IN THE SUPREME COURT OF SIERRA LEONE

SC.CIV. APP 1/2018

BETWEEN:

MOHAMED BANGURA	Appellant
And	
DALIAN SHENGAI OCEAN FISHING CO.	1st Respondent
ABIE ARUNA KOROMA	2nd Respondent
MONZA FISHING COMPANY	3rd Respondent

CORAM:

Hon Justice E. E. Roberts JSC

Hon. Justice G. Thompson JSC

Hon. Justice A. B. Halloway JSC

Hon. Justice Sengu Koroma JSC

Hon. Justice E. Taylor-Camara JA

Mr. E.T. Koroma for the 1st Appellant

Mr. Umaru Napoleon Koroma for the 1st Respondent

Mr. Africanus Sesay and Ms Sadia Bakarr for the 2nd and 3rd Respondents

JUDGMENT OF THE HON.MR JUSTICE E TAYLOR-CAMARA, JA

DELIVERED THE 29th DAY OF NOVEMBER 2019

1. My Lords, the facts of this matter have been set out in the severally judgments of my fellow Justices and I refer to them in this Judgment only to the extent relevant to the issues.

2. In its Judgment dated 13 February 2017, the High Court (A S Sesay, JA, as he then was) held that Mr Michael Wang was the Vice–President of the 1st Respondent company, Dalian Shenghai Ocean Fishing Company Limited, and that in that capacity he was an authorised representative of the 1st Respondent, as was Mr David Wei. The Judge found that Mr Wang in particular, had ostensible authority to enter into agreements which bind the company and that in 2013 he did enter into an agreement with the Appellant pursuant to which, the Appellant agreed to act as the local agent for the 1st Respondent and in pursuance thereof, undertook certain activities in furtherance of the establishment and development of the 1st Respondent's fishing business. The judge held further, that Mrs Abie Aruna Koroma, the 2nd Defendant, who is the chief executive officer of her company, Monza Fishing Company, the 3rd respondent, with full knowledge of the agreement between the Appellant and the 1st Respondent, induced the 1st Respondent to breach its contract with the Appellant resulting in loss and damage to the Appellant.

3. By its decision of 28 December, 2017, the Court of Appeal, by a majority, reversed the decision of the High Court. The Court of Appeal held that:
   a) There was no consensual agreement between Messrs. Wang and Wei on the one part, and the 1st Respondent on the other, under which Messrs Wang and Wei could have agreed to act as agents for the 1st Respondent company, because the said company was not incorporated or doing business in 2013, the period during which the Appellant claims the agreement between he and the 1st Respondent company took place.
   b) For the same reason, the Court held that neither Mr Wang nor Mr Wei could have had ostensible authority to, nor did they enter into the alleged agreement on the 1st Respondent's behalf so as to bind the 1st Respondent.
   c) It followed from the above, that the 2nd and 3rd Respondents could not have induced a breach of a contract that did not exist, and so they were not liable.

4. The principles governing the review of findings of fact by appellate courts are well known. They were set out in English cases such as *Watt (or Thomas) v Thomas* [1947] SC (HL) 45; [1947] AC 484, *and Benmax v. Austin Motors Co. Ltd (1955) 1 ALL E.R. 326.*

5. In a statement that has become the classic enunciation of the principles upon which an appellate court can interfere with decisions of the trial judge, Lord Thankerton, in *Thomas v Thomas*, said:

> "(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 unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

6. This statement was adopted by this Court in the case of *Dr. Seymour Wilson v Musa Abess* Civ. App. No 5/79 (Unreported), which case has been subsequently cited in our courts in cases like *Wurie v Shomefun and Another* (CIV. APP. No. 8/81) [1983] SLSC 9 (29 December 1983), *Okekey Agencies Ltd v Lahai and Another* (CIV-APP 32/2005) [2007] SLCA 7 and *Bangura and Another v Kamara* (Civ. App. 44/05) [2009] SLCA 12. In these latter cases, the Court (Tejan-Jalloh JSC, and Hamilton JSC respectively) quoted Livesely Luke CJ in the *Seymour Wilson* case, where, after considering *Watt (or Thomas) v Thomas* [1947] AC. 484 and *Benmax v. Austin Motors Co. Ltd (1955) 1 ALL E.R. 326* he said:

> " There is no doubt that an appellate court has power to evaluate the evidence led in the court below, reach its own conclusions, and in a suitable case to reverse the finding of fact of the Trial Judge. But these powers are exercisable on well-settled principles, and an appellate court will not disturb the findings of fact of a trial judge unless those principles are applicable. The appellate court is, however, free to

reverse his conclusion if the grounds given by him, therefor, are unsatisfactory by reason of material inconsistencies or inaccuracies, or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen or heard the witnesses, or has failed to appreciate the weight and bearing of circumstances admitted or proved".

7. In *Wurie v Shomefun and Another,* Tejan JSC, referring to the *Thomas* case principles said:

> "The above propositions make it abundantly clear that before an Appellate Court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely of their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption of its correctness which must be displaced."

8. The *Thomas* principles have been restated and developed in several cases since. In the recent English Supreme Court case of *In the matter of B (a Child) (FC)* [2013] UKSC 33, Lord Neuberger said:

> "where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.

Lord Reed in another Supreme Court case, *Henderson v Foxworth Investments Ltd.* [2014] UKSC 41, similarly said:

> " .....in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified. "

9. The Court of Appeal appears to have accepted and premised its decision on the arguments advanced by the 1st Respondent herein, to wit, that the 1st Respondent did not, and could not have entered into agreement with the Appellant on the terms claimed by the Appellant because the 1st Respondent company had not been incorporated nor had it otherwise come into existence until 2014, whereas the Appellant's claim was that the alleged agreement was entered into between the Appellant and the 1st Respondent sometime in 2013. In effect, the Court of Appeal made a critical finding which ran counter to that found by the trial judge and proceeded to hinge its decision on that one finding. The question this Court has to ask and answer, is whether the Court of Appeal was correct to do so.

10. In dealing with this matter, the Court of Appeal, in its majority judgment, said (at P3):

> "The Respondent says that he came in contact with the 1st Appellant through a Chinese National named Michael Wang in January 2013. That same night in January 2013, Mr Michael Wang introduced the Respondent to a certain Mr David Wei who in turn told the Respondent that he is representing Dalian Shenghai Ocean Fishing Company..... However, Dalian Shenghai Ocean Fishing (SL) Limited was incorporated on 9th June 2015.
>
> "The Learned trial Judge noted that the 1st Appellant Company was duly registered as a Company incorporated in China but he did not indicate the date of incorporation. It is Counsel for the 1st Appellant who indicated that his client's certificate of Registration in China is dated 5th May 2014. In effect, the 1st Appellant started operations in 2014.
>
> "Can it now be said that Mr Michael Wang or Mr David Wei as the case may be, were lawfully acting for and on behalf of the 1st Appellant who accordingly was not in existence in 2013? I do not think so..."

11. On the question whether the Appellant had established that there was in law and in fact, an agency agreement between the Appellant and the 1st Respondent, the Court of Appeal said that what needed to be established was that there was consent (consensual agreement) between the principal and the agent. In this case it considered whether there was such agreement between Messrs. Wang and Wei on the one part and the 1st Respondent on the other part. The Court asked itself whether Messrs. Wang and Wei were appointed as agents by the 1st Appellant to act for and on its behalf, and if so, did they consent to so act and

conduct themselves such that their actions could be perceived as being those of the 1st Appellant? The Court concluded that they could not,

> "for the simple reason that it was not established that the 1st Appellant was in existence prior to 2013."(P6)

12. The Court went on to say that:

> "Even if agency is to be implied, it is still defeated by arguments that the appellant was not in existence as at the time Mr Wang or Mr Wei made representations to the Respondent in 2013."

13. On the question whether Mr Wang had ostensible authority to enter into a binding agreement with the Respondent on the 1st Appellant's behalf, the Court said that

> "for the principle of ostensible authority to be effective, it is imperative that the 1st Appellant's company should have been in existence prior to 2013 when Mr Wang and Mr Wei made representations to the Respondent.
>
> "If that had been the case, the 1st Appellant would have been bound by the acts of Messrs. Wang and Wei in the application of the principle of ostensible authority."

14. The Court concluded that in the circumstances of the case, it failed to see how that could be the case here.

15. The Court of Appeal reversed the High Court decision on the ground that the first Respondent was not in existence when the agreement was said to have been made i.e. 2013. This was a critical finding of fact on its part. The trial judge whilst finding that the agreement was entered into in 2013, did not appear to consider the actual date on which the contract was made an issue or primary fact on which to base his decision. What was important from his point of view was that there was an agreement between the parties which the Appellant says was breached by the 1st Respondent, such breach being induced by the 2nd and 3rd Respondents. The Defendants did not raise the issue of the date as part of their pleaded Defence. They simply denied or declined to admit the claims and put the Plaintiff/Appellant to strict proof of his case. It was only in their closing address at the end of the trial, and subsequently in their grounds of appeal, that the Defendants raised this as an issue. The Court of Appeal proceeded to view this issue of the date as a critical finding,

indeed the lynchpin on which to base its majority decision. Was the Court of appeal correct?

16. The evidence is that the 1st Respondent, Dalian Shenghai Ocean Fishery Co. Ltd (hereafter "Dalian China") is a company incorporated and registered in China. No direct evidence was led as to when it was incorporated or who it was established by, but Mr Wang, in evidence did say:

> *"I know the actual owners/shareholders of the 1st Defendant. The shareholders are Mr Shidong.....the second shareholder is Yugon Chu, I cannot remember the name of the 3rd defendant shareholder. I am not the third shareholder."*

17. Dalian China is different from Dalian Shenghai Ocean Fishery (SL) Ltd. (hereafter "Dalian SL"), which is a Sierra Leonean registered company that was incorporated in Sierra Leone on 9 June 2015 and established by two Chinese businessmen by the names of Yang Yufeng and Ying Shidong. Whilst the names of the two companies may be similar, they are not identical and there was nothing before the Court which should have led anyone to assume that Dalian China and Dalian SL are one and the same company. Indeed it is palpably clear that they are not the same and cannot be the same. Whilst it is possible that there was/is some co-ownership of the two companies, no direct evidence was led on this and no such suggestion was advanced in argument. There is no evidence either that Dalian SL is Dalian China (a foreign company) registered in Sierra Leone, or a wholly–owned subsidiary of Dalian China. If Dalian SL were a foreign registered company, then its Certificate of Registration would have indicated as much and it would be registered under its own name - Dalian Shenghai Ocean Fishery Co. Ltd. This is not the case here. (see Exh. A at pages 543 and 544 of the court record). If Dalian SL was a subsidiary of Dalian China, then Dalian China should have appeared as a subscribing member of Dalian SL. This is not to say that Dalian China could not have subsequently become a member of Dalian SL, but the fact is that on incorporation, there was no evidence of Dalian China being a member of Dalian SL and so there was no basis for concluding that Dalian China is in any way connected to, let alone the same as Dalian SL.

18. Despite the fact no evidence was led as to the date of Dalian's incorporation, the Court of Appeal was nonetheless content to accept the statement of counsel for the 1st Appellant as evidence that the company was registered on 5 May 2014. As stated earlier, the Court said that:

"It is Counsel for the 1st Appellant who indicated that his client's Certificate of Registration in China is dated 5th May 2014.

19. The Court appeared to regard that statement from counsel as evidence and accepted it as a fact. That in my view, was an error, for reasons I will shortly explain.

20. Dealing first with the Court of Appeal's reference to Dalian SL however, it is clear that the Court made a mistake in referring to Dalian SL, appearing to confuse it with the 1st Respondent. Indeed it appears to have been a confusion shared by others including counsel for the parties, leading to unnecessary arguments about whether the Appellant was a promoter of "the 1st Defendant" or not. It is correct that Dalian SL was incorporated in Sierra Leone on 9 June 2015, some two years after the agreement between the parties is said to have been entered into. This however, has no bearing on the issues at hand. Dalian SL is not Dalian Shenghai Ocean Fishery Co. Ltd, a party to the litigation, nor do any of the allegations made by the Plaintiff touch and concern it. The Plaintiff's action was not against Dalian SL but against Dalian China. Nowhere in his pleadings or in the evidence, does the Plaintiff mention Dalian SL, and for the good reason that it was not, as the Court of Appeal rightly said, in existence at the time of the events. If therefore the Court of Appeal was confusing Dalian SL with Dalian China, and thus basing its decision on the fact that Dalian SL was not incorporated in 2013, then whilst it may have been correct from a factual point of view, it would be a totally irrelevant fact because there was no claim or allegation levied by the Plaintiff against Dalian SL i.e. it did not matter that Dalian SL was not in existence in 2013 because the Plaintiff was not claiming against it. The claims are against Dalian China and there was therefore no reason to mention Dalian SL.

21. Turning now to the Court's acceptance of counsel's statement regarding the date of incorporation of Dalian China. In my view, this was an error. Statements from the bar by counsel and not made under oath, in an affidavit, or in a Witness Statement, are not admissible evidence of the facts stated. So counsel's statement ought never to have been accepted by the Court as a fact. There was no Certificate of Incorporation or other documentary evidence submitted or admitted into evidence by the 1st Defendant establishing that Dalian China was incorporated or registered in 2014, nor did Mr Wang, the only witness for the 1st Defendant, make such statement in his oral evidence or in his tendered Witness

Statement. The statement by counsel was therefore inadmissible and ought not to have been accepted, much less relied upon by the Court of Appeal as a basis for making a finding of fact that the 1st Respondent company was not incorporated or in existence at the material time.

22. But even had this not been the case, and the statement was properly before the court as evidence, I question whether that statement, upon analysis, was in fact true, or, if it was true, whether much can be taken from it. This is because it is clear from the letter dated 17 January 2014, addressed by the Appellant to the Ministry of Fisheries and Marine Resources (Exhibit A), that he wrote, in the name and on behalf of Union Fishing 2007 Co. identifying himself "as agent" and claiming that he/Union Fishing were in partnership with the 1st Respondent, naming it as *"Dalian Shenghai Ocean Fishery Company Limited based in China"*. In that letter he was requesting Ministerial clearance for Dalian's fishing vessels to enter Sierra Leonean waters. The Director of Fisheries replied that same day, acknowledging Union Fishing 2007 as partners of the 1st Respondent. This was in January 2014. It is clear then that the 1st Respondent was in existence two weeks into the year 2014. That the Appellant knew what name to state in the letter is highly suggestive that he knew, or had been given by someone, the name of the company on whose behalf he was applying. The Appellant says he was asked to apply to the Ministry by Mr Wang who he says was the authorised agent of the 1st Respondent. He buttresses this claim with the complimentary business card given to him by, and bearing the name of Mr Wang, which card describes Mr Wang as the Vice President of Dalian Sheng Hai Ocean Fishery Co. Ltd. i.e. Dalian China. (Exh.J)

23. In March 2014, Michael Wang was writing email correspondence to Mr Alieu Thorlu Bangura of Union Fishing 2007 Co (Exhs. L and M) from an email address that appears on the complimentary business card given to the Appellant by Mr Wang (Exh.J). Mr Wang does not dispute he wrote the correspondence. In that correspondence, Mr Wang mentions Dalian China by name and the content of the email appears to confirm the Appellant's evidence that he, the Appellant, attended an interview with the Chinese Counsellor at the Chinese Economic and Commercial Bureau, to confirm he was working in partnership with Dalian China and that he had arranged for Mr Thorlu-Bangura to do likewise.

24. In cross-examination, Mr Wang denied knowing Mr Thorlu-Bangura had a fishing facility, yet he agreed that he sent the two emails (Exhs. L and M) to Mr Thorlu-Bangura detailing the arrangements for the Chinese Counselor's visit to Mr Thorlu-Bangura's facility and his visit to the Chinese Economic and Commercial Bureau and what should be said by Mr Thorlu-Bangura thereat. In particular, in Exh L, Mr Wang tells Mr Thorlu-Bangura a) that he should say that he had worked with Dalian China, and b), that he should *"stress to the Counselor, Union Fishing 2007 is the only fishing company has the jetty, cold room and office facilities at downtown of Freetown."*

25. These pieces of evidence support the view that in March 2014, Mr Wang was very much involved in arrangements with the Appellant and Mr Thorlu-Bangura about Dalian China's fishing business. Indeed the emails, in particular the one dated 11 March 2014 (Exh. L), clearly show that Mr Wang was not only aware of, but also supportive of, the work the Appellant was doing on behalf of Dalian China and indeed he appeared in that email, to be actively promoting the interests of Dalian China as its local representative and was in effect, giving instructions to both the Appellant and Mr Thorlu-Bangura as to what to say at the interviews with the Chinese Counselor.

26. The correspondence from the Ministry (Exh. B) also referred to Dalian China, and according to the Appellant, that letter was given or shown to the Chinese Counsellor who in turn accepted it as evidence that Dalian China was on its way to obtaining the requisite authorisation to fish and do business in Sierra Leone which in turn led to the Chinese Government approving the loan to Dalian China. This was in March 2014, and this, together with the letter to the Ministry, would suggest that Dalian China was in existence way before 5 May 2014 which is the date when counsel for the 1st Respondent says Dalian China was incorporated in China. It is highly unlikely therefore that that statement by counsel was accurate.

27. Over and above this, both the Appellant and Mr Wang in their respective Witness Statements, agree that they both met in November 2013 and discussed Dalian China, although they each have different accounts of what the nature of the discussions were. In his Witness Statement, Mr Wang says that:

"I know the plaintiff in this matter as we met in November 2013 at the Sierra Fishing Company....

"At the end of 2013, a man by the name of David Wei, a Chinese National came to Freetown, Sierra Leone....David told me that his company by the name of Dalian Changhai Fisheries Co Ltd was building fishing boats in China...

"David asked me to look out for an agent for his company... After a while, David told me to look out for an agent for Dalian Shenghai Ocean Fishery Company. I recommended several companies to him. The Plaintiff with whom I had discussed this issue of David with, met with David and recommended one Mr Thorlu Bangura the owner of Union Fishing 2007 to David."

28. This evidence indicates that Dalian China, or an entity bearing its name, was in existence in the tail end of 2013, and Mr Wang and the Appellant were actively promoting its affairs between November 2013, through January and March 2014, prior to the date stated by counsel to be the date of its incorporation in China - 5 May 2014.

29. The view of the trial judge, after reviewing the evidence, was that Mr Wang was the Vice President of Dalian China and that he was acting as a representative and agent of the 1st Respondent when in 2013, he entered into the oral agreement with the Plaintiff/Appellant as claimed. Having seen and heard the witnesses, he found that "the evidence of Mr Wang was not credible" and that the 2nd Respondent (and through her, the 3rd Respondent) "had full knowledge of the contract" between the Appellant and the 1st Respondent and that the 2nd Respondent had deliberately induced the 1st Respondent to breach its contract with the Appellant in order for the 3rd Respondent to take over the agency.

30. The Court of Appeal rejected the judge's findings and without applying the *Thomas* principles to determine whether the judge had been found wanting in his approach to the law and/or the evidence, drew its own conclusion that Messrs Wang and Wei could not have been agents for the 1st Respondent, and could not therefore have entered into any agreement with the Appellant on the 1st Respondent's behalf in 2013, because the 1st Respondent was only established in May 2014. Having so found, it then erroneously concluded, on its reasoning, that as no contract was or could have been in existence between the 1st Respondent and the Appellant, there could not therefore be any contract, the breach of which the 2nd and 3rd

Respondents could have induced, and therefore the 2nd and 3rd Respondents were not liable.

31. In my view, this was an error on the part of the Court of Appeal, not only for failing to consider and apply the *Thomas* principles, but equally, for making a critical finding of fact that was not based on any evidence in the proceedings. Absent counsel's statement, there was no evidence before the High Court that Dalian China was incorporated in May 2014 and to that extent, there was no evidence on which the Court of Appeal could properly have drawn the conclusion that it did.

32. This is a case where there was credible evidence before the judge that the 1st Respondent was in existence in 2013, that Mr Wang, at least, was a representative of the 1st Respondent, who had ostensible authority to enter into agreements with third parties on the 1st Respondent's behalf, and that in 2013 he did so enter into agreement with the Appellant, which agreement the 2nd Respondent induced a breach of. The judge evaluated the evidence before him and made the findings that he did.

33. It seems to me, that the Court of Appeal failed to apply the correct principles to be adopted by an appellate court stated earlier. The Court of Appeal appears to have reviewed the matter and proceeded to make its own findings of fact without averting its mind to the *Thomas* principles. To borrow the words of Lord Hope in the case of *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1 at para 16:

> "The rule which defines the proper approach of an appellate court to a decision on fact by the court of first instance is so familiar that it would hardly be necessary to repeat it, were it not for the fact that it appears in this case to have been overlooked."

34. The Court of Appeal appears to have overlooked the findings of fact made by the trial judge and reviewed the evidence as if it were a court of first instance. The Court proceeded to draw its own conclusions therefrom without consideration as to whether, as the *Thomas* principles require, the judge had made a material error of law, or made a critical finding of fact which had no basis in the evidence, or had misunderstood the evidence, or had failed to consider relevant evidence.

35. On this basis, I am of the strong view that the Court of Appeal erred in failing to apply the correct principles when overturning the findings of fact made by the trial judge, and in admitting and relying on the statement by counsel as proof that the 1st Respondent could not have entered into and breached the agreement with the Appellant. In light of the above, I would allow the appeal on Grounds A, B and F.

36. In view of my conclusion, I do not think it necessary that I consider Grounds C, D and E.

Reliefs

37. Having found in favour of the Plaintiff/Appellant on the facts and as to liability, the judge then went on to award him certain reliefs which appear in the Court's order dated 13 February 2017. The Appellant asks that the decision of the High Court be restored and it falls on this Court to consider whether the Court's order is still appropriate.

38. Having looked at the orders made by the judge, I think it important to briefly highlight some that require further review. In doing so I am conscious of the test to be applied in the case where the appellate court is considering interfering with an award of damages by the trial judge as set out in *Davies v Powell Duffryn Associated Collieries Limited* [1942] AC 601, 616-617, where Lord Wright, adopting the test originally stated by Greer LJ in *Flint v Lovell* (1935) 1 KB 354, said:

> "An appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. It is difficult to lay down any precise rule which will cover all cases, but.....the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered."

39. The Privy Council adopted a similar stance in *Nance v British Columbia Electric Railway Co Ltd* [1951] UKPC 19, [1951] AC 601, [1951] 2 All ER 448, where Viscount Simon said that where the appellate court is minded to disturb the lower court's award, it :

> "...must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Agency fees

40. The judge ordered the 1st Respondent/Defendant to pay the Appellant the sum of $126,000 being agency and promoter fees. The Plaintiff's claim was for $96,000 being agent's fees together with $20,000 as miscellaneous expenses and $10,000 by way of transportation costs etc. Together the sums claimed amounts to $126,000. However the High Court disallowed the two sums of $20,000 and $10,000, thereby leaving a claim in the sum of $96,000. However, having discounted the $30,000 figure, the judge proceeded to award the original $126,000. It appears the Judge mistakenly included the $30,000 which he had already said was not recoverable.

41. The $96,000 was composed of agent and promoter's fees from 2003 to 2005. The evidence was that the 1st Respondent's fleet consisted of eight vessels and that the fees payable were $500 per vessel per month, so the amount payable should have been $4000 per month ($500 x 8 vessels) and not the $6000 claimed and awarded. The Appellant himself confirmed this in his evidence when he said that *"The agency fee we agreed on $500 per boat for every month totaling $4000 per month."* The award should not therefore have been calculated on the $6000 per month claimed. On that basis, the amount the judge should have awarded should have been $64,000 and not the $126,000 he did. Of course, the fact the fees were payable "per boat" would suggest that the fees were payable only when the vessels arrived and were operating in Sierra Leone waters, but this was not challenged or taken up during the trial or on appeal.

42. In light of the above, I am of the view that the judge made an error in his calculations and erroneously awarded the sum of $126,000. In such circumstances I think it appropriate case, applying the *Davies* principles, for this Court to intervene to amend the High Court's order

so that the Plaintiff recovers the correct amount that the Court should have awarded, which is the sum of $64,000.

Reliefs against the 2nd and 3rd Respondents.

43. The judge ordered the 2nd and 3rd Respondents to pay to the Plaintiff the value of the 26,000 cartons of fish sold by them on the local market between the period 14 July 2015 to 20 July 2015 i.e. the proceeds of the catch by the eight vessels over that period as appear in Exhs.H 1-3. He also ordered recovery of the value of all hauls of fish obtained by the 2nd and 3rd Respondents from the 1st Appellant's fishing activities until 'payment', although looking at the Plaintiff's Statement of Claim, I believe that should have read 'judgment'.

44. The evidence given by the Plaintiff is that the 1st Respondent would "give" him all the local catch. Taken at face value, it might appear that the Appellant was entitled to be given this as his own share under the agency agreement. The Plaintiff also says that he, Mr Wang and the 2nd Respondent would have shares in Lifeboat Fishing Company Ltd, ("Lifeboat"), which was the company to be set up by the Appellant and through which the agency would be operated. It is clear from the evidence that the agency was to be operated by Lifeboat, which company was to have several shareholders, including the 2nd Respondent and Mr Wang. Interestingly, although the Appellant said that Mr Wang was to be a shareholder, his name does not appear on the draft Memorandum and Articles of Association prepared by the Appellant. So there is a serious inconsistency here with the Plaintiff's claim that they were to form the company jointly. Whilst this fact could have given rise to several questions about exactly what role Mr Wang would have played in a company which was to act as agent for another company of which he was Vice President, that was not an issue investigated by the parties at trial, and it is not for this court to conduct such investigation. The important thing to note however, is that on the Plaintiff's own evidence, the agency would not be personal to the Plaintiff himself, but rather would be with his company, Lifeboat. If so, then the Appellant would personally only be entitled to, at best, a 35% share of the value of the company, and ironically, the 2nd Respondent would have been entitled to a 25% share in the company. Either way, the Appellant would not be personally entitled to all the local catch as he claims, only Lifeboat would, and Lifeboat did not and does not exist and is not the Appellant in this action and the Appellant is not suing in a representative capacity.

45. Even assuming the Plaintiff/Appellant was entitled to the whole of the local catch, it is clear

that he would have had to pay the 1st Respondent for the fish in much the same way as Monza, the 3rd Respondent would under the Dalian-Monza agreement (Exh.'M'). It is clear from clause 11 of that agreement, that the agent only has a first option to buy the local catch from the 1st Respondent at a price to be agreed, failing which the 1st Respondent is free to sell the catch to any other third party. I am conscious that the terms of the Monza agreement cannot be regarded as evidence of what the agreement with the Appellant would have looked like, nevertheless, it is noted that the Appellant did give an indication of to what he meant when he said the 1st Respondent would give him the local catch. By his own evidence under cross-examination by counsel for the 2nd and 3rd Defendants, the Appellant said "*I was going to pay them for the fish. If I am supplied the fish, they will give me an agency to which I will pay.*" (see P 802 of the court record) To my mind therefore, a true interpretation of the evidence would indicate that the Appellant would not have personally been entitled to be 'given' the entire local catch. He/Lifeboat would only have been entitled to buy the catch and retain the profit from the re-sale. He would not have been entitled to the entire gross proceeds of the sale. At best, even assuming the Appellant was personally entitled, he would only have been entitled to 35 % of the catches (assuming no other costs, disbursements or expenditure). In light of the above, the conclusion must be drawn that the judge misunderstood the evidence and made a mistake in ordering that the Plaintiff personally could recover the full value of the entire local catch against the 2nd and 3rd Respondents, I am of the view that in the circumstances, this is an appropriate *Davies v Powell Duffryn* situation where this Court can intervene and amend the order of the trial judge in respect of both orders. For my part, I would amend orders 7 and 8 so that the Plaintiff is entitled to no more than 35% of the profits the 2nd and 3rd Defendants/Respondents made from the sale of the 26,000 cartons of fish and subsequent sales of fish from the Dalian fleet. This figure takes into consideration that even if Lifeboat had come into existence, the Plaintiff as a shareholder would only have been entitled to a 35% share of any profit dividend which the company may have made after deducting expenses and allowing for re-investment in the company.

Damages against the 2nd and 3rd Respondents.

46. The judge ordered the 2nd and 3rd Respondents to pay the Plaintiff the sum of $120,000 by way of damages for inducing the breach of contract by the 1st Respondent. The judge did not say a single word to explain why, having made orders for them to give an account of proceeds of sale and payment of the profits to the Appellant, he found it necessary to make

a further order by way of damages, especially one of such magnitude. It seems clear that the effect of the orders for an account and payment of profits was to disgorge the 2nd and 3rd Respondents of all the profits they may have made under their contract with the 1st Respondent, and have them pay the profits to the Appellant, thereby penalising them for their wrongdoing and placing the Appellant in the position he would have been had the contract not been breached due to the 2nd Respondent's actions. Indeed the claim under this head was against all three Defendants, but the judge made the orders against the 2nd and 3rd Respondents only. Whether this was a mistake also or deliberate is not clear as the judge did not again state why he made that order.

47. Such loss as was claimed by the Appellant against the 1st Respondent was awarded to him in orders for damages, as was his claim for an account for profits against the 2nd and 3rd Respondents. The damages award was compensatory in nature. The order for an account of profits was restitutionary i.e. it was intended to remove from the 2nd and 3rd Respondents any gain made from their unlawful act and hand them over to the Appellant. No evidence was led as to any additional loss the Appellant suffered as a result of the inducement. There therefore seems to be no reason why the judge should have awarded additional damages, especially of such high value.

48. The judge did not say he was awarding the $120,000 as exemplary (punitive) damages, and indeed he could not have awarded such damages as they are not recoverable if they were not specifically claimed. Under HCR Ord.21 R8(3), a claim for exemplary damages must be specifically pleaded and particularised. But even if the judge was minded to order punitive damages he should have made it very clear that that was what he was doing, why he was doing it, and how he came about the figure that he ordered. Yet the judge did not say anything to explain that award. He did not do so, and they were not claimed so it cannot be said that the damages were ordered as exemplary damages.

49. Whilst the courts aim to ensure that successful litigants are properly compensated for their loss, the courts also have to protect unsuccessful parties against double payment. The Court needs to ensure that litigants are not over compensated. Many of the reliefs claimed in litigation are alternative remedies even if they are not pleaded in the alternative. Some remedies are awardable as of right. Others are discretionary. They need to be applied for, but it is in the Court's discretion whether to award them.

50. In this case the Plaintiff claimed several reliefs all but a few of which the judge granted. But it appears to me that in ordering the account and payment of profits as well as ordering high damages, there was an element of double compensation going on. The award of damages, when looked at in relation to the other awards made against the 2nd and 3rd Respondents is difficult to understand. It was, in my view, inordinately high as to be a wholly erroneous estimate of the damage. In my view, if damages are awardable, such damages should be nominal given that the Appellant's loss has already been compensated for by the other orders of the court.

Justice E Taylor-Camara, JA

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