IN THE SUPERIOR COURT OF JUDICATURE

IN THE APPEAL COURT

ACCRA-GHANA

CORAM: GBADEGBE, JA, PRESIDING

PIESARE, JA.

QUAYE, JA.

SUIT NO. CA 99/2002.
23RD APRIL, 2004

ESSMMC SHIPPING CO. LTD. - PLAINTIFF/RESPONDENT

VERSUS:

CUSTOMS EXCISE & PREVENTIVE SERVICE - DEFENDANT/APPELLANT

GBADEGBE, JA: read the following judgment of the Court.

In this appeal which arises from the decision of the High Court, Accra upholding the claim of the respondent the questions which the court has to decide turn on the liability of the appellant regarding the seizure and or confiscation of the respondent's fish, the award of damages and the order that the respondent pays custom duties on the fish the subject matter of the action herein. In the court below, the learned trial judge accepted the respondent's case that that the conduct of the appellant in ordering the seizure of the fish and subsequently dealing with it in a manner inconsistent with the rights of the owner was unlawful and consequently made an award in her favour in damages but directed that the respondent pays the appropriate custom duties on the fish. The said decision has been appealed to this court by both parties to the action, that of the respondent, however, being a cross appeal.

The issues between the appellant and the respondent are set out in their respective pleadings. By his plaint the respondent claimed special damages and interest for the wrongful seizure of 21,620 cartons of fish by the appellant. It was averred on her behalf that in October 1989 she imported into the country a large quantity of fish worth US $657,423.47.When the consignment arrived, the parties herein entered into an agreement whereby the entire quantity was warehoused after the respondent had paid the requisite deposit and entered into a bond for the payment of the appropriate duties thereon. By this arrangement, the duties were to be paid on the fish when and as it was removed from the warehouse. In the course of this

dealing between the parties, the appellant seized 21,620 cartons of the fish and dealt with same without reference to the respondent. The evidence which is available from the record alleges that on the instructions of the Commissioner the entire quantity was processed into animal feed. As a result of this, the respondent mounted the action herein in the court below seeking the reliefs hereinbefore mentioned. In answer to the claim the appellant justified its conduct by relying on the exercise of statutory authority. In particular, it was asserted on its behalf in paragraph 10 of the statement of defence that the respondent had breached the terms and conditions relating to the warehousing and further that the expiry date of the fish having elapsed, there was no option left to the Commissioner than to act as he did in the matter. In our view, at the close of the pleadings the real issue to be determined by the trial court was whether or not the seizure was lawful. If it was that would put an end to the respondent's claim, but if it was not, then the court had to consider the issues of damages and interest as indorsed on the writ of summons.

The judgment of the court below was given on the basis of the finding by the learned trial judge that act of the Commissioner that was based on Exhibit M was derived neither from any statutory authority nor the relationship between the parties under which the appellant allowed the respondent to have her consignment of fish warehoused in an approved warehouse pending the payment of custom duties thereon. This finding, it is to be observed, had the effect of rejecting the appellant's defence to the action. In the said exhibit which was the foundation for his subsequent letter, exhibit N, on which the wrongful act of seizure giving rise to the liability of the appellant was planked, the Commissioner contrary to the mandatory requirements of the applicable law did not to refer to the particular section of the law namely NRCD 114, the Customs and Excise Decree, 1972, under which the seizure was effected. That a seizure under the applicable law could only be in relation to an act in the nature of an offence arising under section 49 of the said law to justify the invocation of section 84 is a matter which apart from statute appears clearly on the face of exhibit M, the document initiating the seizure which is a statutory form described as Customs and Excise Form number 6: see- Comptroller of Customs and Excise v Coker [1975]2 GLR 418. We would like to say that having regard to the effective date that the acts on which this case turns were committed the relevant law is NRCD 114 and not PNDC Law 330, the latter legislation having come into force in 1993 long after the events which have provoked the instant action. Therefore, we reject the attempt by learned counsel for the appellant in his submissions in these proceedings to justify the acts which have resulted in this action by resort to PNDC Law 330.

This being the position, the court next turns its attention to the specific requirement endorsed on the statutory form which demands of the seizing authority to "state the reason for the seizure and the relative section of the Customs and Excise Decree 1972, (NRCD114)." Since there was a non-compliance with the enabling law by the authority purporting to effect the

seizure there can be no argument that from that moment whatever was done pursuant thereto lacked statutory authority and consequently the finding of the court below that the said act was wrong and unlawful is one which is unassailable. The court has also taken note of exhibit N of the 22nd of May 2000 which purported to cancel the seizure notice contained in exhibit M and instead ordered a re-exportation of the fish on which this action turns by the 31st of May and wish to say that like exhibit M before it, there is no statutory authority in support of the said conduct that we consider rash. It would appear to us that some time after the notice contained in exhibit M was issued, the Commissioner must have observed that the same was ineffectual as far as the requirements of the applicable law were concerned, a situation which must have compelled him to as it were deal with the matter plainly without a pretence to legality; for clearly there was none on which he could have based his action. If we may observe of the alleged direction to re-export the fish, we think that the condition precedent to the exercise of any such power as provided for in section 144 of the Customs and Excise Decree, NRCD 114 was never satisfied namely the revocation of the appointment of the private warehouse and note further that even in such a case the period that the law provides for the exportation is three months and not the fourteen days ordered by the Commissioner in exhibit L. In the circumstances, unless the Commissioner's conduct is justified on any right derived from the agreement relating to the warehousing, we think that there is no doubt that in dealing with the fish in the manner which has unfolded from the evidence the Commissioner acted unlawfully in the matter for which the appellant cannot escape liability. Flowing from these, it is observed of the arguments submitted to us by the appellants regarding the seizure that in so far as they seek to impeach the decision of the trial court they are without any merit and the grounds touching same are hereby dismissed.

The court wishes also to say regarding the above point that on the face of exhibit M , the reason clearly stated theruender namely "Commissioner's memo of 19/4/90" which must have been written after cancelling out the statutory requirement regarding the specification of the relevant section of the enabling law that might have been contravened to justify the seizure plainly shows that in ordering the seizure the Commissioner was acting without legal authority and puts beyond doubt any pretence that was subsequently claimed both in the court below and before us on his behalf as to the legitimacy of his conduct. It is plain without argument that a careful and dispassionate reading of the said memo which was admitted in evidence as exhibit L does not satisfy the requirements of the Customs and Excise Decree, 1972, NRCD 114 that for a seizure made under section 84 to be lawful it must be in relation to an offence committed under section 49 of the decree. As said earlier on in the course of this delivery, basing the seizure and or confiscation on exhibit N is also just as bad as that before it and affords the appellant no answer to the claim contained in the respondent's plaint as far as its liability for the seizure goes. Therefore, the only point of substance arising from the appellant's onslaught on the judgment the subject-matter of this appeal which the court has to consider is that relating to the award of

damages. Accordingly, the court does not desire to examine the other reasons canvassed in this appeal for the seizure; for in its opinion the appellant's conduct in relying on the memo of the Commissioner in exhibit M creates estoppel by conduct against it with the result that by the provisions of section 26 of the Evidence Decree, NRCD 323 this court is precluded from finding that the reason for the action which has provoked the action herein is one other than that specified in the body of exhibit M.

This then leads us to the other aspect of these proceedings namely the award of damages and the direction to the respondent-cross-appellant to pay the relevant custom duties in respect of the fish wrongfully seized. These raise two separate considerations namely whether the quantum of damages awarded in favour of the appellant was right and lastly whether the court below was right in making an order that the respondent-cross-appellant pays the custom duties in respect of the fish wrongfully seized with interest? Commencing from the award in damages, we are of the view that the effect of the unchallenged evidence contained in exhibit M is that the quantity of fish seized and subsequently dealt with by the appellant was 21,620 cartons. In the face of this unchallenged evidence the next question to determine is whether the court below used the correct multiplier in coming to the quantum of damages? In its delivery, which is on appeal in these proceedings the learned trial judge used the unit of $11.99 for each carton. True it is from the claim that there were two species of fish that were warehoused-mackerel and herrings with each having a different value the former being $12.52 and the latte r$11.99. In his computation, the learned trial judge at page 94 of the record of proceedings used the lower figure in arriving at his decision. Our view of the matter as far as the multiplier goes is that in the absence of strict proof as to the exact species of fish which was seized the use of the lower figure was right and in accord with common sense and the justice of the matter. We, however, think that by rounding up the total figure the court below came to a value which exceeds the actual total when the multiplier of the unit cost per carton is used. By a simple arithmetical calculation the cost comes to 11.99 x 21,620 which is $259,223.80.

We think that whiles this represents the cost price, the damages which the appellant suffered as a result of the unlawful act of the respondent is not the purchase price of the fish but the fair market value of the fish which but for the wrongful act of the appellant she would have earned there being no dispute from the available evidence that the fish was imported for commercial purposes. Also lost to her would be the opportunity of utilising the amount which would have been realised from the sale over the years from 1990 to date. In the circumstances, the court thinks that it is just to make an order that the said amount attracts interest at the prevailing bank rate in the United States from the date of the wrong on which this action has turned. A careful and anxious consideration of the evidence contained in the record of proceedings compels us to reckon the effective date of the seizure as the 1st of June 1990.In our view the jurisdiction to award interest which is derived both from equity and statute namely LI 1129, serves the purpose of

adequately compensating the party who has been wronged for the loss which she must have been put to by being deprived of the use of her money for a considerable period. On this point we may refer to the case of Wellensteiner v Moir Number 2 [1975] 1 All ER 849 at 856 wherein Denning, MR observed as follows:

'In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money years later- is by no means adequate compensation especially in days of inflation."

See also- Harbutt's Plastscine v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225 at 236.

We think that if indeed the fish was processed into animal feed as the appellant alleged in its evidence, there must have inured to it some income which properly speaking belongs to the respondent and that it would be unjust after it has kept the proceeds since June 1990 to simply order its refund to the respondent without interest. In order to ensure that the respondent is justly compensated by the appellant we further make an order that the computation of interest on the judgment debt subsists until the final payment of the amount: see (1) Hansem Enterprises Limited v IBM World Trade Corporation, an unreported judgment of the Supreme Court in Civil Appeal Number 2/98 dated 16th May 2000. Accordingly, in place of the damages awarded by the court below and the consequential order for payment of interest we hereby substitute an award in the sun of $259,223.80 with interest at the bank rate allowed on the US dollar from the 1st of June 1990 until the date that the amount is finally paid. We make bold to say that it is competent for the court where the currency of the contract is one other than the cedi to make an award by way of damages in that currency as was decided by the Supreme Court in the case of GPHA v Issoufou [1993-94] 1 GLR 24, a decision which followed the court's earlier pronouncement on such awards in the case of Royal Dutch Airlines (KLM) v Farmex Ltd. [1989-90] 2 GLR 623. This notwithstanding, it is observed of the attack made on the judgment of the court below regarding the damages being denominated in the dollar that a careful reading of the award at page 94 directed its conversion into the local currency and that in the premises the criticism of the delivery of the court below as far as this aspect of the matter is concerned is not derived from a fair reading of the record and same is dismissed.

In our view there is no point of substance in the complaint that the amount allowed was higher than what was claimed. We think that this was an error in the proceedings which could have been corrected by the trial court under Order 28 rule 12 of the rules as contained in LN 140A. Besides, we think that there is ample power in this court under rule 31(a) and (b) the Court of Appeal Rules, CI 19 either on its own or upon an application in that behalf to correct any error in the proceedings or make any such order as may enable the real matter in controversy between the parties to be determined and that looked at either way the allowance by way of the award of the higher figure

does no injustice to the appellant who contested the action knowing fully well that the claim as well as the evidence in support of same were in relation to the 21,620 cartons of fish which they had dealt with in an unlawful manner. We think that this complaint is purely technical and does no justice to either party and cannot lend our support to a situation in which the obvious requirements of justice are sought to be circumvented by a resort to mere technicalities: see Gbogbolulu (Chief) v Hodo (Chief) (1941) 7 WACA 164 at 165.

This leads us finally to the cross appeal of the respondent. The gist of this is that having found that the fish was wrongfully dealt with by the appellant the trial court ought not to have made an order directed at her to pay the relevant custom duties. It is to be noted of this particular head of award that although there was no specific clam made by the appellant regarding the payment of custom duties by the respondent the learned trial judge must have come to the opinion that on the facts the justice of the matter required same and we think that he was justified in so doing by virtue of the provisions of Orders 20 rule 5 and 63 rule 6 of LN 140A. Having said this we find it convenient to say at once that there is no merit in the cross-appeal and proceed therefore to dismiss the said ground without a detailed examination of same. The contention of learned counsel for the respondent regarding the order to pay custom duties in our view stretches the matter too far and we think that on this point his learned colleague on the other side of the aisle so to say is right.

Closely linked to this is the award of interest on the amount to be paid as duties. In our opinion the payment of the appropriate custom duties should not attract interest because it is the appellant whose unlawful conduct has resulted in the delay in the payment of the duties There can be no doubt from the record of proceedings that but for the act of the appellant which has provoked the action herein the respondent would have made good his obligation regarding the payment of custom duties on the fish under the warehousing agreement .Since on the admitted facts no fault can be attributed to the respondent, we think that the correct order ought to have been that the respondent pays only the appropriate duties on the 21,620 cartons of fish as at the date of the seizure. In the computation of the duties payable we think the entire quantity of fish should be deemed to be herrings in order to ensure consistency with the figure used in computing the value of the fish wrongfully dealt with by the appellant.

For the reasons stated above, we dismiss the appeal of the appellant as well as the cross appeal of the respondent and affirm the decision of the court below save as to the variations relating to the award of damages and the payment of interest on the custom duties by the respondent.

N.S. GBADEGBE
JUSTICE OF APPEAL

I agree. **E.K. PIESARE**
JUSTICE OF APPEAL

I also agree. **G.M. QUAYE**
JUSTICE OF APPEAL