits or account of US$617,948.49.

The defendant bank filed an answer to the complaint of the plaintiff. The defendant admitted that the transaction was never completed as per the MOU. The defendant also admitted that the 25% cash contribution was deposited along with the 2% charges consistent with the MOU. In other words, the defendant did not deny withholding the amount prayed for by the plaintiff consistent with clause two (2) of the MOU. Defendant alleged that it has the obligation to

charge the plaintiff for charges. The defendant prayed this Honorable Court to deny and dismiss the complaint of the plaintiff; the plaintiff filed a reply upon which pleading rested.

The plaintiff filed this motion for summary judgment on ground that the defendant bank admitted withholding its money. The defendant bank resisted this motion which also is an admission of the allegation levied against it. The only issue for determination of this matter is whether or not the defendant bank is required by the MOU to return the money in full.

Defendant is contending that following the failure of the transaction, the amount was withdrawn by Mutual Benefit Assurance, and that it has some charges deducted from the amount. The plaintiff is contending that there should be no deduction once the contract was never consummated, and that the provision of the MOU should be adhered to and that the full amount of the 25% cash distribution should be returned without any deduction.

This Court says the contention of the movant is in conformity with clause two (2) of the MOU which says that the defendant bank shall return a full sum of 25% constituting cash contribution to Mutual Benefit and Assurance Company. The word shall as used in the MOU is mandatory not discretionary, and the bank is under obligation to return the full sum of the 25% as cash contribution to co-plaintiff/co-movant Mutual Benefit and Assurance Company.

Section 11.3 of our Civil Procedure Law provides that where there is no genuine issue of fact there is no need for trial, but a judgment can be rendered as a matter of law. Section 25.8 of our Civil Procedure Law also provides that any admission made by any party is admissible against that party. The defendant party admitted withholding the amount, and this Court says it is wrongful and unlawful for the defendant bank to withhold the 25% cash contribution contrary to the MOU. In other words, the tripartite MOU is enforceable against all the parties and that any breach of any provision thereof is also enforceable against the defaulting party. In the case at bar, the defendant bank defaulted when it refused and neglected to pay the 25% cash contribution in full as required by the MOU.

Wherefore, and in view of the foregoing, the motion for Summary Judgment is hereby granted and the resisting party is hereby ordered to return to co-plaintiff Mutual Benefit Assurance the 25% cash contribution in full without any deduction from the escrow bank account, and the withheld amount prayed for by the plaintiff should therefore be returned in full consistent with the MOU. AND IT IS HEREBY SO ORDERED.

The appellant Ecobank excepted to this ruling of the Judge. We quote hereunder clauses 3 and 4 of the bill of exceptions which is relevant to the determination of this appeal:

3. That the co-appellee, Kakata Holding Company did not specify what amounts represented the twenty five percent (25%) cash contribution and the two percent (2%) bank charges and other related fees but rather deposited an amount of United States Dollar Six Hundred Seventeen Thousand, Nine Hundred Forty-Eight Dollars and forty nine cents (US$617,948.49). Accordingly, it is impossible to determine what constituted the 25% contribution towards facilitation of the importation of the 25,000 metric tons of cement and the two percent (2%) bank charges without the taking of evidence. So Your Honor erred when Your Honor granted movants' motion for summary judgment; for which respondent's excepts.

4. That Your Honor's ruling on the Motion for Summary Judgment does not name a sum certain, and therefore vague, ambiguous and indistinct. Accordingly, and consistent with the Jaw hoary with age in this jurisdiction, a judgment which does not name a sum certain is void and unenforceable.

We agree with the appellant that the appellee's petition was unclear as to what constituted the twenty-five percent since the amount deducted, the bank said was for bank charges and other related fees incurred during both transactions. The Judge in his ruling failed to address the issue of the 2% which formed part of the amount deposited. There is no showing anywhere in the record that the Judge addressed the issue of the 2%, stating clearly whether the co-appellees were also entitled to the 2% because of the failure of the parties to consummate the transactions. Instead, the Judge ruled:

The Defendant is hereby ordered to return to Co-Plaintiff Mutual Benefit Assurance the Twenty-Five Percent (25%) cash contribution in full without any deduction from the escrow bank account and the withheld amount prayed for by the Plaintiff should therefore be returned in full consistent with the Memorandum of Understanding (MOU).

Clearly the Judge did not fully answer the question raised by him, Whether or not the bank was required to return the money deposited in full.

We see a mix-up in what constituted the twenty-five percent (25%) the appellees were referring to and sought to recover. For emphasis, let us quote count 1 of the Motion for Summary Judgment again:

1. That movants filed an action for damages against respondent in which movant sought to

recover the sum of US$162,569.00 (United States One Hundred Sixty-Two Thousand Five Hundred Sixty Nine Dollars), as special damages representing (25%) twenty-five percent of the sum of US$617,948.49, (United States Six One Seventeen Thousand Nine Hundred Forty Eight Dollars, Forty-Nine Cents), which respondent illegally withheld from movant's money.

The appellees herein sought by the motion for summary judgment to recover the total sum of US$162,569.49 which they said in count 1 of their motion represented the deduction of 25% of the amount put in an escrow account for the transaction of the importation of the cement and which under the tripartite agreement should have been refunded. However, we find to the contrary that this amount withheld by the bank and which the appellees said represented twenty-five (25%) of their deposit was not the amount of the twenty-five percent (25%) referred to in the Tripartite Memorandum of Understanding which should have been returned to the appellees in case the transaction was not consummated.

The ruling of the trial court states that there is no dispute that the appellees, particularly Mutual Benefit Company, deposited the required 25% under the letter of credit and that the appellees were entitled to a full refund of the 25% payment in conformity with clause 2 of the Tripartite Memorandum of Understanding, as the use of the word, shall made it mandatory for Ecobank to return the full 25% cash contribution. But the amount deposited also constituted the required 2% as bank charges and other related fees. Did the agreement also say that in the event the transaction was not consummated the bank would not proceed to offset charges and other related fees against the 2% deposit for charges and fees? Were there no charges and fees undertaken by the bank in its attempt to consummate the transaction?

TheJudge set out in his ruling the mathematical equivalent of the percentages of the total transaction of 2.3 million as follows: 25% cash contribution, the equivalent of US$575,000 United States Dollars; 2% payment for charges and fees, the equivalent of US$46,000; total deposit to have been made into the escrow account of the appellant bank being US$621,000.00.

A review of the record before us shows that in order to meet up with its obligation under the tripartite agreement, Mutual Benefit Assurance Company (MBA) instructed its bank to transfer sixty hundred and twenty one thousand United States Dollar (US$621.000.00) into an escrow account set up by the appellant bank for the cement transaction. This amount represented the twenty five percent (25%)

contribution of US$575,000.00 requireddeposited and forty six thousand United States Dollar US$46,000.00 or two percent (2%) for charges and other fees relating to the cement transaction.

The following bank information/payment instructions form part of the court's records before us:

January 30, 2009

Charles Uwadiegwu
c/o Guaranty Trust Bank PLC
Street, Lagos

Attention: Kermi Oladehunce

Dear Madam:

BAND INFORMATION/PAYMENT INSTRUCTIONS

We are pleased to provide below the information for the onward transfer of US$650.000 (Six Hundred Fifty Thousand United States Dollar) to Kakata Holdings Limited & Mutual Benefits Assurance Inc.

BAND NAME:
Citibank N A
111 Wall Street
NY NY 10043

Swift code:
CIMU533

Beneficiary:
Ecobank Liberia Limited
Account number 3614-7565
Swift code: ECOLCRLM

For further credit:
(a) $621,000 to Kakata Holdings Inc.
Account no. 1421-0000-2820-27

(b) Mutual Benefits Assurance Inc., Liberia
Account no.10210168622018

Kind regards.

Soye
ED. CORPORATE PLANNING & INVESTMENT

Both parties have admitted that of the required US$621,000.00 transferred and instructed to be placed in the Kakata Holdings Company's account, United States Dollars, three thousand fifty-one dollars and fifty-one cents (US$3,051.51) was deducted as service charge for the above stated internationalmoney transfer. The actual money therefore received in the account as appellees' 25% contribution and the 2% for bank charges and other related fees was US$617,948.49 and not the agreed cash amount of US$621,000.00.

Where the full amount of US$621.000.00 was deposited and the transactions with appellees' suppliers was not concluded, there would be no issue of Ecobank obligation asper theagreement toreturn the full 25% or US$575,000.00 constituting the cash contribution of the appellees toward the letter of credit. As the trial Judge said in his ruling, and we do agree, "the word, "shall" in the Memorandum made the return of the 25% mandatory, not discretionary". A reading of clause 2 of the agreement regarding Ecobank's responsibility is clear on its face and leaves no room for any other interpretation. This Court in the case, Bridqeway Corporation vs. Citibank,38LLR 90, decided 1995, held that the cash collateral of 25% of the amount of each letter of credit deposited by the customer with the bank, for letters of credit, is a special deposit; the bank merely assumed the charge orcustody ofthe property without authority touse it. The relationship created in such case is that of a bailor and bailee, not that of creditor and debtor. Clearly, from the ruling just referred to, the 25% deposit made as cash contribution towards the letter of credit is supposed to have been be treated as a special deposit, and required to be returned in full on demand where the contract between the parties so stipulates.

Agreeing with the appellant that one cannot gather from the Judge's ruling what constituted the 25% of the amount deposited and should have been refunded where only US$617,948.49 and not US$621,000.00 was deposited, and that the Judge's ruling failed to consider the 2% required for bank charges and fees, we however do not agree with the appellant that the Judge needed to take evidence to substantiate the amount that constituted the twenty-five percent.

The records reveal that after the appellees efforts to consummate the cement transaction failed, co-appellee Mutual Benefits Assurance Company met with the appellant bank about the refund of the Company's deposit. The Bank wrote Mutual Benefit Assurance Company a letter as follows:

December 4, 2009

The General Manager
Mutual Benefits Insurance
Tubman Boulevard
Sinkor, Monrovia

Dear Sir,

RE: KAKATA HOLDING COMPANY

With reference to the meeting held among our good selves relative to the Letter of Credit facilities issued on behalf of KAKATA Holding Company's between March 2009 and September 2009, we will like to advise you of the following updates:

i. Two L/C's were opened in favor of the above-named company but regrettably, none of these were concluded due to the inability of the suppliers to perform;

ii. Following your letter in November 2009 for full reimbursement of the funds placed in escrow to secure the issuance of the L/C, the Bank consolidated it expenses under this transaction as follow:

I. Amount in escrow
US$617,948.49

Contribution Fee: 4%
US$32, 999.00

Direct Bank Charges
US$81,762.18

Facility Fees
US$46,000.00

Other Fee/Charges
US$5,000.00

US$165,762.00

Less : US$3,193.00 (0.5% being reversed)

II. Total: US$162,569.00

Total to be given back (I - II) US$455,379.49

Once again, we thank you for your cooperation and look forward to a continued mutual rewarding relationship between our entities.

Regards,

Daniel Worpo Thompson, II
Relationship Manager

Felix P. Saint-Jean
Head, Wholesale Bank

Cc: Kakata Holding Company

The appellant therefore pay to the co-appellee Mutual Life Insurance only US$455,379.49, as the amount to be refunded based on clause 2 of the tripartite agreement.

This raises the question whether, in the case where both transactions failed, the bank could not proceed to set-off its bank charges and other fees, and whether the setoff could exceed 2% or US$46,000.00?

In the case, where the agreement limits the bank charges and fees to 2% or US$46,000.00 this amount was separate and distinct from the 25% which should have been deposited in an escrow account and returned in case the transaction was not consummated. The 25% therefore was the balance of the amount actually credited to the Kakata's Holding account less the 2% or US$46,000.00.

The Bank has alleged that it consented to grant appellees two letters of credit. This was not disputed by the appellees. The parties stated that when the transaction ofappellees' first

supplier VYCO, SA,Switzerland fell through, the appellees' arranged with another supplier, 21st Century Global Corporation of the U.S.A., to provide the cement before the deadline of co- appellee Kakata Holding Company's agreement with the Ministry of Education. The parties met with the appellant bank to provide another letter of credit to the 21st Century Global Corporation. Their request was granted but this second transaction also did not materialize.

Could the Bank, because of the second transaction charged beyond the agreed 2% for bank charges and other related fees? We say, No. As much as the second understanding did not include an amendment/addendum to the first agreement, the bank charges and related fees were legally limited to only the 2% or US$46,000.00, strictly in line with the agreement between the parties.

It is generally stated that when a depositor is indebted to a bank, and the debts are mutual, that is between the same parties and in the same right, the bank may apply the deposit, or such portion thereof as may be necessary, to the payment of the debt due it by the depositor, provided there is no expressed agreement to the contrary and the deposit is not specifically applicable to some other purpose. Am. Jur. 10, section 853, Banks and Financial Institutions. In this case, the tripartite MOU provided that of the amount deposited in the escrow account by the appellees, US$46,000.00 or 2% of the letter of credit was purposely for charges and other related fees under the transactions. Where there was no agreement for further bank charges and fees, the appellant bank could not have proceeded to offset charges against the 25% set up as a special deposit and which was required to be refunded in case the agreements were not consummated. In the case, CHALKLEY v. FLOMO, 4LLR 181, 189 (2002), this Supreme Court held there is a definite difference between a debtor-creditor relationship and a bailor-bailee relationship, as a bailment in its ordinary legal signification imports the delivery of personal property by one person to another in trust for a specific purpose, with a contract express or implied that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it. As we stated previously, any setoff beyond the 2% agreed to by the parties under the terms of the agreement cannot be sustained by this Court as the Bank upon request by appellees for issuance of another letter of credit failed to require an amendment/addendum to the tripartite agreement to take into account other bank charges and fees that the bank might have incurred due to this second transaction.

The appellees have termed the deduction of the US$162,569.00 as illegal especially when both of the transactions did not go through which they said was due to the appellant's fault. Appellees therefore in their application for summary judgment

requested the trial court to have the appellant refund the total US$162,569.00. This request was granted by the trial court.

We do not agree that the required 2% which formed part of the deduction made by the appellant could have been refunded without the taking of evidence. This court held that an agreement voluntarily made between competent persons is not lightly to be set aside on the grounds of public policy or because it has turned out unfortunately for one party," Morgan vs. Montgomery, 33LLR11, 14,(1985).

Aswepreviously stated, the agreement did not call for return of the 2% deposit in case the transactions were not consummated. The refund of the 2%, or any portion thereof, can only be considered by the trial court after hearing evidence in the suit for damages still pending in the court below.

Having said that the 2% could not have been recovered in a summary judgment proceeding, the 2% or US$46,000.00 deducted from the deposit of US$617,948.49 leaves a balance of US$571,948.49 which should have been treated as a special deposit, representing the deposit of 25% that the appellant bank under clause 2 of the agreement was under an obligation to refund in case the transactions were not consummated.

There being no dispute that appellant Ecobank refunded to the co-appellee Mutual Benefit and Assurance Company only US$455,379.49, and based on all that we have said, the appellant is legally obligated to refund a balance US$116,569.00 to the appellees; thereby, constituting the total required refund of US$571,948.49 as the appellees actual deposit of the 25%, that should have been refunded as per clause 2 of the tripartite agreement.

The ruling of the Judge is therefore affirmed with modification as made by this Court hereinabove. Costs ruled against the appellant. AND IT IS HEREBY SO ORDERED.

THE APPELLANT WAS REPRESENTED BY COUNSELLORS AMARA SHERIFF AND J. JOHNNY MOMOH OF THE SHERMAN & SHERMAN, INC., AND THE APPELLEES WERE REPRESENTED BY COUNSELLOR BEYAN D. HOWARD OF THE LEGAL CONSULTANTS, INC.