IN THE SUPREME COURT OF SIERRA LEONE

CIV.OPP 6/2000

BETWEEN: THE OWNERS OF THE SHIP
"MV MASCHO STAR" APPELLANTS

AND

RICHAB S.A. AND ANOR. RESPONDENTS

A.J.B. GOODING ESQ. AND BERTHAN MACAULAY JNR. ESQ., FOR THE APPELLANTS

YADA WILLIAMS ESQ. AND OSMAN JALLOH ESQ. FOR THE RESPONDENTS

CORAM:

HON. MS. JUSTICE U.H. TEJAN-JALLOH	**CHIEF JUSTICE**
HON. MR. JUSTICE G. SEMEGA-JANNEH	**J.S.C.**
HON. MR. JUSTICE M.E. TOLLA THOMPSON	**J.S.C.**
HON. MS. JUSTICES. KOROMA	**J.S.C**
HON. MR. JUSTICE E. ROBERTS	**J.A.**

JUDGMENT DELIVERED THE 3rd DAY OF MARCH, 2009.

JUDGMENT

TEJAN-JALLOH, C.J. This is an appeal from a judgment of Sierra Leone Court of Appeal delivered on 5th day of April 2000 restoring the judgment in default of Appearance of Hon Mr. Justice L.B.O Nylander dated 7th June, 1990 which had earlier been set aside by an order of the same Judge dated the 22nd day of April, 1991.

This appeal turns on issues of non-compliance with the Rules relating to service of tile originating process of litigation, meaning of liquidated and unliquidated damages, award of damages and costs in Foreign Currency; rate of interest to be awarded in Foreign Currency. The grounds of appeal are:-

(i) The Court of Appeal failed to consider the Cross Appeal and gave no , *ca* -_ for dismissing the Cross Appeal in the light of the evidence before it, to wit

(a) The affidavit of Edward Fynn sworn to on the 5th day of June 1990 and the 28th day of June 1990; and the affidavit of Ade Renner-Thomas sworn to on the 28th day of June 1990.

(b) The indorsement at the back of the Writ of Summons herein maue by the same Edward Fynn.

(c) The oral testimony given by the same Edward Fynn.

(d) The Oral testimony of Edward Kamanda Bongay (the Under-Sheriff) which contradicted that of Edward Fynn.

Thereby wrongly holding "I have no reason to disbelieve. the totality of his evidence" referring to the evidence of Edward Fynn, the Court Bailiff, who served the Writ of Summons.

(ii) Further and in the alternative, if it held that the Court of Appeal considered the Cross Appeal the Court was wrong to uphold the learned Trial Judges· ruling that the service of the Writ of Summons was valid even though the said service failed to comply w·1th the provisions of *Order 9 Rule 12 of the Supreme Court Rules of England 1960.*

(iii) The Court of Appeal erred in law when it held *inter alias* as follows

> *"There is no contention that the action before me is Admiralty Action in rem which arose out of the jurisdiction of the High Court. Our High Court Rules are silent on the Rules governing any such action We therefore need to know which of the Rules of Court would apply*
> *The Respondents are urging me to hold that since there are no specific rules governing Admiralty Action in Rem, the general orders applying else where in our Rules would apply to such action.*

I must here state that I have noticed a *conspicuous fallacv in their argument with regards to the rules to be applied to the application Learned Counsel Mrs. Lisk had this to say, "since there are no specific rule governing admiralty action in rem the general orders applying else where in our Rules would apply to such actions". That cannot be true. when our rules are silent we have* a *legal obligation to go to the English Rules of Court of England for the year 1961. By Order 13 of the Supreme Court Rules of England 1961 under which in an appropriate action* a *Plaintiff (sic) final judgment against* a *Defendant for liquidated demand where the Defendant has failed to enter an appearance after the time fixed does not apply to an Admiralty action m rem....*

In admiralty action in rem, judgment for any defendant can only be obtained by motion".

In that it failed to have regard to and/or apply the provision of *Order 10 Rules* 5 *of the High Court Rules* which is in the following terms -

"Where Writ is indorsed with claim for pecuniary damages only or for the detention of goods with or without a *claim for pecuniary damages and the defendant fails to appear the Plaintiff may enter interlocutory judgment and* a *Writ of* inquiry *shall issue to assess the value of the goods and the damages or the damages disclosed by the indorsement on the Writ of Summons".*

The High Court Rules are not silent regarding rules relating to procedure in admiralty action in *rem.* Most of these rules are general provisions applicable to all actions including Admiralty Actions in *Rem.*

In particular the provisions of the afore-mentioned rule, apply to all actions including an Admiralty Action .in *rem,* which was the instant case. It was therefore not

necessary to resort to *Order 52 Rule 3 of the High Court Rules* thereby invoking the Rules of the Supreme Court of England 1960.

(iv) The Court of Appeal erred in law when it held *inter alias* as follows -

> *"To say, as the learned Judge wrote in his ruling that the Plaintiff ought to have entered an inter locutory Judgment and have damages assessed by the Court is wrong and without any foundation in law"*

In that it failed to have regard to read/or apply the provision of *Order 1*O *Rule* 5 *of the High Court Rules.*

(v) The Court of Appeal erred in law restoring the decision of the learned Trial Judge when he awarded damages to the Plaintiff in United States Dollars, when the evidence disclosed that the loss suffered by the Plaintiff/Respondent was in Leones The Court had no jurisdiction to award damages in Foreign Currency to the Plaintiff/Respondent.

(vi) The Court of Appeal erred in law in restoring the decision of the learned Trial Judge when he awarded "interest" till payment. Such award been in excess of the jurisdiction of the Court having regard to the provisions of *section 4 of the Law Reform. (Miscellaneous provisions) Act Cap 19 of the Law of Sierra Leone 1960.*

(vii) The Court of Appeal erred in law in restoring the decision of the learned Trial Judge upon motion for judgment in that the latter awarded interest upon a Foreign Currency judgment (United States Dollars) without the Plaintiff/Respondents leading any expert evidence to prove what was the rate of interest in that currency

(viii) The Court of Appeal erred in law in restoring the decision of the learned Trial Judge when he awarded interest at the rate of 15 per centum per annum which is higher than the interest rate of 12 per centum per annum indorsed on the Writ of Summons without making any amendments to the statement of claim.

(ix) The Court of Appeal erred in law in restoring the decision of the learned Trial Judge when he awarded cost of the action to the Plaintiff/Respondent in United States Dollars (USD 37,000/00) for costs incurred by the Plaintiff/Respondent in Sierra Leone there being no legal basis for the award of costs for work done in Sierra Leone.

(x) On the question of the service of the Writ one Edward Fynn a Court Bailiff was called to give evidence before the learned Trial Judge as to the participation in the service, he was examined before the Court and in the end of it all, the learned Trial Judge said:-

> *"I have no reason to disbelieve the totality of his evidence. I have to accept the learned Trial Judges conclusion on the point, he was in a good position to see the witness, evaluate his evidence and watch his demeanor as far as the service of the Writ is concerned the Cross Appeal therefore fails"*

The Court of Appeal misdirected itself when it dismissed the Cross Appeal and upheld the learned Trial Judge's decision that the service of the Writ of Summons was valid without a proper consideration and evaluation of the evidence documentary as well as o:al. relating to the service of the Writ.

The appellant in their Cross Appeal substantially relied upon the Judgment of the learned Trial Judge dated 7th June 1990 which was subsequently set aside on the 22nd of April 1991. The Cross Appeal was dismissed by the Court of Appeal, on the ground that as far as the service of the Writ was concerned the Court held that the learned Trial Judge's reason for setting aside his previous decision of 7th July 1990 was wrong. Looking at the panel of eminent Justices in the Court of Appeal. I have no doubt that the Court must have averted their minds to the *dicta* of Lord Justice Thankerton in the famous case of *Watts (or Thomas) v Thomas (1947) page 582 at Page 587.* Their Lordship must have considered the test laid down in the case before coming to their conclusion in agreeing with the findings of the learned Trial Judge.

With respect to Counsel for the Appellant, the argument urged on the issue as to whether or not the service of the Writ was proper is no longer of any moment by reason of the fact that the original Writ of Summons had been amended pursuant to *Order 24 Rule 2 of the High Court Rules* before it was served. On the question of service of the Writ, one Edward Fynn, a Court Bailiff testified as to how he effected the service. He was examined before the Court and the learned Trial Judge concluded that on the totality of the evidence he had no re2son to disbelieve the witness. *In Riger-Benue Transport* Co *Ltd. v Marumal and Sons (Nigeria) Ltd. (1989) LP (Comm) 185* cited by Counsel for the Appellant, the Supreme Court of the Federal Republic of Nigeria was dealing with a situation where the Trial Judge's decision was based on his evaluation of the credibility of the witness, *manner and demeanor.* At Page 91 the Court said:-

> *"A Court of Appeal will not normally interfere with tl1e findings of fact of a trial Court unless such findings are perverse If the findings are based on the credibility of witnesses a Court of trial which has the advantage of seeing and watching their demeanor 1s in a dominant position. If however, the complaint is as to non evaluation or improper evaluation of the evidence tendered before the trial Court the Court of Appeal is in a good position as the trial Court".*

I wish to observe that though Counsel for the Appellant had said some disparaging things about the testimony of Mr. Fynn, he failed to prove that the findings of fact based on the evidence of the demeanor of Mr. Fynn and Mr. Bongay, who was the Under Sheriff and the documentary evidence presented before him were perverse. The Court of Appeal rightly appreciated the fact that in such a situation the learned Trial Judge was in a dominant position.

In Joint Venture Construction v Conteh (1970-71) ALR SL. 145; the Court of Appeal reiterated the same well ,mown principle of law that Judges findings made after hearing the witness and observing their demeanor are entitled to great weight and should not be disturbed unless it is clear that they are unsound. Suffice it to say that the complaint about the findings has not been justified.

Learned Counsel for the Appellant placed great reliance on the case of the *Mane Constance (1877) Maritime Law* cases which involved service of Writ of Summons 1n action in *rem* and also in the case of *Prince Bernard (1963) P.D 117.* The service was held to be irregular, because it was not nailed to the Mast of the Vessel in accordance with *Order IV Rule 10 of the Rules of Supreme Court.* In that case the Writ was served on the Master on board the Ship. The Judge insisted that the Writ of Summons should be served in a proper manner. In this appeal, there is evidence which the learned Trial Judge accepted that the amended Writ of Summons was pasted on the Mast of the Ship as was in the above cases. This view of mine is reinforced by the evidence of the Bailiff where he deposed as follows -

> *"When we went on board the Customs officer asked for the Captain of the vessel. We went to his Cabin or office. I appraised him of our mission to arrest the ship "MASCHO STAR". I asked for the Mast of the ship We climbed up the Mast and I affixed the Writ of summons for a short time.* I *came down with if". The law relating to such service it to be found on Order 9 r 12, which states as follows:*
>
> *"In Admiralty Action in rem service of a Writ of Summons or Warrant aga111st ship freight or cargo on board is to be effected by nailing or affixing the original Writ or Warrant for a short time on the main Mast or* on *the single Mast of the Vessel and on taking off process leaving the true copy of it nailed or fixed in its place".*

In my view the Court of Appeal quite rightly accepted the learned trial Judge's conclusion on the evidence of the Bailiff, who effected service of the Writ, because they appeared to have followed the guidelines laid down in *Watt or Thomas v Thomas.* The cases of the *Glannibanta (1876) 1 PD. 283 at page 287; Grace Shipping Inc. and Another v CF. Sharp* & Co. *(Malaya) P T.E. Lid. (1987) LRC (Comm) page* 550 *at page* 563. *Armagas Ltd. v Mundogas S.A. (The Ocean Frost (1985)* 2 *Lloyd's Report at page* 57. *Benmax v Austin Motor* Co. *(1955) A.ER. 326 at page 328 and Coglan v Cumberland (1896) 1 Ch D 704* - all of these cases deal with the same general principles and circumstances in which an Appeal Court was entitled to interfere with the conclusions of a trial Judge. I opine that none of them laid a new ground or different principle of law.

The situation which should warrant the Court of Appeal to interfere with the findings of a trial Judge does not exist here, and in my own judgment I am satisfied that the requirements as regard proof of service was fully complied with by tl1e Respondent This therefore leads me to say that the case of *Barclays Bank of Ghana Ltd. v Ghana Cable* Co *Ltd. and Others (1998 and 1999) GLR1 and Brakowa v Awuak Yewa (1956) 2 WALR 164* both of which turn on how service should be proved are irrelevant to the matter on an appeal by reason of the fact that the issue of service was adequately addressed and proved. The conclusion is that there is no merit in grounds 1, 2 and 10 of the appeal.

I think it will be idle to contend that our High Court Rules of 1960 are not silent as regards Admiralty action in *rem* if ii had not been silent it would have made provision for obtaining Judgment in default in Admiralty action in *rem Order* 52 *Rule 3 of the High Court Rules 1960* saves the situation by providing as follows:

> *"Where no other provision is made by the rules the procedure practice and forms in force in the High Court of Justice in England on the 1st day of January 1960 so far as can be conveniently applied shall be in force in the High Court."*

In the circumstances the need to resort to the pertinent provisions in the English Supreme Court Rules 1961 arises. It is, therefore, apposite to refer to *Order* 13 *r 12A* which provides as follows:

> *"In Admiralty action in rem if the defendant does not appear within the time limited for appearance upon filing by the plaintiff of the proper affidavit of Service (emphasis mine) and a statement of claim and a certificate of non- appearance the action may on the expiration of twenty-one days from the service of the Writ be set down for judgment by default".*

It is stated in the Rules that such service gives the Court Jurisdiction to pronounce Judgment *(The Nanlik (1895 p. 121).*

Order 13 Rule13 Default in Admiralty Action

- This Rule briefly stated says that in Admiralty action in *rem* upon default of appearance if. when the action comes before him, the Judge is satisfied that the plaintiff's claim is well-founded he may pronounce for the claim and may make such order as he shall think Just

It is observed that Counsel for the Appellant who had been arguing against the resort to *Order* 52 *Rule 3,* when he entered his appearance he made it appearance under protest which does not exist in our High Court Rules. It is a conditional appearance that 1s normally used in Admiralty proceedings. How then can Counsel be heard to complain about the use of a wrong procedure when his own appearance under authority of the law which he had cited to wit; *B.M Dakhlallah v Horse Import and Export and Others* CC. *4 92/04* amounted to a nullity. In that case the Court said a conditional appearance is not sanctioned by our High Court Rules. Muria J.A at Page 6 held that it is an irregularity of substance and concluded that in law there was no appearance at all in place.

This decision which the learned Counsel placed reliance upon rendered his appearance under protest a nullity and that being so he cannot claim to have a *locus* in this matter. But being aware of the dictum of *Liversey-Luke JSC in Sierra Leone Oxygen Factory v PB Pyne-Bailey (Judgment dated 10th May 1974 Unreported page* 20. He said *inter allia*

> *"The Rule making body in its wisdom has made provision for dealing with* cases *where there has been non-compliance with the Rules. Order* 50 *Rule* 1 *of the High Court Rules provides* as *follows. Etc etc. This rule empowers the Court to disregard the irregularities and to decide on the material question The Court is thereby enabled to do justice without placing undue premium on technicalities."*

Adopting the above dictum the irregular appearance entered by Counsel for the Appellant may be overlooked inorder to do justice and shed away technicalities.

I am satisfied on the available evidence that the Respondent has complied fully with the necessary provisions of the rules requiring:-

1. *filing of a proper affidavit of service*

2. *filing of a statement of claim*

3. *filing of certificate of non-appearance before ...*

4. *setting down the action for judgment by default*

Perhaps I should elaborate on the above requirements

As regards the filing of a proper affidavit of service that issue was adequately dealt with both in the Court of trial and the Court of Appeal

1. There is no doubt that there is a statement of claim.

2. Certificate of non-compliance is found on page 33 of the records dated the 6th day of June 1990 and signed by A Showers - Master and Registrar

3. As for setting down the action for judgment. This means on motion for Judgment The requirement is that the original Writ must be annexed to the affidavit of service before judgment in default can be obtained *(The Eppos (1885).*

The learned Counsel for the Appellant cited the cases of in the *Estate of F-c1rker (Deceased) Hagen and Another v John and others (1920-36) ALR (SL) 21.* and *Poku and Another v Kwao and Another (1989-90) GLR 82* both of which can be said to saying, in the case of the earlier one that the absence of the English provision in our Rules could be deliberate, whilst the latter one is a Ghanaian case where the Court found that their Rules are not silent on the particular point. The result is that these two cases are distinguishable from the situation in the matter on appeal

Learned Counsel for the Appellant in an attempt to buttress his contention that the Court should not have resorted to *Order 52 Rule 3* found comfort in relying on Order 1O Rule 5 of the High Court Rules, which in his opinion is the appropriate rule for the Admiralty Act,0n in *rem.* To use his words he said:

"I submitted that resort to English Rules for judgment in default in this action was unnecessary since there is an adequate provision under our Rules and under Order X for default judgment in Admiralty Actions. Counsels contention is that switching should not be automatic and whole-sale switching must be selective. I therefore urge your Lordships to hold that my interpretation of Order 53 Rules 3 of the old Rules is the correct interpretation I submit that their contention that since this case is an Admiralty Action in rem action Order 10 in particular Rules 5, *3 and 11 are inapplicable is a wrong statement of the* ***law".***

On the other hand the Respondent's side contends quite rightly that Order 10 Rule 5 does not apply to these proceedings because it provides thus

"Where the Writ is indorsed with a claim for pecuniary damages only or fo1 detention of goods with or without a claim for pecuniary damages··

In my view, this is a correct statement of the law, when one views it against the background of the Respondent's original claim, which is for both a liquidated and unliquidated amount The original claim is for the sum of U$469,500/00 which was amended to the sum of U$290,300/00 being the resale value of the goods short-delivered and/or damaged and consequential loss plus interest on the amount at the rate of 12 per centum per annum. The record shows that judgment in default obtained by the Respondent was for only the liquidated part of the claim. I hold the view that it would have been inappropriate if the Respondent had proceeded under *Order* 25 or whatever other rules in our High Court Rules. For all the reasons I have endeavoured to state above, I dismiss grounds 3 and 4 of the appeal.

Ground 5 - Award of Damages in United States Currency

Counsel for the Appellants contended that the learned trial judge had no Jurisdiction to award damages in foreign currency i.e. U.S. when the only evidence disclosed was that the preponderant (98%) loss suffered by them was in Leone Currency. He submitted that to frame your claim in foreign currency without proof of loss in such currency ought no to be countenanced by the Court. He derived support for this view in the case of *Castrol Limited*

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v John Michael Motors Limited SC Civ. App. No.1.198 where Or. Ade Renner-Thomas Chief Justice said at page 30 said:

> *"It is clear in this case that the currency in which the Respondent called on business in Sierra Leone was as at all material times the Leones. The only time a foreign currency came into the reckoning was when John Michael Motors had to settle Castro's invoices for the supply of the products*

It seems to me that this decision must be restricted lo its facts and circumstances and save that I respectfully agree with the judgment as a correct statement of the law and as it accords with commercial sense. I agree with the Respondent's side that this case is distinguishable from the instant case. Counsel for the Appellant also relied on the following cases:

1. *Alex Hawni Factor Ltd. v. Modern Injection Moulds Ltd. (1981) 3ALLE.R.658 which dealt with the issue of jurisdiction to include interest in default judgment and whether Court having jurisdiction to award interest up to entry of judgment*

2. *Jefford and Anor* v. *Gee [1970) 1ALL.E.R.1202. This is a case where the Cou11 considered the principles applicable in awarding interest on special and general damages in Personal Injury and Fatal accident case. In my view this case is irrelevant to the issues in this matter.*

A mass of other authorities was cited and relied upon by the Appellant's Counsel. I have devoted some time to read them through and discovered that most of them lay down principles of law which are general and clear and others relate to the application of principles to certain circumstances which are not the same as those in the instant case

In my opinion, with due respect to Counsel for the Appellant, I think a good deal of his argument is beside the point; for example, Counsel drew our attention to the Bill of Lading Having relied upon it he cannot then be heard to say that new matters are being raised Counsel submitted that because the Bill of Lading was endorsed to the first plaintiff for the 2nd plaintiff, the first plaintiff was the owner of the consignment of rice destined for sale in Sierra Leone. He contended that the Currency of his business must be presumed to be in

Leone Currency. This contention seems to me to ignore what the Bills of Lading itself says Respondents Counsel drew attention to second page of the Bill of Lading, where it Is endorsed to the 2nd Plaintiff investment Sierra Leone & Development Holdings Ltd for Richab S.A. It is their contention that the property in the goods remained with Richab SA a foreign Company doing business in Switzerland. Attention is also drawn to the fact that the Bill of Lading states the Currency of the contract between the Appellant and the Respondents and the freight is expressed to be payable as per Charter Party dated London 31/1/1990 Respondents Counsel submitted that the property in the goods was never transferred to Sierra Investment Development Holding Ltd. In support of this subm1ss1on Counsel derive support from Halsburys Laws of England 4th Edition paragraph 1355 at page 1048 under rubric "Transfer to Agent" where the learned Author stated the law as follows:

> *"A Bill of Lading may be transferred to an agent merely for purposes of convenience to enable him deal with the goods specified in it on behalf of the owner. as for example, where he is authorized to take delivery of them to stop them in transit*

Counsel also relied on the dictum of Lord Ellenborough in Warin v Cox (1808) 1 Camp 369 on the issue of indorsement of a bill of lading: He said-

> *·'No case has gone* so *far as to decide that* a *bill of lading transferable like a bill of exchange and that the mere signature of the person entitled to the delivery of the goods prima facie passes property in them to the indorsee.. There must be value upon the indorsement of* a *bill of lading or no property in the goods is thereby transferred."*

In order to satisfy the demands of modern Commercial transactions in a situation like this the Courts have allowed the recovery of the full value represented by any negotiable instruments. For instance, in a contract of carriage of this nature, I think it is reasonable to expect damages for loss or breach to be calculated in currency in which the loss was felt or which most truly expresses his loss. *See The Despina R. (1979) 1 ALL ER. 421 at page 429.* I think ii is important to note that the consignment of rice in the instant case could not have been purchased with Leones. I will take judicial notice of the fact that in this jurisdiction, award in Admiralty Action in *rem* has unusually been in foreign currency

Examples of this can be found in the cases of MV. Sylt Schiffahrtsge Sell Shart and other v Gambia National Line and Another Civ. App. Nos. 3 and 4 of 90) No.25 (unreported) CC 487 96 Ibrahim Bazzy and Sons. (A firm) v The Owners and/or Person interested in the Vessel "The Santiago De Cuba (unreported) among many others. It is my view that the "Texaco Melbourne (1994) 1 Lloyds. Report 473 is not on all fours with the facts in the instant case. In that case the goods shipped were not delivered, whereas in the instant case the Respondent's claim is for short delivery. Again in the Texaco Melbourne both plaintiffs' were Ghanians doing business in Ghana, where cedis is their currency In sum. I am not persuaded that Respondents are not entitled to claim in United States Dollars as they did. Ground 5 of the appeal therefore fails.

Coming to ground 6 which turns upon the construction of section 4 Cap 19 of the Laws of Si8rra Leone 1960. Appellants Counsel's contention is that the High Court erred in law when it awarded interest until payment. The relevant section provides as follows

> *Section 4(1) "In any proceedings tried in any Court of record for* 11:e *recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as It thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and* <u>*the date of the judgment."*</u> (emphasis mine).

This is a correct statement of the law and happily enough the Respondents have conceded the point. The result is that ground six of the appeal succeeds.

<u>GROUNDS 7 AND 8</u>

What seems to be the issue here is not that interest cannot be awarded on a foreign currency judgment. Appellant's contention is whether or not it is necessary to call Expert witnesses. I share the view that there is nothing in *Section 4 of Cap 19 - Laws of Sierra Leone Reform* which requires calling of Expert witnesses before interest local or foreign is awarded. In deed our Courts have adopted the principle enunciated in *Miliango* S. *V. George Frank (Textiles) Lid. No.2 (1976) 3 ALL ER.* 599 *as regards the fixing of interest. The principle was applied in M/V Sylt (supra), see also Commercial Enterprises Ltd. v*

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Whitakers Property Ltd. and Donald Macaulay Civ. App. 23191. In that case the Court of Appeal reduced the rate of interest from 45% to 12% without any witnesses being called on the issue. The law is settled that where the rate of interest is 11ot fixed by statute. agreement or usage there is no hard and fast rule as to the amount that will be allowed depending on the circumstances of the particular case - see *Halburys Laws of England* 3rd *Edition Vol.27 at Paragraph 12 Page 11.*

As regards the entering of judgment for less than the amount pleaded From my knowledge and experience one can complain about entering judgment for over and above what is claimed, but I have not come across any law which precludes *a* plaintiff from entering judgment for less than what he had originally claimed. It is when it is above that one has to file an amended Writ or claim. I agree with the learned Counsel for the Appellant that the interest which should have been awarded is 12% as claimed in the Writ of Summons It is my view that the authorities cited by the Appellant's Counsel are not appropriate Grounds 7 and 8 are hereby disposed of.

GROUND 9

On ground 9 the complainant by the appellant is that:

> *"The Court of Appeal erred in law in restoring the decision of the learned trial Judge when he awarded cost of the action to the Plaintiff/Respondent in United States Dollars (U$37,000l00) for cost incurred by tile Plaintiff/Respondent in Sierra Leone there being no legal basis for the aware! of cost in foreign currency for work done in Sierra Leone".*

The reason for quoting the above ground in extenso will be apparent later in this judgment

It is generally said in legal parlance that 'costs follow the event,' this phrase simply means that success in the litigation being followed by the award of costs. In the case of *Donald Campbell* & Co *Ltd. V. Pollock 1927 AC.* 732. It was held that "A Judge ought not to refuse cost to the successful party except for reason connected with the case". Also cost is at the discretion of the Judge in the exercise of this discretion, that is, he has that element of latitude to award cost. However, this is not to say that an appellate court is excluded from interfering with the award of cost whether there is an appeal against the award or not.

The issue here is the award of costs in foreign currency for work done in Sierra Leone have no wish to say or write anything which might seem to fetter the discretion of the learned trial Judge, as it appears to me that in this case the facts on the record of proceedings are plain and straight forward - most of the work done was done in Sierra Leone. The institution of the action, filing of the motion, and the documents in support thereto were all done here in Sierra Leone. Again purchase of empty bags, handling and re-bagging survey etc. took place here. There fore in my view, since all these activities took place in Sierra Leone cost awarded should have been in Leones instead of dollars. Taking all this into consideration in my judgment, this is not a proper case for the award of cost in foreign currency. I agree with Mr. Gooding that there is no legal basis for the award in foreign currency.

I do not intend to rest this ground here, as I wish to address the issue of the quantum awarded as cost. But can I do so when there is no appeal on quantum? The answer lies in the 1991 Constitution and the general powers of the Court of Appeal Rules.

Section 122(3) of the Constitution states:

> *"For the purpose of hearing and determining any matter within its jurisdiction and the amendment execution or the enforcement of any judgment or order made in any such matter and for the purpose of any other authority or by necessary implication given to it, the Supreme Court shall have all the powers authority and jurisdiction vested in any Court established by this Constitution or any other law"*

r 32 of the Court of Appeal Rules states:

> *"The Court may from time to time make any order necessary for determ11Hng the real question in controversy in the appeal and may amend any defect or error in the record of appeal and may direct the Court below to enquire into and certify its findings on any question which the Court think fit to determine before final judgment in the appeal and may make any interim order or grant any injunction which the Court below is authorized to make or grant and may*

...) \

direct any necessary enquires or account to be made or take and generally shall have full jurisdiction over the whole proceedings as ;f the proceeding had been instituted and prosecuted in the Court or Court of 1st instance and *may rehear the whole case or remit it to the Court below to be reheard or to be otherwise dealt with as the Court may direct."*

.., In reliance on the combined effect of those two provisions, I think this Court is eminently placed to assume jurisdiction and power to deal with the issue of quantum in this appeal

The learned trial Judge awarded the sum of U$37,000/00 in United States Dollars as cost to the Plaintiff/Respondent. The judgment which attracted the said amount was a Judgment in default of appearance. The action was not tried on its merit and so the substantive consideration like the importance and difficulty of the case, the attendance and examination of witnesses, which should have been taken into account in the assessment of the cost to be awarded were absent. I dare say the judgment in default of appearance was based on c1 technical matter of procedure. In my view, these are aspects which the learned trial Judge ought to have taken into consideration in making an award. In the result. I consider the sum of U$37,000/00 inordinately high and in any event ought to have been assessed in Leones.

In the circumstances,

(1) In the circumstances, there will be Judgment in favour of the Respondents for the sum of U$290,300/00 to be paid in Leones equivalent at the prevailing Bank rate being the resale value of goods short delivered

(2) Interest on the said amount at the rate of 12% per annum from the 24°' day of April. 1990 to the date of this Judgment.

(3) As regards the costs in the High Court I award the sum of thirty mi/Inn Leones (Le30,000, 000/00).

(4) Costs of this Appeal to the Respondent such costs be taxed.

SUPREME COURT OF SIERRA LEONE
CIV.APP.NO:6/200

BETWEEN:

THE OWNERS OF THE SHIP "MV MASCHO STAR" — APPELLANTS

AND

RICHAB S.A.
SIERRA INVESTMENT AND
DEVELOPMENT HOLDINGS LTD — RESPONDENTS

CORAM

HON. MS. JUSTICE U.H. TEJAN-JALLOH - J.S.C.
HON. MR. JUSTICE G. SEMEGA-JANNEH - J.S.C.
HON. MR. JUSTICE M.E.T. THOMPSON - J.S.C.
HON. MS. JUSTICES. KOROMA - J.S.C.
HON. MR. JUSTICE EKU ROBERTS - J.A.

COUNSEL:

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YADA WILLIAMS ESQ. FOR THE RESPONDENTS

JUDGMENT DELIVERED ON THE 3RD DAY OF MARCH, 2009.

SEMEGA-JANNEH - J.S.C.

INTRODUCTION

This case was commenced by the issuance of a Writ of Summons dated the, 20th April 1990, and since, it had found its way slowly indeed extremely slowly

Hor\. Ms. Justice U.H Tejan-Jalloh - Chief Justice

: Agree

Hon. Mr. Justice G. Semega-Janneh J.S.C.

I Agree

Hon. Mr. Justice M.E. Tolla Thompson J.S.C.

I Agree

Hon. Ms. Justice S. Koroma J.S.C

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Hon. Mr. Justice E. Roberts J.A.

REF: CJ/HJ

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through the High Court, the Court of Appeal and now rest before this Court The case arose out of a bill of lading concerning the consignment of rice which v1as short delivered and/or damaged. Usually, cases of this nature, speaking from experience, are quickly settled through negotiations and, if negotiations fail the Courts try to dispose of the matter quickly. Why the case lasted so long in the Courts beats the imagination: but. I am hoping, it will find a final resting place in this Court.

THE FACTS

The Respondents (Plaintiffs in the High Court) were entitled to a consignment of rice under a bill of lading shipped to Freetown. Sierra Leone, on board the vessel "MV Mascho Star". The consignment was short delivered and/or damaged An action in rem was commenced in the High Court against the Appellants (Defendants in the High Court) on the 20'h April 1990 for the sum of US$689,750.00 being resale value of 30,000 bags of rice, short delivered and/or damaged, inclusive of the sum of US $17,750.00, for purchase of empty bags,

payment of labour and survey fees, and interest thereupon at the rate of 12 per centum per annum from the 1st April 1990 till payment (see pages 25 and 26 of the Main Records (M.R)).

On the 24 th April 1990 the Writ of Summons, with the indorsed statement of claim, was amended, reducing the sums claimed to US$469,500.00, reflecting the resale value of 20,000 bags of rice instead of 30,000, inclusive of USS21 .500. for purchase of empty bags, labour and survey fees (see pages 1-3 of Supplemental Records (S.R)). No further amendments were made to the Writ of Summons and the indorsed statement of claim. On the 24th April 1990, pursuant

to Court Order made on the 23rd April 1990, the vessel "MV Mascho Star' was arrested and, at the same time, the amended Writ of Summons was served by Mr. Edward Fynn, a process server.

On an Ex-parte Motion for Judgment in Default of Appearance dated the 6t June 1990 and supported by affidavit, judgment was pronounced by the learned Judge on the 7'h June 1990 in favour of the Plaintiffs (Respondents herein) for the sum of US$290,000.00 with interest thereon at the rate of 15% per annum from the 24th day of April 1990 till payment and costs assessed at US$37,000 00 The rate of 15% per annum was prayed for on the .face of the Ex-parte Motion (See page 25 of the M.R.).

The Defendants (Appellants herein) entered appearance under protest on the 15th June 1990. On the same date, they filed a Notice of Motion to set aside the Default Judgment on objections stated on the face of the Notice of Motion and reproduced hereunder as follows:-

1. That the service of the amended Writ of Summons dated the 24th day of April 1990 herein and all subsequent proceedings be set aside for irregularity on the following grounds:-

   (a) That the said amended Writ of Summons was served on Captain Mukadom of the *MN* "Masco Star" contrary to the rules and practice of the Court.

   (b) Further or in the alternative the copy of the original amended Writ of Summons was neither affixed on the mast of the said *MN* "Mascho Star" nor affixed inside the wheel house as required by the rules and practice of the Admiralty Court.

2. Further or in the alternative that the Judgment entered by the Plaintiffs on the 7th June 1990 in default of appearance be set aside for irregularity on the following grounds -

(a) That the Ex Parle application for Judgment in Default elated 6th June 1990 and the affidavit in support herein did not comply with the rules and practice of the Court in that the Affidavit of Service of the amended Writ of Summons was not annexed to the application.

(b) The Affidavit in support of the application did not annex the original Amended Writ of Summons as required by the Rules of Court.

(c) The amended Writ of Summons was not served on the Defendants in accordance with the Rules and Practice *of* the Court in that it was served on the Captain of the MN "Mascho Star"

(d) That the Affidavit of Service did not annex the original amended Writ of Summons

(e) That the claim for damages and breach of contract indorsed and prayed for in the Amended Writ of Summons are for unliquidated damages and for which the Judgment in Default of Appearance Rules require either a Writ of Inquiry to be issued or damages assessed by the Court and cannot be awarded as a result of an Ex Parte Notice of Motion

In consequence of the application. the learned trial Judge set aside the Judgn1ent in Default by Order dated the 22nd April. 1991.

Aggrieved by the decision of the High Court. the Plaintiffs (Respondents herein), by Notice of Appeal dated the 20"' May 1991. appealed to the Court of Appeal

The Defendants (Appellants herein) cross appealed by Notice of Appeal dated June1991

The appeals were heard together on the 20"' February 1992 and on diverse dates thereinafter by the Court of Appeal, constituted by the Hon. Justice EC Thompson-Davis J.S.C., Justice M.O. Adophy J.S.C. and Justice M 0. TaIu-Deen J.A. On the 5th April 2000, the Court restored the Judgment in Default in favour of the Respondents herein.

The Appellants herein, being dissatisfied with the decision of the Court of appeal appealed to this Court by Notice of Appeal dated the 3rd July· 2000 on the following grounds:

1 The Court of Appeal failed to consider the Cross Appeal and gave no reasons for dismissing the Cross Appeal In the light of tl1e evidence before it, to wit:-

a. The affidavits of Edward Fynn sworn to on the 5th day of June 1990 and the 28th l day of June 1990: and the affidavit of Ade Renner-Thomas sworn to on the 28th day of June, 1990

b. The indorsement at the back of the writ of summons herein made by the same Edward Fynn;

c. The oral testimony given by the same Edward Fynn before the Learned trial judge on the 13"' July 1990:

d. The oral testimony of Edward Kamanda Bongay (the Under-Sheriff) which contradicted that of Edward Fynn

thereby wrongly holding "I have no reason, to disbelieve the totality of his evidence", referring to the evidence of Edward Fynn the Court Bailiff who served the Writ of Summons.

(ii) Further and in the alternative, if it is held that the Court of Appeal considered the Cross Appeal the Court was wrong to uphold the Learned Trial Judge's ruling that the service of the Writ of Summons was valid even though the said service failed to c:ompiy with the provisions of Order 9 Rule 12 of the Supreme Court Rules of England 1960.

(iii) The Court of Appeal erred in law when it held inter alia, as follows:-

"There is no contention that the action before us is an Admiralty Action in rem which arose out of the jurisdiction of the High Court. Our High Court rules are silent on the Rules governing any such action. We therefore need to know which Rules of Court would apply.

The Respondents are urging me to hold that since there are no specific rules governing Admiralty action in rem, the general Orders applying elsewhere in our Rules, would apply to such actions.

I must here state that I have noticed a conspicuous fallacy in their argument with regard to the rules to be applied to the application. Learned Counsel Mrs. Lisk had this to say "Since there are no specific rules

governing admiralty action in rem, the general orders applying elsewhere in our rules would apply to such actions". That cannot be true, when our rules are silent we have a legal obligation to go to the English rules of court for the year 1961. By order 13 of the Supreme Court Rules of England 1961 under which in an appropriate action. a Plaintiff fin al Judgment against a Defendant for a liquidated demand where that Defendant has failed to enter an appearance after the time fixed, does not apply to an Admiralty Action in rem ...

In an admiralty action in rem, judgment for any defendant can only be obtained by motion·

1n that it failed to have regard to and/or apply the provisions of Order 10 Rule 5 *of* the High Court which is in the following terms -

"Where the writ is indorsed with a claim for pecuniary damages only or for the detention of goods with or without a claim for pecuniary damages, and the defendant fails or the defendants. if more that one, fail to appear. the Plaintiff may enter interlocutory judgment and a writ of inquiry shall issue to assess the value of the goods and the damages or the damages disclosed by the indorsement on the writ of summons."

The High Court Rules are not silent regarding rules relating to the procedure in an Admiralty Action in Rem. Most of these rules are general provisions applicable to all actions including Admiralty Action in Rem

In particular the provisions of the afore-mentioned rule, apply to all actions including an Admiralty Action in rem. which was the instant case. It was therefore

not necessary to resort to Order 52 rule 3 of the High Court Rules thereby invoking the Rules of the Supreme Court of England 1960.

(iv) The Court of Appeal erred in law when it held, inter-alia, as follows -

> "To say, as the learned judge wrote in his ruling that the Plaintiff ought to have entered an interlocutory judgment and have damages assessed by the Court is wrong and without any foundation in law".

in that it failed to have regard to and/or apply the provision of Order 10 rule 5 of the High Court Rules.

(v) The Court of Appeal erred in law in restoring the decision of the Learned Trial Judge when he awarded damages to the Plaintiffs in United States Dollars, when the evidence disclosed that the loss suffered by the Plaintiffs/Respondents was in Leones. The Court had no jurisdiction to award damages in foreign currency to the Plaintiff/Respondents

vi) The Court of Appeal erred in law in restoring the decision of the learned trial judge when he awarded interest "till payment", such award being in excess of the jurisdiction of the Court having regard to the provisions of Section 4 of the Law Reform (Miscellaneous Provision) Act Cap 19 of the Laws of Sierra Leone 1960.

vii) The Court of Appeal erred in law in restoring the decision of the Learned Trial Judge upon motion for judgement in that the latter awarded interest upon a foreign currency Judgement (United States Dollars) without the Plaintiffs/Respondents leading any expert evidence to prove what was the rate of interest in that currency.

viii The Court of Appeal erred in restoring the decision of the learned Trial Judge when he awarded interest at the rate of 15 per centum per annum. which is higher than the interest rate of 12 per centum per annum indorsed in the writ of summons, without making any amendment to the Statement of Claim.

ix) The Court of Appeal erred in law in restoring the decision of the Learned Trial Judge when he awarded costs of the action to the Plaintiffs/Respondents in United States Dollars (US$37.000 00) for costs incurred by the Plaintiffs/Respondents in Sierra Leone, there being no legal basis for the award of costs in foreign currency for work done in Sierra Leone.

x) "On the question of the service of the said writ one Edward Fynn a Court Bailiff was called to give evidence before the Learned Trial Judge as to his participation in the service, he was examine(j before the Court and in the end of it all, the Learned Trial Judge said· I have no reason to disbelieve the totality of his evidence". I have to accept the Learned Trial Judge's conclusion on the point, he was in a good position to see the witness. evaluate his evidence and watch his demeanor, as far as the service of the writ is concerned. The Cross Appeal therefore fails"

The Court of Appeal misdirected itself. when it dismissed the Cross Appeal and upheld the Learned Trial Judge's decision that the service of the Writ of Summons was valid without a proper consideration and evaluation of all the evidence, documentary as well as oral, relating to the service of the writ.

THE ISSUES

In their amended case dated the 12th November, 2007, the Appellants ha•;e stated eight (8) proposed issues for consideration and resolution by this court have essentially accepted the proposed issues but with some modifications

which, in my view, more properly reflect the issues to be determined by this court. They are as follows:

1. Whether or not the Court of Appeal has the Jurisdiction to re-examine, reconsider and evaluate the evidence given in the High Court and, if the answer is in the positive, was the court right in not vacating the conclusions of the High Court and replace t11em witl1 its own conclusions

2 Whether or not the High Court Rules (now revoked) provides a procedure for obtaining judgement in Default of Appearance in Admiralty Action in rem and, if not, consequently resort had to be made to Order 52 Pule 3 of the High Court Rules and adopt the relevant procedure of the English Rules of 1960.

3. Whether or not a judgement obtained in default of appearance in an Admiralty Action in rem by motion for Judgement supported by affidavit evidence pursuant to the relevant rules of the English Rules of 1960 is regular and, if not, what is the effect

4. Whether or not a court of record has Jurisdiction to award damages in foreign currency and, if the answer 1s in the positive, can the court do so in the circumstances of this case.

5 Whether or not the court has the jurisdiction, in the circumstances of this case, to award the same rate of interest up to the date of payment of the judgement sum.

6 Whether or not the court has the discretion to fix a rate of interest on a foreign currency judgement sum without first receiving evidence of the rate at which the foreign currency could be borrowed in the country in which the said judgement sum originated

7. Whether or not the learned trial judge had jurisdiction to award a higher rate of interest on the judgement prayed for 1n the amender! statement of claim.

8. Whether or not the learned trial judge had jurisdiction to assess legal costs in foreign currency

ORDER 52 RULE 3 OF THE HIGH COURT RULES AND RESORT TO THE ENGLISH RULES OF 1960

Order 52 rule 3 of The High Court Rules (as amended) which provides

> '3 when no other provision is made by these rules the procedures. practice and forms in force in the High Court of Justice in England on the 1st day of January 1960, so far as they can be conveniently applied, shall be in force in the Supreme (now High Court) Court"

is broadly and simply crafted This provision is not unique or peculiar to S1erizi Leone. Other former British Colonies. including the Gambia. Ghana and Nigeria had similar provisions. The courts in this jurisdiction. have appl1ec strict interpretation or construction of the provision, which I understand to be. for t11e purpose of restricting or narrowing its application since the Sierra Leonean case of Re Parker (DCD) 1920-36 ALPS L 21.

I will now analyse some of the authorities supplied for a better appreciation of tile methods of interpretation employed by our courts in attempts to achieve a restricted application of the provision In the Sierra Leonean case of Re Parker the plaintiffs by originating summons sought an order under Order 55 rules 3 and 4 of the English Rules of 1908 pursuant to Order 65 rule 2 of the Local Court rules

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(which is now Order 52 rule 3,) that account, enquiry and relief should be taken. made and given The local Order 52 (LII) incorporated a paraphrase of Order 54;, (LIVA) of the English Rules with its heading "DECLARATION ON ORIGINATING SUMMONS" and Order 51 (LI) incorporated a paraphrase of Order 54 of the English Rules with its heading "APPLICATIONS AND PROCEEDINGS AT CHAMBERS". The legislature, in incorporating the paraphrases of the said English Rules, omitted the whole of Order 55 (LV) of the English Rules w:\h its heading "CHAMBERS IN THE CHANCERY DIVISION which was subdivided into parts, of which Part II, beginning with rule 3, had a sub-heading "Administrations and Trusts; Foreclosures and Redemption". The full court refused to permit the importation of rules 3 and 4 of Order 55 of the English Rules of 1905 through the portal of Order 65 rule 2 of the local rules for the reason that

1) *The draftsman having intentionally included one form of procedure under originating summons the remaining forms cannot be imported through Order 65 rule 2 of _the local rules on the ground "that no provision is made" by the local rules, and*

(2) *The fact that the draftsman deliberately omitted the whole of* Order *55 dealing with chambers in chancery the procedure could not be conveniently applied to the circumstances of the colony· meaning Sierra Leone.*

(See Re Parker at page 25 lines 18 - 26)

The conclusion reached by the court through the judgments of McDonnell, Ag. J, and of Sawney-Cookson, J, was that the questions and matters that the originating summons sought to be dealt with concerned administration matters and, since Order 55 of the English Rules was deliberately omitted, the legislature must have intended that the said questions and matters must be dealt with by administration suit.

The reasoning that the existence of one form of Originating Summons in our Local rules, disqualifies the importation of another form of the Originating Summons (in this case, as used in Chancery in the English Rules) on the basis that the one in our local rules qualifies as another provision under Order 52 rule 3 is attractive, but, I can only accept the reasoning or argument if the form (or procedure) in our local rules, or some other provision, can appropriately be used instead of the intended importation. If there are rules that can be appropriately and/or conveniently applied or used in dealing with the questions or matters to be dealt with, then that rule of procedure should be used. This seems to have been the suggestion or conclusion reached by Sawrey-Cookson, J when in his judgement in Re Parker, he concluded:

> ....and that the questions and matters here sought to be dealt with by originating summons must be dealt with by a method which the legislature must be taken to have decided in its wisdom was the better suited t9 the requirements and conveniences of the colony, i.e. by administration suit"

An appropriate avenue was available to the plaintiffs in Re Parker in the local rules for the questions and matters raised in the originating summons to be dealt with. One can reasonably conclude that the decision in Re Parker was in reality based on the fact that another provision was made in the Local Rules of 1908

No authority is provided to show that any of the former colonies gives the provision a strict interpretation, and if any did so, whether it follows the line taken in this jurisdiction. On the contrary, the foreign cases cited seem to have been decided on the basis of an understanding of the provision. as stated in their respective jurisdiction, in its ordinary and natural meaning. Our own provision is even more simply stated and it avoids the phrase "for the time being" which has generated a great deal of controversy as to its meaning in some 1urisclict1011s Simple words and phrases are used in the provision Why impose further

restrictions in the applicability of the provision, other than those explicitly stated in the provision, on the basis of assumed intentions of the draftsman? What practical or good purpose does it serve7 Prevent the utilization of a procedure for which there is not another in our local rules, that can be conveniently applied to the circumstances of Sierra Leone? I am of the view that the provision should be understood in its ordinary and natural sense, and the court's should concern themselves in determining:

(1) whether there is another provision to the intended importation in our local rules and, if there is none.

(2) whether the intended importation can be conveniently applied in the circumstances, always bearing in mind that the circumstances of Sierra Leone today is significantly and materially different from its circumstances when the local rules were enacted

McDonnell, Ag. J's concerns (at page 25, lines 10 - 16 in Re Parker) of “the 64 orders of our rules" being a superfluous redundancy" and the possible undermining of "the principle of selection of English Orders suitable to local use can be properly and adequately addressed by proper application of the restrictive principles (criteria) contained in the provision Orders (or rules) that fit the said principles can be imported but those that do not fit can be rejected this Is the selective process envisaged in the provision, in my view

The suggestion or conclusion of the passage quoted from the Judgement of Sawrey-Cookson, J. is partially reflected in the Ghanaian case of Poku and Another V Kwao and Another (1989-90) 2 GLR P 82. Ghana has a similar provision provided by the High Court (Civil Procedure) Rules, 1954 (L N1404A)
Order 74 which states that:

"Where no provision is made by these rules the procedure, practice and forms in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, be in force in the Supreme Court (now High Court) of the cold coast' (brackets provides)

In Poku's case, supra, the Applicants (Plaintiffs) commenced action by an originating summons in what purported to be an interpleader action. Upon the originating summons being served on the claimants they deposed their case in affidavits. As the affidavit raised the determination of the issue as to whether or not the lands had been sold to the applicants, the trial court Judge ordered pleadings to be made and to which all the parties acquiesced The trial Judge gave judgement. An appeal was made to the Court of Appeal The Court of Appeal held that the commencement of the proceedings by originating summons was proper as sanctioned by English rules of pra tice applicable to Ghana by virtue of Order 74 of LN 140A which permitted the Ghana Courts to have recourse to English rules and procedure where the Ghana rules were silent on an issue. On further appeal by the defendants from the decision of the Court of Appeal, the Supreme Court, in essence, held:

(1) the commencement of an interpleader suit by an originating summons was sanctioned by Order 57 rules 5 of the High Court (civil procedure) Rules 1954 (LN 140A) but on the facts of the case it was not an interpleader action. The applicants were therefore bound by Order 2 rule 1 to commence the action by writ of summons. Instead of ordering the parties to file pleadings, the trial judge ought to have struck out the proceedings with liberty to the applicants to issue a writ, particularly as the matter was an obvious case of declaration of title and not an action for the construction of any statute, deed, instrument or document

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(2) resort by the Court of Appeal to Order 74 of LN 140A to save the procedure from collapsing was misconceived, because that rule only came to play when no provision was made by the rules. But Orders 1, 54 and 54A made ample provisions for commencing all actions by writ except those for which some other mode, such as an originating summons. was required.

There is a distinction between Re-Parker and the Poku case in that in Re Parker a different mode for which the originating summons could be used in the local rules was imported to initiate the action, whereas, an appropriate procedure was available by administration suit. In the Poku case an existing procedure in the local rules was used but when **it** was realized that the procedure was wrong. an attempt was made to correct the error by importation from the English rules The use of originating summons was available in the local rules. The nature of an action is not determined by the label that one decides to give it but Is determined by the facts. The facts of the Poku case were such that the court concluded they were not indicative of an interpleader claim; and also by the endorsement of the claim on the originating summons, it was clear that no question of construction of any document or statute or instrument was involved. The facts revealed matters in controversy that ought to have been determined by a trial commenced by writ. There was no need to import a corrective procedure; the "correction" could have been done by striking out the action with liberty to the Applicants to issue a writ.

I appreciate the second reason for the rejection of the importation in Re Parker The inference I deduce from the reasoning is that the intentional omission of the whole of Order 55 was because it could not "be conveniently applied to the circumstances of this colony" meaning Sierra Leone. McDonnell Ag.J. in his judgement posed the question "why were some orders included and others rejected". He gave the answer at page 25 in these words:

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> "One can well believe that the procedure in chancery chambers was considered unsuitable to the needs of this colony (Sierra Leone) and that omission to provide for it was intentional" (Brackets Provided)

The belief may be well founded but could the omission not have been based on other well founded or plausible beliefs? Could it not have been that the omission of Order 55 (and other Orders) was that, at that moment in or period of time, actions for which the omitted Order could have been used were not common, if at all, in the small colony of Sierra Leone and, as a result, the draftsman did not want to burden our local rules with Orders that would be infrequently used, if used at all. and could be resorted to in the rare needs for its application or, indeed, resorted to more frequently in the future as the circumstances of the colony (Sierra Leone) require more frequent application of the Order?. In short, the circumstances of Sierra Leone might change in the course of time (as it certainly has since Re Parker) to make it practicable for the omitted orders (or rules) to be conveniently applied to the new circumstances.

Notwithstanding the likelihood of other probable and/or well founded beliefs for the omission, I may willing to accept the reasoning of McDonnell, Ag J, as stated, provided that the omitted Order does not bear a relationship with or is not of the same genre as any of the Orders in the local rules, and is only made or placed in a different Order in the English rules as a matter of convenience. What would be difficult to accept is if the reasoning is extended to cover omissions of some aspects or rules of the English Order that is embodied into the local rules. If the reasoning. with such an extension, is accepted, it would most certainly have the effect of barring the importation of any English rule or Order and would render Order 52 rule 3 of the High Court Rules redundant and, therefore, raised the question: Why was the Order 52 rule 3 provided in the first place?

In my view, Order 52 rule 3 was included into the local rules for useful and practical purposes. By comparison to the English Rules, our Rules are not detailed or all embracing. It may be said with truth, echoing the words of Mac0onnell. Ag J in the Re-Parker at page **24,** that the rules are an abridgement of the White Book embodying such of the provisions of the latter as were considered suitable for a small country. It must be borne in mind that Sierra Leone is no longer a small country in contrast to the time of Re Parker. In fact even the English Orders that have been made into our Rules are generally a paraphrase of the corresponding English Order or Rule. I am of the considered view that Order 52 Rule 3 is meant to save a situation for which there is no appropriate procedure (that is. no other provision) in the local rules provided it can be conveniently applied to the circumstances. The Courts ought to approach the use of Order 52 rule 3 in a practical manner, as they have done in other situations, with a view of avoiding the frustration of justice by reason of gaps or inadequacies in our local Rules that can

easily and conveniently be overcome by resort to the English Rules, 1960.

The objections nationalistic or otherwise, in respect of Order 52 Rule 3 of our local rules, and similar provisions, in other jurisdiction, could have long been resolved after independence by our legislatures. This long standing failure on the part of our legislatures, and in the case of Ghana the presence of the phrase "for the time being" which seems to allow the importation of the English Rules as they are changed, amended or extended from time to time over the years gave rise to the strident nationalistic outcry of Taylor J S.C in the Poku case at pages 91-9 in these words:

> *"It seems to me that the provision (Order 74 of LN 140A) if applied* in *this case must be considered to be unfortunate and certainly an ill-foundation in modern conditions on which to rest decisions of the courts of a sovereign Republic. Its continued existence in our statute law, must be due to the lethargic manner* in *which our post-independence legislatures regard and carry out their duties. Such lack of realism will make our legal system to mirror the aspirations of non-Ghanaians and foreign jurists and*

undermine our legal order as a *reflection of the* social *and economic conditions existing in our own society I have indicated elsewhere in judgments I previously delivered that I deprecate the approach to legal reasoning which mandatorily forces us to be bound by fluctuations in thinking in other judicial forums" (BRACKETS PROVIDED)*

One strongly identifies with this cogent statement but until our legislatures are galvanized into action, as they have now done in this jurisdiction and some others with a similar provision, the Courts must continue to interpret and deal with situations arising out of or connected with such Order or similar Orders.

In the High Court case of B.M. Dakhlallah and Horse Import and Export and Others C.C 492/04, Muria J.A. held that the conditional appearance entered by the 1st Defendant was of no effect since our local rules did not have a provision for conditional appearance, following the decision of Doherty, J , in the Cup Company Limited v Sierra Leone Airlines (8th November 2004). He capped his reasoning by

making reference to the case of Davies and Co. v. Andrea and Co. [1924] OB 598 No power to enter conditional appearance when it is not provided for.

Muria J.A, with all respects to him, in my view, wrongly extended the reasoning 1n Re Parker, for the rejection of the importation of the whole of an English Order. which, it was presumed, had been intentionally omitted by the draftsman in the local rules, to also cover situations in which a rule (or some rules) of an English Order is omitted in the embodiment into our local rules, when, in the Judgment at page 4, he states

"there is *no conditional appearance under our High Court Rules The provisions for appearance contained in* 0. 9 *which adopted some, but not all, of the provisions of* 0.*12 of the English Supreme Court Rules* as 111 *force on the 1st January 1961. <u>One of those provisions omitted was conditional appearance.</u> I think it is correct to assume <u>that the draftsman</u>*

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"One can well believe that the procedure in Chancery Chambers was considered unsuitable to the needs of the colony (Sierra Leone) and that omission to provide for it was intentional?
To interpret 0.LXV, r 2 (now 0.52r 3), in such a way as to enable any provision contained in the White Book (the English Rules) 1905 to be applied here would, be in my opinion, lead to an absurdity, by making the preceding 64 orders of our rules as superfluous redundancy and would be repugnant to the principle of selection of English Orders suitable to local use, upon which our rules appear clearly to be based and when the draftsman has as we must again suppose, deliberately omitted the whole of 0.LV (55) dealing with chambers in the Chancery Division, **we** must, I hold, refuse to import any of its rules on the ground that, to use the words of the conclusion of 0.LXV (65) r 2, they cannot "be conveniently applied to the circumstances of this colony (Sierra Lone)"
(BRACKETS AND EMPHASIS PROVIDED)

In addition to my views already expressed, I say that McDonnell a. g. J. was entitled to conclude, and might have correctly concluded, that rules 3 and 4 of 0.LV (55) of the English Rules of 1905 could not "be conveniently applied to the circumstances of the colony (Sierra Leone)" (Brackets provided) but what if, for example, on 7th June 1990 and thereafter, they could be conveniently applied to appropriately changed circumstances of the Republic of Sierra Leone? Notice must be taken in that even in Re Parker it was noted that at a former sitting of the Full Court a contrary opinion to that in Re Parker was expressed on grounds not set forth on the record. Albeit, a contrary decision was given by the same Court and this, clearly, demonstrates an opening for other views or understanding of the Order.

deliberately omitted those provisions of the English Rules that cannot "be conveniently applied" to the circumstances of the country

I am of the firm view that the position expounded in Re Parker. is different from the interpretation given to it by Muria, J.A by his extension of the reasoning to cover situations not in the context of the second reason given in Re Parker with significant repercussions.

In Re Parker, McDonnell, a.g. J., in his Judgment, was referring to Orders, specifically Order 55 of the English Rules of 1905 of which there was an attempt to import rules 3 and 4 when the whole Order 55 was omitted by the draftsman in embodying a paraphrase of the White Book (the English Rules) into our local Rules. This can be clearly discerned in the passage found in the judgment. page 24, reproduced hereunder as follows:-

> "Now the Legislature in approving our rule inserted in 0..L11 (52) a paraphrase of O.LIVA (54A) with the heading "DECLARATION ON ORIGINATING SUMMONS", it inserted in 0.L1 (51) a paraphrase of 0.LIV (54) with its heading "APPLICATIONS AND PROCEEDINGS AT CHAMBERS" and omitted, I cannot but suppose deliberately, the whole of O.LV (55) with its heading "CHAMBERS IN THE CHANCERY DIVISION'. which is subdivided into parts, of which Part II, beginning with r 3, has a sub-heading "Administration and Trusts; Foreclosure and Redemption' Why were some Orders included and others omitted."
> (BRACKETS AND EMPHASIS PROVIDED)

It can be observed that the omission was of the whole of Order LV (55) of the English Rules of 1905 and that emphasis was placed on the procedure contained in the Order, that is, the procedure that applied in English Chancery Chambers To buttress the point McDonnel proceeded further to state:

time the Davies Case was decided there was, as a matter of fact, no provision in the English Rules for Conditional Appearance. In my view there Is provision for Conditional Appearance (and Appearance under Protest in respect of Partnership and Admiralty actions) in our local rules through Order 52 Rule 3 by resorting to the English Rules of 1960, that is, rule 1 of Order 12. It is no surprise to me that Mr. Gooding, the Counsel who successfully argued in the Dakhlallah case that there was no provision in our rules for Conditional Appearance made use of the English rule of Appearance under Protest which is in the same position as Conditional Appearance in relation to our local rules. Senior Counsel have been making use of both procedures. All after the decision of the Dakhlallah easel

CONCLUSIVE VIEWS

Reflecting on the discourse above, I must now decide whether or not the Respondents rightly resorted to the English rules in their application by Mntion for Judgment in Default of Appearance in an action in Rem. In Order 1O of the Local High Court Rules of 1960, provisions are made for a party to obtain judgment in default of appearance. Our Order 10 (like the others) is an abridgment of Order 13 of the English Rules of 1960, which deals with proceedings in Default of Appearance. The draftsman, however, omitted rules12A and 13 of Order 13 of the English Rules 1960 in Order 10 of the local rules. For whatever reason the said rules were omitted, I am firmly of the opinion that these rules can be easily appropriately and conveniently applied by importation as there are no appropriate corresponding rules (that is, no other provision) in our local rules. and I so t1old Even though it is not challenged that one could resort to the English Rules of 1960 in respect of service of Writ of Summons in Admiralty Action in Rene. it is in order for me to express, and I hereby express the view and hold that resort call be made to Order 9 rule12 of the English Rules of 1960. Order 6 of our local Rules is an abridgment of Order 9 of the English Rules of 1960, which deals with service of a Writ of Summons. Rule 12 of Order 9 was omitted by the draftsman like in the cited instances, when embodying the English Order in Order 6 of our

In S.I.B.C. v Bisili, cited by Muria, J A. the High Court of the Solomon Islands had to consider the application of 0.71 of their High Court Rules of 1964 which is similar to our Order 52. The local rules of the Solomon Islands in Order 7 makes provision for a party to change his advocate but do not say how such can withdraw his service in acting for a person. In that regard the Court was prepared to resort to 0.71 in order to resolve the problem or lacuna

I have looked at Order 62A of the White Book (the English Rules) of 1964 which deals with change of Solicitor by a party and withdrawal by a Solicitor of his/her representation of a party. One can reasonably assume that 0.7 of the Solomon Islands High Court is a paraphrase of 0.62A of the English Rules of 1964 or a corresponding Order of a later edition with omission of how a solicitor may withdraw his/her representation. The High Court of the Solomon Islands certainly did not reject or refuse the importation of the relevant rule of the Englisl1 rules on the ground that omission of such rule of the relevant English Order in the local rules by the draftsman on the basis that it "cannot 9e conveniently applied to the circumstances of the Solomon Islands unlike the decision in the B M Dakhlallah case, supra

In Order 9 of our local rules provision is made for appearance to originating processes but without rules for entering Conditional Appearance and Appearance under Protest. Order 9 is a paraphrase of Order 12 of the English Rules and it deals with Appearance including Conditional Appearance and Appearance under Protest. The situation in the B.M Dakhlallah case. in relation to the omission of a particular rule (or rules) of the relevant English Order. is a similar situation to that which existed in the Bisili case. Yet the two courts too different and opposing routes In my view, the Solomon Islands High Court took the right course.

In respect of the reference to the Davies Case, I agree that there is no power to enter Conditional Appearance where it is not provided for. It appears that at the

properly considering and evaluating the oral and documentary evidence, if I may add, substituting its own decision if it is warranted under its Jurisdiction and powers of review under rules 9 (1), 31 and 32 of the Court of Appeal Rules and Section 129 of the Constitution of Sierra Leone No,6 of 1991.

Mr. Gooding has cited several cases to buttress his argument These cases include The Glannibanta 1876 1PD p283 at 287; Coghland *v* Cumberland (1898)1 CH,O, 704; Yuill *v* Yuill 1945 p,15 and at 19 and 20; Grace Shipping vs. C. F. Sharp 1987 LRC(Comm) 550 P,C, and the Nigerian case of Niger Benue Transport Co, Limited vs, Narumal and sons 1989 LRC (Comm) at p 186 3rd para of the head note, The case of WATT (OR THOMAS) (1947) p 582 at is587 is the classic case on the issue, Lord Thonkerton did not find rt necessary to review the decisions of the House of Lords because he was confident that the principle contained in that decision is simple, and he restated it thus.

> "1, Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> 2, The appellate court may take the view that without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> 3, The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakenly so appears from the evidence, may be satisfied that he has not taken

local rules. Rule 12 of Order 9 of the English Rules can be easily, appropriately and conveniently be applied in proceedings in this jurisdiction

THE OBJECTIONS ON THE GROUND OF IRREGULARITY.

Objections, on the basis of irregularity, with the purpose of setting aside proceedings, must be raised on the face of the Motion and Summons as the case maybe. This is required by Order 50 Rule 3, which states

> "3 Where an application is to set aside any proceedings for irregularities, the several objections intended to be insisted upon shall be stated in the Summons or Notice of Motion."

The Appellants in the High Court raised several objections on irregularity relating to the service of the Writ of Summons stated in paragraph 1, and others to the procedure applied in obtaining judgment in default stated in paragraph 2 of the Notice of Motion, reproduced at pages 3 - 4 of this Judgment. In my view. irregularities that were not raised on the face of the Notice of Motion cannot later be raised in the Court of Appeal or this Court unless the irregularity Is rooted in the issue of jurisdiction. If the alleged irregularity is such that it may deprive the Court jurisdiction, then the matter can be raised at the appellate stage. I will now proceed to deal with arguments relating to the alleged irregularities

SERVICE OF THE AMENDED WRIT OF SUMMONS

The contention of Mr. Gooding, is that service of the amended Writ of Summons was not done in accordance with rule 12 of Order 9 of the English Rules of 1960 in the light of both the oral and documentary evidence. Against this background Mr. Gooding argues that the Court of Appeal misdirected itself, or was wrong, when it dismissed the cross-appeal and upheld the High Court's decision that the service of the amended Writ of Summons was valid, or proper. without first

practice. The cross-examination also touched on other matters concerning the amended Writ of Summons. The trial judge also heard the evidence of Mr. Edward Kamanda Bongay, the Under-Sheriff, called by the Appellant. He was cross-examined by Mr. Renner-Thomas, Counsel for the Respondent. The trial judge was addressed by both Mr. Gooding and Mr. Renner-Thomas.

In his ruling of the 22nd April 1991, the trial Judge dealt with the evidences of both Mr Fynn and Mr. Bongay. He rejected the evidence of Mr. Bongay. As for the evidence of Mr. Fynn, the trial Judge acknowledged that it was sometimes confused under cross-examination but made clearer under re-examination. In the end, the trial Judge accepted the evidence of Mr. Fynn and rejected the claim that the service of the amended Writ of Summons was irregular. The learned trial Judge did explain why or gave reasons for rejecting the evidence of Mr. Bongay and accepting that of Mr. Fynn and, thus, the conclusion he reached.

The Court of Appeal having gone through all of that, it must be assumed, concluded that the manner the amended Writ of Summons was served, was a matter of fact. the determination of which, rested on the demeanour of and what was said by the witnesses. The Court of Appeal, for this reasons, accepted that the trial Judge had the advantage and, as a result, refused to disturb his conclusion.

Mr. Gooding's complaint is that the Court of Appeal reached the decision to uphold the trial Court's conclusion that the service of the amended Writ of Summons was not irregular, and thus resulting in the dismissal of the cross-appeal, without first carrying out a proper consideration and evaluation of the evidence, both oral and documentary The Court of Appeal looked at the evidence and the ruling by the trial Judge and must have come to the conclusion that the issue was one of fact, the determination of whicl1 rested on beliefs; thus leading to the decision not to disturb the conclusion of t11e trial
.. Court on the basis that the learned trial Judge was in a better position in evaluating the evidence because he had the opportunity to see the witness, Mr. Fynn. and watch his demeanour. In the limited circumstances surrounding the issue, the answers and

> proper advantage of his having seen and heard the witnesses. and the matter will then become at large for the appellate court ·

Lord Thonkerton added that:

> "It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be. the individual case in question"

Since the principle was re-stated by Lord Thankerton, Judges in countless number of cases have acted on, and, expressed the principle in different ways, but, invariably within the confines of the principle as re-stated by Lord Thankerton. I have read what have been cited in the authorities in respect of the issue and, in my view, they are consistent with the principle as re-stated by Lord Thankerton. I am of the firm view. and I do accept and hold, that the principle as re-slated by Lord Thankerton is the law. notwithstanding the variant expression of the principle. In this respect, it 1s noteworthy, and must be borne in mind, that the principle :,vas applied by the Common Law Courts before the case of WATT v THOMAS and that Lord Thankerton did not create the principle; he merely formulated or re-stated it. The Court of Appeal will not interfere or disturb the findings of fact by a trial court unless such findings are unsound or perverse, or, to put in another way, no trial court can reasonably be expected to come to such findings or conclusion given the evidence.

The decision of the High Court as regards the service of the amended Writ of Summons is not unreasonable in the circumstances, and can be justified by the evidence. At the request of Mr. Gooding, Mr. Fynn, the Process Server, was made available for cross-examination. Under cross-examination, he gave evidence of how he boarded the vessel "MV Mascho Star" accompanied by a custom officer and how he climbed up the mast and affixed thereon the amended Writ of Summons for a short time before coming down with it. He further gave evidence of affixing a copy of the amended Writ of Summons on the door of the Masters cabin and before leaving the vessel he had the Master sign the original Writ of Summons according to the usual

demeanour of Mr. Fynn, in relation to the questions under cross-examination pertaining to the service of the amended Writ of Summons, are of the utmost relevance on the matter or perception of belief or disbelief. In my view, the treatment of the issue by the Court of Appeal (at page 99 of the MR) is, in the circumstances. adequate. A trial Court ought to give reasons for its decision but the need for and the extent and dept of analysis of the evidence must necessarily depend on the case. Perhaps another panel or tribunal would have treated it differently but. nonetheless, rt was adequately dealt by the Court of Appeal

I conclude that Mr. Gooding by his complaint wanted an analysis and reasoning tl1at leads to the ineluctable conclusion, and not a state of analysis or reasoning that leaves much to inferences in reaching the conclusion. It must be noted that ordinarily Superior Courts ought to give reasons for their decisions and that generally involves revealing the thinking processes by which, or by stating the explanation of how, the decision is reached. Mr. Gooding invites the Court to review the evidence and findings of the Court below relating to the service of the amended Writ of Summons. Notwithstanding what I have already said concerning the ruling of the trial Judge and the judgment of the Court of Appeal relating to the service of Writ of Summons. it is appropriate, if only to serve as guidance, to accept the invitation.

The evidence of Mr. Bongay was not much. It was rejected by the trial Judge in favour of that of Mr. Fynn. The learned trial Judge, in my view, gave good reasons for rejecting Mr. Bongay's evidence. In addition, I am of the *view* that Mr. Bongay did not perform well under cross-examination and, consequently, his overall evidence was not helpful. He could not recall under cross-examination, talking to Mr. Renner-Thomas, of Counsel, about the matter (that is the amended Writ of Summons and its service); he could not recall instructing Mr. Fynn to serve a Writ of Summons in the matter; he might have signed a Warrant but he could not recall. However he conceded when shown the warrant with his signature. Not to recall is not to deny a fact. and if one fails to recall a fact that one is expected to recall in given circumstances, it impinges

on one's credibility. Mr. Bongay's evidence, in my view, did not undermine the evidence of Mr. Fynn and, the trial Judge rightly, in my view, rejected his evidence.

The oral testimony of Mr. Fynn relating to the service of the amended Writ of Summons (see pages 64 and 65 of the MR) is coherent and clear. The substance of his evidence under-cross examination is that he affixed, using cellotape the amended Writ of Summons on the main mast for a short time and then removed same He later affixed a copy of the amended Writ of Summons on the door of the Master's cabin and also had the captain sign the amended Writ of Summons as was the practice He categorically stated he served the ship and not the captain. Paragraph 1 of the Affidavit of Mr. Fynn of the 5th June 1990 (page 47 of the M.R) reflects this evidence contrary to the contention of Mr. Gooding (see pages 9 and 10 of M.R.) The fact that a copy of the amended Writ of Summons was affixed on the Master's office door and that the amended Writ of Summons was signed by the Master does not detract the fact that the amended Writ of Summons was affixed on the main mast for a short time before being removed. Again paragraph 2 of the Affidavit of Mr. Fynn (at page 6 of the SR.) does not conflict with the oral evidence of Mr. Fynn. In fact. it reflects the oral evidence that Mr. Fynn affixed the amended Writ of Summons on the mast of ship and that he had the same indorsed by the captain after its removal from the rnast by him. Finally, Mr. Fynn left the ship, leaving a copy of the amended Writ of summons behind, affixed on the Master's office door. An acceptable explanation was given for having the Master sign the amended Writ of Summons.

The oral evidence of Mr. Fynn under cross-examination, which includes his answers to questions pertaining to the documentary evidence, was accepted by the learned trial Judge. In my view, he was entitled to do so, and the acceptance of the evidence was reasonable in the circumstances. II is another matter whether or not the accepted evidence amounted to service on the vessel "The MV Mascho Star". To answer the question one is to refer to Order 9 rule 12 of the English Rules of 1960. which is the relevant rule. and accepted as such, by both Counsel, is as follows

"In admiralty action in rem .service of a writ of summons or warrant against a ship, freight, or cargo on board, is *to be effected by na1l1ng or affixing the original writ or warrant for a short time on the main mast or on the single mast of the vessel, and on taking off the process leaving a true copy of it nailed or fixed in its place".*

Mr. Fynn did affix the amended Writ of Summons on the main mast. What he failed to do was affixing, in replacement of the removed amended Writ of Summons. a copy thereof on the main mast. A copy, instead, was affixed on the door of the Master's office.

In my considered opinion, the rule was materially and substantially carried out. and for all intent and purposes, service was effected. Failure to replace the amended Writ of Summons with a copy does not in my view, detract or nullify the service or reduce the service to a non-service, and is, therefore, not fatal. The essence of the service is the affixing of the amended Writ of Summons on the main mast and not the replacement of same with a copy. It ·1s for this reason, I hold, that the trial Judge ought not to have set aside the judgment in default of appearance. I may add by way of distinguishing the two authorities cited by Mr. Gooding, namely: The Marie Constance (1877) 3 ASP. P. 505 and Prins Bernard (1963) volume 2 Lloyd's List Law Reports page 236 from the instant case. In both the Marie Constance and the Prins Bernard cases. the writ was not affixed on the mast but in the instant case the writ was so affixed, albeit. for a short time; the essence of the service, as stated earlier, is the affixing of the amended Writ of Summons on the mast. In the two authorities cited there was in effect a non service of the Writ of Summons and, as a consequence, the court held in both cases that there was no proper service. It is not the same situation in the instant case. here there was substantial and, in my view, effective service. I am of the considered opinion that minor infraction of a rule does not necessarily amount to non-compliance or a nullity: where there is substantial compliance, the scale ought be weighed in favour of compliance even if it requires resorting. to Order 50 Rule 1 of the High Court Rules, 1960.

After closely reading the evidence of Mr. Fynn, I conclude that "the confusion" referred to by the learned trial Judge In his ruling arose out of the issue of the nature of the Writ of Summons served. The "confusion" was apparently corrected under re-examination. What is clear to me, and accepted by Counsel, is that it was the amended Writ of Summons that was served. Mr. Gooding in his objections of irregularity in paragraph 1 on the face of the Notice of Matron repeatedly referred to the amended Writ of Summons as the document served. This fact is not denied by the Respondent I understand the Appellant to be raising objections of irregularity on the face of the Writ of Summons. and Mr. Gooding argues that these alleged irregularities detract the originality of the amended Writ of Summons or are indicative that the amended Writ of Summons served was not an original He submitted in his address at page 12 that the amended Writ of Summons, (Exhibit "EF 1" at page 1 of the S R) is not the original Writ of Summons that was allegedly amended because -

(i) *It was not tested by the original signature of the Master and Registrar as required by practice.*

(ii) *Amendment on the face of the writ was not sealed by the Court*

(iii) *The indorsed statement of claim was not signed by Counsel - only amendment dated and signed on the face of the writ of summons.*

(iv) *Amendments were not underlined in red ink on the face of the writ*

These objections were not raised on the face of the Notice of Motion to set aside the ruling of the trial Judge (see pages 36-37 of the MR) in breach of Order 50 rule 3 of the High Court Rules and ought not be raised or argued in the appeal The same are not raised in the grounds of appeal or the particulars of misdirection on errors in law. I am of the considered view that these objections do not raise the issue of or touch on the jurisdiction of the Court Notwithstanding, I will deal with the points raised.

The signature of the Master and Registrar is clearly visible on the face of the amended Writ of Summons (Exhibit "EF 1" at page 1 of the SR.) at the very bottom to cover the reference to the order allowing the amendment. The indorsed Statement of Claim was indeed signed by Counsel. The signature is clearly placed at the end of the amended indorsed statement of claim. Order 5 rule 3 of the High Court Rules states:

> *"3 Every writ of summons issued out of the Master's office shall be signed and sealed by the Master and such summons shall thereupon be deemed to be issued. Every summons shall bear the date of issue"*

and clearly did not specify where on the face of the Writ of Summons the Master's signature should be placed. In practice, the signature of the Master comes immediately under the testing in the name of the Chief Justice and the date. These requirements, however, only apply to the Writ of Summons. There is no complaint that the Writ of Summons did not meet these requirements. The Writ of Summons issued when it was signed and sealed. The Writ of Summons. intrinsically, continue to subsist, the amended Writ of Summons is not fresh or new, it merely amends the existing sealed Writ of Summons and it meets different requirements. In its proper place there is a printed signature of the Master and Registrar on the amended Writ but the actual signature of the Mater and Registrar is given at the bottom. The marks, in the place one usually finds the seal, in the photocopy (Exhibit EF1) appears to be of the usual rubber stamp impression of the Court's seal.

The objection that the amendment on the face of the writ was not sealed by the Court is not tenable. Rule 8 of Order 24 of the High Court Rules only requires that:

> "Whenever any endorsement or pleading is amended, the

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same when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in the manner following, viz:

"Amended day of pursuant to Order of..... dated the day of….."

and this was duly complied with as apparent on the face of Exhibit 'EF 1" (see page 1 of the SR). The amended Writ of Summons did not have to be "resealed' (or sealed) as the Writ of Summons had already been sealed. After all. the copy of the Writ of Summons with the "actual seal" is not the copy that is usually served. It is a copy bearing a rubber stamp impression of the Courts seal that is normally served.

Even more significantly the objection has no basis. The objection relies on the English Rules of 1960, specifically Order 28 Rule 1 under the rubric Amendment of the Writ by the Plaintiff. The rule called for an amended copy of the writ showing the amendments in red and flied in the appropriate office. The amendments in red means that the amendments themselves should be in red ink which is different from merely underlining in red the amendments. The practice here, and it is not contended ii is the practice, may be to underline the amendments in red but such is not in line with the rule. Therefore the objection as it stands, fails. However, in my considered opinion, the omission of the rule or the practice of underling in red the amendments, even if applicable in the jurisdiction, is not a nullity but a mere irregularity which can be cured or waived pursuant to Order 50 Rule 1 of the High Court Rules.

THE CLAIM AND THE PROCEDURE APPLICABLE FOR JUDGMENT IN DEFAULT OF APPEARANCE IN REM.

(b) Must give sufficient particulars of the contract to disclose its nature.

It is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim or fails to bring it. within the definition. The words "debt" or "liquidated demand" do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (Knight v. Abbrott, 10 Q BO 11) ,. See the White Book 1960, Order 3 Rule 7 at pages 29-30. An example of a liquidated demand is a claim for a stated sum paid for a consideration that has failed Also. liquidated damages can be included in liquidated demand.

In the High Court Rules the words "pecuniary damages" in Order 10 rule 7 appear to have been used in place of unliquidated damages The conclusion is reached by comparison of Order 1O rule 7 of the High Court Rules with Order 13 rule 7 of the English Rules1960 which appears to b the source of Order 10 rule 7, and together with the inherent meaning within Order 10 rule 7. Order 1O rule 5 of the High Court Rules appear to have its source in Order 13 rule 5 of the English Rules 1960. The source of Order 10 rule 11 of the High Court Rules appears to be Order 13 rule 12 of the English Rules 1960. The authority for this is found in the Note under the contents of the High Court Rules 1960 in volume 7 page 126 of the Laws of Sierra Leone which states:

> *"Note - Following the practice in England. these Rules are printed without any revision of the serial numbers of the Orders or Rules.*
> *Underneath most of the marginal notes are references (in italics and within brackets) to the corresponding rule of the Supreme Court Rules of England. These references are not part of the marginal note and are merely to indicate the English rule, which appears to be the source of the local rule (the two may or may not be identical in text) and thus to help the*

The Plaintiffs claim has been variously described as "unliquidated amount" by the learned trial Judge and the Court of Appeal and "unliquidated demand" by Mr. Gooding. For good measure, Mr. Gooding adds that it is trite law that liquidated damages for which default judgment can be obtained without ascertainment of damages by the Court must be calculable to the last cent. The pl1rases "unliquidated amount" and "unliquidated demand" are not used in the High Court Rules with particular reference to Order 10 or the English Rules with particular reference to Order 13, and I am of the view, that in the context of the claims in the amended Writ of Summons and the indorsed Statement of Claim. their applications are inappropriate and erroneous. The claims are grounded in contract and/or tort for damages; and notwithstanding the stated sum of US$ 469,500 in claim 1, the claim, in my view, is for unliquidated damages Liquidated damages is defined as a genuine pre-estimate of damages agreed upon to be payable as damages in a certain eventuality, recoverable as a specified sum or money at a specified rate; or money recoverable under statute as damages. Such damages in neither case should amount to a penalty. See the White Book 1960, under Order 3 rule 7, at page 30. Unliquidated damages are the antithesis of liquidated damages. In the light of the definitions, relative to the pleadings, the claims can better be described as unliquidated damages. The understanding of the term "liquidated damages" proffered by Mr. Gooding, in the light of the definition given above, is erroneous.

In both the High Court Rules, with particular reference *to* Order 10. and the English Rules 1960, with particular reference to Orders 3 and 13. the phase "liquidated demand" is used. In the English Rules 1960 the phrase "debt or liquidated demand" is used. Clearly, debt and liquidated demand are being equated, or one is said to be in the nature of the other. For a claim on a contract

to come within the definition "liquidated demand" it must:

(a) State the amount demanded or be so expressed that 'he ascertainment of the amount is a mere matter of calculation, and

statement of claim if satisfied the Plaintiff's claim is well founded In cases wl1ere evidence is obviously needed to satisfy the Judge on the claim an aff1ciavit 1n support should be filed, although the court may require oral evidence wl1etl1e1 affidavit evidence is filed or not pursuant to Rule 1F (b), of the English Rules 1960 under the caption: Limitation of evidence in Admiralty action. wh1cl1 states

> "b - In default action in rem, evidence may, without any order or direction in that behalf, be given by affidavit'.

Out of caution, an evidential affidavit in support ought to be filed in all cases with tl1e motion for judgment in default of appearance in an action in rem. In another respect that rule 13 is different from rule 5 and 7 of Order 13 is that in rule 13. no distinction is made in the manner of obtaining judgment in respect of a "debt or liquidated demand" and 'unliquidated damages" In rules 5 and 7 interlocutory judgment is entered for damages to be assessed In respect of rule 13 the Judge pronounces on the claim if satisfied that it is well founded on the basis of the Statement of Claim and/or affidavit in support whether the claim is unliquidated or not. In both rules 5 and 7 of Order 13 there is no requirement for a Statement of Claim: it sufficient that the claim is endorsed on the writ *of* Summons, and this, perhaps, explains the need for an interlocutory judgment for damages to be assessed (or in respect of the local rules a Writ of Inquiry is to issue for assessment of the damages.)

Now since rules 5, 7 and 11 of Order 10 of High Court Rules 1960 correspond to rules 5, 7 and 12 respectively of the English Rules 1960, and yet it was found necessary to have rules 12A and 13 of Order 13. it follows. in my view. that the situations in rules 5 and 7 are different from the situation in rules 12 and 13 and that it was necessary to import rules 12'[1] and 13 of the English Rules 1960 to meet the situation in their contemplation pursuant to Order 52 rule 3 of the High Court Rules of 1960. In my view, the Respondents are right in the procedure

reader trace, through the White Book, such cases as may assist in the interpretation of the local rule".

Our High Court Rules 1960 are an abridgement of the English Rules 1960.

I observe that both rules 5 and 7 of Order 13 of the English Rules 1960. like the respective corresponding rules 5 and 7 of the High Court Rules. speak specifically of entering interlocutory judgment in respect of certain claims for damages to be assessed; in respect of our local rules a Writ of Inquiry *is* to issue for assessment of the damages, etc. As for rule 11 of Order 10 the wording is virtually the same as rule 12 of Order 13 of the English Rules 1960. Notwithstanding rules 5, 7 and 11 of Order 13 of the English Rules 1960. provisions are made in rule 12A and 13 specifically for Admiralty Actions in rem in respect of default of appearance.

The question that begs for an answer is why was it necessary to have rules 12A and 13 of Order 13 in the face of rules 5 and 7? Clearly the answer is that the situation in an Admiralty Action in rem is different from the general situations that Rules 5 and 7 of Order 13 of the English Rules 1960 have in contemplation In Rules 12A and 13 of Order 13 the procedural and evidential requirements are different from that of rules 5 and 7; and again in the respect of rule 13 it is the Judge that pronounces for the claim in a judgment upon filing of the requisite documents, pursuant to rule 12A, namely:

(a} *A proper affidavit of service.*

(b} *A statement of claim and*

(c} *A certificate of non-appearance*

Compliance with these formalities entitled the Plaintiff to judgment and. as a result, the case is set down for judgment in default and not for trial as contended by Mr. Gooding. The Judge may then pronounce judgment on the basis or the

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they adopted and that they had complied with all the requisite formalities pursuant to rules 12A and13 of Order 13 of the English Rules 1960.

I do recognise that in years of yore compliance with procedural rules was a matter of strictissimi juris, and particularly so in a situation where, a plaintiff proceeds by default. See Hamp-Adams v. Hall [1911] K.8.D. 942. However. in more recent years, there has been a gradual development and a tendency in judges, not to treat all such rules with absolutely strict interpretation, especially, in situations where a strict application of a rule would result in gross injustice this is in stark contrast to situations were good sense and justice had oftei1 been sacrificed on the alter of strict adherence to technicalities and procedural rules

Order 70 of the English Rules 1960 is ipsissima verba to order 50 of our High Court Rules 1960 under the caption: EFFECT OF NON COMPLIANCE: except that rule 4 in our local rules used to exist in the English Rules until it was annulled in 1959. Order 70 was a device for dealing_ with the harsh effects of the concept of 'procedural nullity' as distinct from "mere irregularity" but it was not equal to the task. See the White Book 1999 Order 2 para:21012. page 9 In my view, it did not measure up to the task because of the strict interpretation given it by the Judges continuing adherence to a strict distinction between what they regarded as procedural nullities and mere irregularities. The problem was amply demonstrated in the case of Re Pritchard [1963] ch.502 C.A. In this case. the Court had a fresh opportunity of giving the English Order 70 a more liberal interpretation by following the dissenting view of Lord Denning MR, thus blurring the distinction between procedural nullity as distinct from mere irregularity and thereby furthering the cause of justice. It was as a result of the dissatisfaction with the decision of Re Pristchard that in 1964 the order, particularly rule 1, was amended and re-stated in the light of the decision.

In my view, rule 1 of Order 50 of the local High Court Rules of 1960 is broadly stated, and I see no obstacles in giving it a liberal interpretation so as to eliminate

the judge made rule of making strict distinction between a nullity and irregularity. thus, allowing the Court to make decisions on compliance of procedural rules based on the justice of the individual case and circumstances while leaving intact fundamental failures that are rooted *in* basic principles of law rather than a requirement of the rules. At this point, let me say that if I were disposed to hold the alleged irregularities in the instant case as irregularities, I would, without hesitation, cure them under rule 1 of Order 50, even that which deals with the service of the amended Writ of Summons. Such an application would be similar to the exercise of the court's discretion under Order 2 Rule 1 of the English Rules (Order 2 replaces Order 70) in the case of Golden Ocean Assurance Limited and World Marines Shipping S.A. vs. Martin, the Golden Mariner (1990] 2 Lloyd's Rep. 215 where there was defective service of proceedings but since existence of the proceedings were known to the Defendant, the defective service was treated as a mere irregularity that could be cured by the Court by the exercise of discretion under Order 2 Rule 1. See also Fielding *v.* Rigay (1993] 4 All E R 294. In the present case, the evidence clearly shows that the Appellants were aware of the action in the High Court. See paragraphs 5, 6 and 1O of the said affidavit of Ade Renner-Thomas in support of the application for judgment in default of appearance at pages 37-59 of the S.R.

THE AWARD OF DAMAGES IN FOREIGN CURERNCY

It is not in contention that our Courts can pronounce judgment and award damages in foreign currency. In the case of Castro! Limited vs. John Michael Motors Limited S.C. Civ.App.No.1/1998 _(unreported) at page 25, this court in the judgment delivered by Renner-Thomas C.J. decided to address the fundamental question of whether our courts do have the jurisdiction to pronounce a judgment in foreign currency. After researching relevant statutes and precedents without a definitive answer, the learned Chief Justice resorted to English case law which before the republican status of Sierra Leone was of binding authority in this jurisdiction. After reviewing the relevant English authorities or cases, the learned

Chief Justice, at page 28 of the judgment, adopted the reasoning of Lord Wilberforce in the House of Lords' case of Miliangos v George Frank (Textiles) Limited (1975] 3 All E.R 801 H.L.(E) in his determination whether any fresh consideration of any substance had emerged since 1961 which should induce the House of Lords to follow a different rule from that laid down in the case of the United Railways of the Havana and Regla Warehouses Limited (1960]2 All E R 332 concluded in these words

> "The law on the topic is judge made; it has been built up over the years from cases to case. It is entirely within the Houses duty, in the course of administering justice, to give the law a new direction in a particular case, where, on principle and in Reason, it appears right to do so, I cannot accept the suggestion that because a rule is long established only legislation can change it- that may be so when the rule is so deeply entrenched and that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than courts can carry out."

As far as I can discern there was no categoric answer to the question that the learned Chief Justice set out to address but I conclude that implicit in the discourse and the House's decision in the Miliangos case his answer to the question was in the affirmative.

The learned Chief Justice in the Castro! case acknowledged that Courts in this jurisdiction had frequently applied the principles laid down by Lord Wilberforce in the case of Services Europe Atlant"1que Sud. (SEAS) v Stockholms Rederiartiebolag SVEA - [1979] 1 All E.R. 421 (referred to as: The Folias) a:1d re-stated by Lord Goff in the case of Ghana National Petroleum Corporation vs Texaco overseas Tankships Limited 1974 1 Lloyds Law Report p472 (referred to as The Texaco Melbourne) as follows:

> "First, it is necessary to ascertain whether there is an intention. to be derived from the terms of the contract, that damages for breach of contract should be awarded in any particular currency or currencies.
> In the absence of such an intention the damages should be calculated in the currency in which the loss was felt by the Plaintiff or which must truly expresses his loss .,

in pronouncing judgments in cases, such as those for the recovery of rents or mesne profits expressed in foreign currency. Recently this Court. in the case of National Insurance Company Ltd v Mohson Tarra! Civ. App No 1/2004 (unreported) affirmed the judgment of the High Court in its award of damages in foreign currency It is now clear that our Courts can pronounce Judgment awards in foreign currency upon those principles expressed by Lord Goff and approved and adopted by the Court in the Castrol case.

However, the contention of Mr. Gooding is not that the Courts cannot pronounce judgment in foreign currency <u>but that if the evidence is that the loss is sustained in Sierra Leone then the loss must be computed and awarded in Leones.</u> This contention is not sustainable in the face of the principles laid down in the Folias and restated by Lord Goff in the Texaco Melbourne and adopted by this court in the Castrol case. The contention may be valid if in relation to the circumstances of this case the application of the said principles do not lead to t11e conclusion that there is an intention that damages should be awarded in foreign currency or that the loss was felt in foreign currency. This necessarily leads to an examination of the facts to determine the issue.

I accept the submission of Mr. Gooding that the Plaintiffs were the owners or entitled to the consignment of rice that was shipped on the "MV Mascho Star

Paragraph 3 of the Statement of Claim indorsed on the amended Writ of Summons which states:

> "3 The Plaintiffs are and were at all material times the owners of the goods and/or holders of the said bill of lading."

lends support to Mr. Gooding's submission, and in the face of the said paragraph, the submissions of Mr. Yada Williams, of Counsel. that tends to contradict the said paragraph, cannot be accepted by the Court. Further. the fact in issue is not the transfer of the bill of lading to the Sierra Investment and Development Holdings Limited (the 2nd Respondent herein) but the endorsement of the bill of lading by Richabs (the 1st Respondent herein) to them. Having regard to the said paragraph, the submission of Mr. Gooding, and for the purposes of this judgment, I need not delve into the law relating to the transfer and/or endorsement of a bill of lading.

Mr. Gooding contends that since the 2nd Respondent is a Sierra Leonean Company doing business in Sierra Leone and share the same address with the 1st Respondent, the currency of business of the 2nd Respondent must be presumed to be in Leones in the absence of evidence of trading in US Dollars currency. As regards the 1st Respondent, he argues that there is no documentary evidence of the place of business of the 1st Respondent and. since there is no specific country or currency attachable to the 1st Respondent, the Court should assume that the 1st Respondent is a local company doing business in Sierra Leone. The address referred to by Mr. Gooding, I conclude on the basis of the record, is the address, 10 Charlotte Street, Freetown, given as the address of the 1st and 2nd Respondents is the address of the firm of Solicitors, Renner-Thomas and Co., who represented the 1st and 2nd Respondents in the Courts below. Clearly the address was given as address of the 1st and 2nd Respondents by their solicitors for the purposes of the suit. The indications are that the place of business of the 1st Respondent is 40 Rue De Rhone. 1211 Geneva 11,

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Switzerland, as evidenced in the bill of lading and the fax copy exhibited as "ART 1" and ART 7" respectively to the Affidavit of Ade Renner-Thomas. Solicitor. sworn on the 6th day of June 1990 at Freetown. Based on these indicators. it is more realistic for the Court to conclude, and I so do, that the place of business of the 1 st Respondent is at Geneva, Switzerland, than to assume. without any acceptable basis, that the 1st Respondent is a Sierra Leonean Company doing business in Sierra Leone.

The Charter-Party was executed in London 31/1/90 - see the bill of lading. The shippers also carry out their business in London. The port of loading is Qasin 1n Parkistan and the bill of lading was also issued at Karachi in Pakistan. In my view, the transactions have the hallmarks of international trade or business. The Court, in my considered opinion, is in the position to take judicial notice, that by and large, international trade was at that time, and perhaps even now. generally conducted in US Dollar currency and, certainly, not in Leones. Even if it is assumed that the importer was doing business in Sierra Leone. the international side of the transactions would have been agreed in and paid for in foreign currency even if it means purchasing same with Leones. In this case it appears from the documents in evidence that the consignment was being exported to

Sierra Leone by the 1st Respondent doing business in Geneva, Switzerland

Both parties to the Charter-Party, it appears, reside, and conducted the business of the Charter from outside Sierra Leone. In the circumstances. I can only conclude that the intention of the Parties to the Charter Party was that damages arising out of the Charter Party were to be paid in foreign currency, and not 1n Leones. I am of the view that the 1st Respondent loss was felt also in foreign currency.

At this juncture, it is important to make reference to the quotation by Mr. Gooding of the words of Lord Goff at page 479 in the Texaco Melbourne case which are as follows:-

'It has long been established that. in claims by a goods owner against a carrier for non-delivery of the goods, the damages recoverable by the goods owner are such as will put him into the position he would have been in if the goods had been duly delivered and are therefore the value of the goods at the time which, and the place where they should have been delivered."

This quotation goes to the issue of the quantum of damages and how the damages recoverable in the given and similar situations are quantified It is not a yardstick, and does not help in determining whether a court can pronounce judgment, in a given situation, in a foreign currency or not; and more directly. whether the court, in the instant case, can do so or not. The question is in relation to the principle of restitutio ad integrum. The question of the quantum of damages was taken into account in paragraph 8 of the affidavit of Ade Renner- Thomas in support of the application for judgment in default of appearance and the invoice exhibited thereto as "ART5". This question, however, does not appear to be and, in my view, is not, an issue in this appeal

In the instant case and that of the Mohson Taraff case, the plaintiff claimed in foreign currency and the claims, as such, met the said principles (or criteria; restated by Lord Goff in the Texaco Melbourne case; and the Courts rightly pronounced their respective judgment in foreign currency. However. it is significant, for our jurisprudential clarity, to consider the situation in the context of the instant case, on the assumption that the claim in foreign currency is not consistent with the said principles. On that assumption, the instant case would be in the same or similar context as the Castro! case, and the claim, following the Castro! case, a decision of this Court, would be converted in Leones and the judgment pronounced in Leones. Of course if the claim is not proven there would not be a pronouncement in either a foreign currency or in Leones; the claim would simply fail.

In a situation where a claim in a foreign currency is justified or, for that matter where a claim is in Leones, the matter is straight forward and the court is not faced with any problem in pronouncing judgment in the foreign currency claimed or in the Leones claimed, respectively, but the court in the Castrol case was faced with a problem in that the foreign currency claim could not be Justified as ,t did not comply with the said principles re-stated by Lord Goff in the Texaco Melbourne case, and therefore the Court could not pronounce Judgment in the foreign currency claimed. The court was faced with the dilemma of either dismissing the claim or doing justice to the plaintiffs proven rights by employing its powers in converting the proven foreign currency amount into Leones. The Court, in my considered view, was right both in law and in doing substantial justice by converting the material foreign currency, that is pounds sterling, into Leones, and I so hold. The court was faced with the dilemma in the Castrol case and had to make the decision it did. However, litigants by their Lawyers should take a cue from the outcome of the case, and in future frame their cases , in a manner which would take into account that there could be a failure in Justifying a pronouncement of a judgment in the foreign currency claimed. In my view, this can easily be done by claiming in the alternative the equivalent of the foreign currency in Leones at a rate of exchange plus interest thereon at the appropriate rate and period.

At this juncture, let me add a note of advice to Counsel and litigants by quoting once more Bristow J in the Miliangos case (pages 496 - 497) thus

> "In future no doubt, where a plaintiff seeks his Judgment in foreign currency, both parties will be prepared at the trial with the necessary evidence to deal with the question of interest."

Obtaining such evidence should not present too much difficulties in view cf *the* phenomenal expansion of international business and trade in wl1ich banks including our local banks, are integral parts or players, and invariably play

significant roles in facilitating such international trade or transactions. In my view, expert evidence of interest in foreign currencies, can easily be obtained from the relevant bank official either orally, by serving a witness summons to the bank or the relevant official, or, by affidavit, as the circumstances require

THE AWARD AND INTEREST ON THE AWARD

Mr. Gooding has made significant submissions in relation to awards given in foreign currency claim and interest thereon. In reference to Castrol the case, he submits:

> "With respect that judgment is per incuriam since the Court had no jurisdiction to convert the foreign currency claim to Leone currency and fix rate of exchange and award interest thereby amending the Plaintiffs pleading by converting the claim without application to the Court to amend the tatement of Claim. With the greatest respect the Court has no statutory authority to make such an award. The power of the Court to award interest is derived from S.4 of cap 19 and such power surely relate to local currency. A retrospective interpretation of the Court's statutory power 36 years before the Miliangos to give it authority to award interest indirectly cannot be good law."

Before the Miliangos case, the English Courts (and other Courts practicing the common law) for centuries refused to pronounce judgments in foreign currency or, in other words, only did so in English Pounds Sterling. The position ·n the case of Re un·1ted Railways of the Havana And Regla Wc1rehouses L1rrntecl [1960] 2 All E.R. 332, found clear expression, by Viscount Simmonds, in these words:

> "It is established by authority binding to this House, that a claim for damages for breach of contract must be converted into Sterling at the date of breach or tortuous act.·

And Lord Denning in the same Havana case was even more emphatic 111 the following words:

> "And if there is one thing more clear in our law, it is that a claim must be made in Sterling and the judgment given in Sterling·

In the Havana case both Lord Reid and Lord Denning were of the view that the rule was "primarily procedural". The rule was judge made and when the circumstances changed, as was apparently the case in the Schorsch Case that the Court was of the mind that it was at liberty to discard the rule on the basis that reasons for the rule which informed the decision in the Havana case have ceased to exist. Finally, in the Miliangos case, the House of Lords confirmed the discardment of the rule and, thenceforth. the English Courts could and did pronounce judgments in foreign currency.

However, it must be recognised and cognizance taken of the fact that what the Courts discarded was the Judge made rule that the English Courts can 011ly pronounce judgment in Sterling. The Courts thereby permitting themselves to pronounce judgments in foreign currency The discardment of the rule obviously did not mean that the English Courts could not and did not pronounce or continue to pronounce judgments in Sterling In effect. the discardment meant the English Courts continued to pronounce judgments in Sterling and, where appropriate in the relevant foreign currency. In my considered view, our courts have the same or similar jurisdiction to continue to pronounce judgments in Leones. the nations currency, and. where justified, in the appropriate foreign currency

A vital and crucial question raised by Mr. Gooding s submissions Is whether the Supreme Court has the jurisdiction to convert the foreign currency to Leone currency as it did in the Castrol case (and fix the rate of exchange and award interest) thereby, in effect, amending the Statement of Claim without any application to the Court to amend. In the submission, Mr. Gooding also argues that this Court has no statutory authority to make the award it gave in the Castrol case. Rule 1 of Order 24 of the High Court Rules which reads

> "The Court may at any stage of the proceedings, allow either party to alter or amend his endorsement on pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties (Emphasis provided)

is ipssissima verba of rule 1 of Order 28 of the English Rules 1960 The English Order (see page 621) under the rubric scope of the order - includes amendments which the Judge or Master may think right to make of his own motion in order to determine the real questions in controversy between the parties. The explanation goes further to state that every Judge of the High Court and also of the Court of Appeal (See 0.58, rule 9) has power to amend the proceedings before him whether he is asked by the parties to do so or not (see Nottage v Jackson 11 QB D 627, 638) but it is not the duty of the Court to force upon them amendments for which they do not ask (per Fry L J In Cropper v Smith. 26 Ch. D, p.715). The Supreme Court. under the Supreme Court Rules 1982, is not specifically given these powers but such powers are bestowed on the Supreme Court by virtue of the provisions of subsection (3) of Section 177 o'
the Constitution, 1991, which provides

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> "(3) For the purposes (SIC) the hearing and determining any matter within its jurisdiction and the amendment. execution or

> the enforcement of any judgment or order made on any such matter, and for the purposes of any other authority, expressly or by necessary implication given to it, the Supreme Court shall have all thepowers, authority and jurisdiction vested on any court established by the Constitution or any other law."

The Court of Appeal is given wide powers in conducting appeals, but, with particular reference to the issue at hand, is the provision of subsection (3) of Section 129 of the Constitution 1991 which confers on the Court of Appeal the powers, authority and jurisdiction vested in the Court from which the Appeal is brought. This clearly gives the Court of Appeal the powers of the High Court as provided for in rule 1 of Order 24 of our High Court Rules. Clearly, the Supreme Court, therefore, has the power to amend, suo moto, directly or indirectly by necessary implication, as it obviously did in the Castro! case. The powers of the Supreme Court in this regard is further buttressed by sub-rule 2 of rule 5 of the Supreme Court Rules, 1982, which empowers the Court to prescribe by means of practice direction such as in the opinion of the Court the justice of the appeal or application may require. Granted there is no practice direction on the point in issue. Amendment "at any stage of the proceedings" has been interpreted to include amendments after judgment and on appeal. In the case of Pearlman (Veneers) S.A. (Ply) Limited v Bernhard Bartels (1954) 1 W.LR 1457 C.A where the Plaintiff had obtained judgment, the Court held that there was jurisdiction to amend the proceedings including the judgment to describe the defendant as Josef Bartels, trading Bernard Bartels, on the ground ti1at tl1er., l1ad been simply a misdescription. But after final decree or judgment, the Judge of first instance cannot, or at all events, will not amend the pleadings or add new parties (A.G v Birmingham, 15 Ch.D. 423: Durham v Robertson [1898] 1 QB p.774). See the White Book 1960at pages 625-626.

The Court's power to grant interest is grounded in statutory provisions which includes sections176 and 177 of the Constitution, 1991, which, respectively define and permit the application of the existing section **4** of the Law Reform (Miscellaneous Provisions) Act 1960 of Cap 19, which has already been reproduced above, and the Judgments Act, 1838. The statutory provision directly in point is Section **4** of the Law Reform (Miscellaneous Provisions) Act 1960 of Cap 19. which empowers a court of record to award interest on a Judgment sum"at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment." Ground 6 of the Appeal, which relates to this point, has graciously been conceded by Mr. Yada Williams of Counsel, for the Respondents.

However there is left the further submission of Mr. Gooding that if i11te1est is claimed on a debt or damages expressed in foreign currency, the plaintiff must adduce expert evidence of the rate of interes.t at which a perso11 ccu:c! reasonably have borrowed the foreign currency I agree with the submIss1011 but would add that the Court, in my view, will only take into account the evidence of the lending rate on the foreign currency if the claim in foreign currency Is Juslifiecl that is to say, the Plaintiff has shown that he is entitled to be awarded ludgr11e11t In the foreign currency. In the National Insurance case a Judgment award ,n foreign currency was justified but because there was no expert evidence of the lending rate of interest on the foreign currency that was in issue the court did not grant interest. The Court could have ordered further inquiry to determine the rate of interest but refrained from doing so for the reason stated in the judgment. The instant case is in the same position as the National Insurance case. the claim in foreign currency is justified but no evidence of the lending rate on the foreign currency has been given. The question whether to order further inquiry or not will be dealt with later.

FIXING A HIGHER RATE OF INTEREST THAN THAT PRAYED FOR

The Court is not Father Christmas and does not grant what is not prayed 'or unless ancillary to the relief prayed. Therefore the Court ought not grant a higher rate of interest than that prayed for It can grant interest at a rate lesser than that pleaded or prayed for The Court can under Section 4 subsection 1 of the Law Reform (Miscellaneous Provisions) Act 1960.give interest on the adjudged sum whether or not interest is pleaded or prayed for In an Admiralty Action in rem upon default of appearance and after the filing of the requisite documents the matter comes before the Judge; he will require the Plaintiff to satisfy him that the claim is well founded on the basis of the requisite documents filed and by affidavit evidence unless the Judge otherwise ordered, for instance. calling for oral evidence. This in my view. is different from signing for Judgment ,n which case, the matter is not placed before the Judge to be satisfied that the claim is well founded In the former situation. it is the Judge that pronounce Judgment and, in doing so, may award interest on the adjudged sum whether or not interest is prayed for.

COSTS **IN FOREIGN CURRENCIES**

The substance of Mr. Yada Williams's submission, in my mind. 1s that i11 this jurisdiction solicitors' costs have always been taxed or agreed upon (or assessed by court) in foreign currencies, and since the practice, in his view. has been established over the years and has become so deeply entrenched that it affects the whole legal system, therefore, the practice must be allowed to continue and can only be changed by legislation In support, he quoted the dictum of Lord Wilberforce in the case of the Miliangos [1976] AC 443 at 469 before the House of Lords as follows:-

> ··The law on this topic is Judge made; **it** has been built up over the years from case to case. **It** is entirely within the Houses duty 1n the course of administering justice, to give the law a new direction in a particular case, where, on principle it appears right to do so

> I cannot accept the suggestion that because a rule is long established only legislation can change it - that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far reaching research than courts can carry out."

Firstly it does not appear to me that the alleged rule or practice is indeed a rule or practice in this jurisdiction, not to speak of it being a long established rule or practice. Secondly, it is my view that the said rule or practice is not entrenched and, certainly, does not permeate or infect the whole legal system In the dictum cited, Lord Wilberforce said the words in connection with the English judge made law relating to the rule or practice by the English courts not to pronounce judgment in foreign currency, a rule or practice that spanned centuries before the House of Lords changed it in the Miliangos case; it is in the context of the quotation that the historical rule or practice was. changed and given a new direction.

In support of his submission, Mr. Yada Williams has quoted two local cases, namely, Abdul Hamed and Sons v. Patbel Limited and Another CC 470/88 H. No 19 (unreported) and Ibrahim Bazzy and Sons (a firm) v. The Owners and/or persons interested in The Vessel "The Santiago De Cuba" of suit No.CC 467/96 (Unreported) in relation to solicitor's costs in foreign currency. Let me first deal with the Ibrahim Bazzy case. The judgment of the case was by consent. The courts hardly ever disagree when the parties to a suit come to an agreement and request the court to give *effect* to such an agreement by making it the courts judgment, that is, by the consent of the parties. In my view, such consent judgment cannot be rightly quoted as supporting a principle of law or practice The Abdul Hamed case was a High Court matter but a point of the judgment is detailed and relevant to the issue herein. Essentially, I agree with the views of the learned Judge, S.A. Ademosu J (as he then was) on the points so well

expressed in pages 109-112 of the judgment with particular reference to the points encapsulated in his following words.

> "It is my view that to tax according to the Laws of Sierra Leone would mean taxing in the national currency of Sierra Leone and not in any currency foreign to the country especially for work done in Sierra Leone where expense in foreign currency is not involved like in the instant case. It is also my view that the bill of costs that should be presented by the solicitor for taxation should also call for Leones and that the question or of working out its equivalent in a foreign currency should not arise because the predominant aim of the solicitor should be to receive a fair and reasonable remuneration for the work he has done in Sierra Leone for a Litigant in Sierra Leone. It is for all the above reasons I have come to the conclusion and with the greatest respect to both the solicitor and the Taxing Master that it is improper to present a bill of costs in foreign currency as it was done in the instant case..
>
> I respectfully agree with Amissah.J.A. in Guardian Assurance Co. Ltd v. Khayat Trading Stores (1972)2 G.L.R. 48 that it was wrong to assess costs on the amount of damages recovered The determining factor should be the nature of the work done and the amount of the work done"

Notwithstanding, I like to add a few remarks. The scale of fees payable in the High Court and fees payable to solicitors expressed in the Appendices to the High Court Rules 1960 as amended by 4ofP N 41/69, are in Leones, or otherwise expected to be payable in Leones. Generally, costs are in the discretion of the Court (or the Taxing Master) and in considering the quantum

of the cost, the Court (or the Taxing Master) must take into account the amount of work done, the complexity of the case and the experience of the solicitor; and these normally should bear a relationship to the trial and its incidents. In cases where certain expenses are incurred in foreign currency, and their expenditure in foreign currency can and are justified, the Court (or Taxing Master), in my view, can take same into account at the appropriate rate of exchange (or the rate of exchange at the time of payment) depending on the circumstances. All of the discourse on the issue, must be viewed in the context of the meaning of a bill of costs which is defined in Wharton's Law Lexicon, 14th edition, at page 978, as follows:

> "an account of the charges and disbursements of an attorney or solicitor incurred in the conduct of his client's business. It is an account of fees, charges and disbursements by a solicitor in a legal business".

A bill of costs for taxation ought to be prepared and presented in Leones. Where at the conclusion of the trial the judge hearing the case makes an immediate assessment, he should do so in Leones on the basis of factors herein before stated.

It is worth noting that although the question of costs is in the discretion of the Judge, the general rule is that costs follow the event, that is, the winner is entitled to be paid the costs he incurred in the litigation by the loser unless there are special reasons for the court to order otherwise. The fees that c1 party pays his solicitor (or counsel) is by agreement between the party and his solicitor, and does not involve the opposing party. In that regard, it must be borne in mind that taxed or assessed costs do not indemnify the winner for all the costs he has paid or will have to pay his solicitor. The reason being that the loser pays to the winner costs taxed by the Taxing Master on a 'party to party basis" (see Order 56 rule 28(24) of the High Court Rules 1960)

....

covering only the essential costs of the litigation whilst the winner will have to pay his solicitor fees calculated on "a solicitor and own client basis" in which he can be charged for all the work done unless he can show his solicitor wJs acting unreasonably.

In the instant case, the judge ought to have awarded costs in Leones and not in a foreign currency even though there was no Defendant present to challenge the Plaintiffs' (Respondents herein) prayers for the costs in foreign currency, namely, United States of America Dollars. It must be borne in mind that in an uncontested trial or hearing, the trial judge (or court) should not allow himself or herself being lulled by the absence of opposition not to ask to be satisfied or satisfying himself of the rightness or propriety of the demands or alleged facts. This case is different from cases where the parties come to an agreement and request the court for a consent Judgments; a consent Judgment is different from a Judgment in Default of Appearance, and require different approaches by the Judge (or Court).

The reality is that the trial judge had awarded costs in United States of America Dollars, and the award was affirmed by the Court of Appeal Notwithstanding the error of the trial Judge in awarding the costs in foreign currency, the fact remains that the Appellants (Plaintiffs in the High Court) are entitled to costs. It would be with great reluctance that I would leave the costs awarded in the High Court intact without a measured and an appropriate reduction of the US Dollar amount. In the given circumstances, I am of the firm view that the award in the High Court is excessive and bears no relationship to the work that had been done up to and at the time the costs were awarded. Even if I am inclined to reduce the costs awarded in the High Court I would have to do so in the absence of any ground of appeal against the quantum of the costs. There is no ground of appeal on the quantum, no challenge, in my view rightly so, in the absence of a ground of appeal in the statement of case of or the issues presented by the Appellants; and notably

...

absent in the arguments of Mr. Gooding. Notwithstanding, the award of costs is at the discretion of the Court and must not be viewed strictly in the adversarial context of our civil proceedings. If on the face of the record, it is clearly apparent that the amount is high, grossly excessive and without a proper foundation, it is within the jurisdiction of this court, in my view. suo moto, to correct the situation. In my judgment, there is no justification or basis for an award of costs in the instant case in a foreign currency. and. accordingly, costs are to be awarded in Leones.

CONCLUSION

All the grounds of appeal, except grounds 6, 7, 8 and 9, fail. Grounds 6. 7.8 and 9 are not fatal to the judgment and, accordingly, have been dealt with The issues have been determined in the course of the judgment. In the premises, I hereby give judgment to the Respondents as follows:

1. The award of US $290,300.00 to the Respondents is herein affirmed.
2. This matter has been too long in the Courts. The Court is not inclined to order any inquiry into the lending interest rate on the foreign currency in question. Consequently, no order as to interest.

3. Costs at the High Court and this Court awarded to the Respondents. The costs in the respective courts to be taxed. The order for costs in the Court of Appeal to be taxed remains undisturbed. All costs to be taxed and computed in Leones.

I thank both Counsel for their hard work, and the invaluable help given to (he Court. I commend Mr., Gooding for the several and many difficult issues he raised and vigorously argued.

HON. JUST/GIBRIL B. SEMEGA-JANNEH