

SUPREMECOURTOFNIGERIA
24THFEBRUARY, 1995, SC.265/1991
CORAM:- M.BELLO CJN, S.M.A.BELGORE, I.L.
KUTIGI, Y.O.ADIO, A.I.IGUH, JJSC.

CHIEFPAULORDIA

(Trading under the name and APPELLANT
style of Central Sawmill Co.)

AND

PIEDMONT (NIGERIA) LTD RESPONDENT

APPEALS - Inconsistency - Allegation of inconsistency in plaintiff's appeal
- Whether the proposition was justified.

APPEALS - Detinue - Resolution by Court 'of Appeal - That action was based
on detinue - And not conversion as found by trial court - Dismissal of the appeal
without appropriate assessment of damages - is not proper.

EVIDENCE - Documents - S.90(4) Evidence Act - Whether document prepared
by a 'witness - But not signed by that witness - Was properly admitted in
evidence.

EVIDENCE - Unchallenged evidence - Admission of document by trial court
- In Spite of defendant's opposition - Failure to contradict its contents - Whether
that evidence remained unchallenged.

DAMAGES - Detinue - Plaintiff normally entitled to his untraversed claim for
damages - But in detinue - Only reasonable damages will be awarded - For the
defendant's retention of the chattels.

DAMAGES - Mitigation - Plaintiff to take steps towards mitigating his loss - As
court would only award damages for a reasonable period.

TORTS - Detinue - Erroneous finding that action was based on conversion -
Action rightly held to be in detinue by Court of Appeal - Need for appropriate
assessment of damages.

TORTS - Detinue - Where plaintiff is entitled to the return of his property - Following Supreme Court's judgment - Defendant's failure to return it on demand - Gives rise to an action in detinue.

TORTS - Detinue action - Plaintiff is entitled to a return of the chattel plus damages for its retention - Or its value plus damages.

FACTS

The plaintiff/appellant bought two galvanised steel barges (boats) from the liquidator of a company. By the time he sought to take delivery, the barges had been taken away by the defendant/respondent who put them to use. Plaintiff instituted an action before Sapele High Court in the former Mid-Western State, but his action was dismissed. Plaintiff's appeal to the Supreme Court was allowed by consent judgment. Plaintiff complied with the said judgment by paying the total sum of N1,040.00 into the defendant's account so as to take possession of the barges. The defendant returned the money and refused to deliver the barges to the plaintiff. This made the plaintiff to file this action before the High Court.

The trial court found in favour of the plaintiff, basing its finding erroneously in conversion rather than detinue. It awarded N2,000.00 to plaintiff as damages for loss of use for four days detention. Plaintiff appealed to the Court of Appeal against the award of damages. Though the court below found that the plaintiffs' action is in detinue and not conversion, it dismissed the plaintiffs' appeal on the ground that Exhibit P1 was not properly before the court. Exhibit P1 was the document that proved the value of the barges. The plaintiff has further appealed to the Supreme Court to determine inter alia whether the plaintiff did not strictly prove the value of the barges.

HELD (Unanimously allowing the appeal per **Lead judgment of BELGORE JSC**)

Whether plaintiff is entitled to the return of his property

1. Since the Supreme Court entered the consent judgment the plaintiff has been entitled to the return of the barges. He made the demand for their return which was ignored by the defendant. His action, rightly, is in detinue. Nowadays it is even possible to ask for specific return of the chattel if it is still in possession of the defendant rather than its value, and damages for its detention. But more

appropriately it is up to the plaintiff to decide course to follow.(P. 585 E)

Action based on detinue and not conversion

2. The Court of Appeal having resolved the issue as that based on detinue curiously erred by dismissing the appeal of the plaintiff. Conversion as distinct from detinue attracts damages in the form of value of chattel up to the time of conversion; in detinue it is as at the date of judgment. Trial Court refused to award damages for detention of the chattels for more than four days believing and so holding that the action was based on conversion. Court of Appeal, rightly in my view held the action was in detinue but it failed to proceed on the appropriate assessment of damages. The Court of Appeal erred in this regard. (P. 586 A)

Documents - S. 90(4) Evidence Act

3. In the realm of company's administrative practice it is not unusual for the Managing Director to sign documents on behalf of the company when such documents are produced by his subordinates. That is the purport of Section 90 (4) Evidence Act. Exhibit P1 was properly admitted in evidence The Exhibit put the value of a similar barge at N315,530.00, that evidence remains uncontradicted That was the value at the time of the action and at the time of the judgment. (P. 587 C)

Unchallenged evidence

4. Since the trial Court admitted Exhibit P1 the defendant never made any attempt to contradict its contents and the value placed by plaintiff on each barge has remained unchallenged. (P. 587 E)

Allegation of inconsistency in plaintiffs appeal

5. I cannot find anything in the grounds of appeal and issues for determination in the appellant are briefs of argument that are inconsistent with each other. A lot was attempted to be made out of this proposition but certainly not justified by the facts of this case. As for concurrent findings of the two lower Courts, they are based on law not on facts as the issue was whether this matter was in conversion or in detinue. (P. 587 G)

Detinue action - Plaintiffs entitlement

6. In an action like this, where chattel is withheld by defendant from the plaintiff, the action in detinue is for either the return of the chattel plus damages for its retention; or the value of the chattel plus damages for its retention. Thus the

defendant even cannot deprive the plaintiff his right to damages for detention of the chattel simply because he was not earning anything from its use. (P. 588 A)

In detinue only reasonable damages will be awarded

7. In the present case the plaintiff merely showed by pleadings what was likely to be his earning per day on each barge and without more; this was speculative evidence. By normal principle of pleadings the plaintiff without more would have been entitled to his claim once his averment is untraversed or un rebutted by evidence. In a case in detinue, however, the Court will award what is reasonable as damages for retention of the chattel by the defendant. The measure of damages in detinue therefore has always been the value of the chattel (if unreturned or lost) and the damages for its detention. (P. 588 C)

Damages - Plaintiff to mitigate his loss

8. In all civil matters where damages have been suffered the complainant must try in earnest to mitigate his loss. Once the plaintiff discovered he could not recover the barges despite the consent judgment at the Supreme Court, having sent the N900.00 ordered in that judgment to the defendant and the defendant refusing to accept the money and at the same time refusing to release the barges to the plaintiff, he ought to have taken steps to mitigate his loss. It is in the light of this that I find one hundred and eighty days (six months) as reasonable period for the plaintiff to have adjusted himself to the fact that the barges could not be returned to him and for him to mitigate his loss.
(P. 588 G)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Basis of action in detinue

Detinue is based on history of development of Common Law. It is based on the defendant's wrongful detention of plaintiffs' chattel, with the evidence of defendant's refusal to deliver up the chattel on demand by the plaintiff. The redress is not strictly for the wrong but for the return of the chattel or its value; and since the second half of last century the loss of use of the chattel (See Common Law Procedure Act 1852 for the transformation that took place in the issue of detinue). Detinue is now an action only in tort for failure to deliver up the plaintiffs' chattel and it entails claim for the return of the chattel or its value and damages for its detention. (P 585 C)

2. General principle of claim for damages contrasted

But all along, the principle is that in a claim for damages, whether in tort or in contract the plaintiff recovers only what he has lost; this is subject to the rule of remoteness. Thus where the defendant has deliberately refused to deliver up the chattels and in the process has continued to make profit by its retention, he will pay the plaintiff damages which will be substantial; this is not the case here. But where the plaintiff has chance to mitigate his damages, the Court will give what is reasonable in the circumstance. (P. 588 E)

C BELLOCJN

3. Action in detinue - What the court may order

It is pertinent to emphasize that in an action in detinue, the court may order the return of the chattel and damages for its detention. In the alternative, the court may order as damages payment of the value of the chattel and also damages for the loss of its use. The measure of damages for the chattel is its value or the cost of its replacement at the time of its recovery while the measure of damages for the loss of use is the actual loss suffered by the plaintiff for its detention which depends on the circumstances of each case. (P. 591 F)

E IGUJHJC

4. Difference between detinue and conversion

The gist of liability in detinue is the wrongful detention of the plaintiff's chattel by the defendant after the plaintiff had made a demand for its return. In conversion, on the other hand, the person entitled to the possession of a chattel is permanently deprived of that possession and the chattel is converted to the use of some one else. In the latter case, the wrong is not merely an interference with the Plaintiffs possessory interest in his chattel but also the injury to his right or title in them. (P. 593 D)

G **5. Assessment of damages in detinue differs from that in conversion**

There is a definite difference in law in the assessment of damages in an action in detinue as against an action in conversion. The law in detinue is the recovery of the chattel itself or if it cannot be returned, then its value as at the date of judgment, not the date of the defendant's refusal to return it. The plaintiff is additionally entitled to damages for its detention. (P. 594 E)

REPRESENTATION

T.J.O. Okpoko, SAN, with Chuks Mogbolu for the Plaintiff/Appellant.

K.S. Okeaya - Inneh, SAN with O. Uzzi, A.O. Okeaya-Inneh
and Miss I.O. Okeaya - Inneh, for the Defendant/Respondent

CASES REFERRED TO

- Odumosu v. A.C.B. (1976) N.S.CC. 635 B
 Resenthal v. Alderton and Sons Ltd. (1946) K.B. 374.
 Hall Ltd. v. Barclay (1937) 3 All E.R. 620
 Okulaja v. Haddad (1973) 11 SC. 357
 Olukade v Alade (1976) 1 All N.L.R. 67
 Strand Electric Engineering Co. Ltd. v. Brisfold Entertainments Ltd (1952) 1 All ER 796 C
 British Westinghouse Co. Ltd. v. Underground Railways Ltd. (1912) A.C. 673.
 General and Finance Facilities Ltd. v. Cooks Cats (Romfore) Ltd. (1963) 1 WLR 644. 650.
 Okeke v. Obidipe (1965) WMLR 113, 115 D
 Obembe v. Wemabod Estates Ltd (1977) 5 SC. 115, 140.
 Elf v. Sillo (1994) 1 NWLR (Pt. 350) 258, 263
 Liesborsch, Dredger v. Edison S.S. (1933) A.C. 449

STATUTES REFERRED TO

- Evidence Law of Bendel State s.90 E
 Court of Appeal Act s. 16

LEAD JUDGMENT BY BELGORE JSC

The appellant bought two galvanised steel barges from the liquidator of a company that constructed the bridge on Ethiopie River. That was in 1978, and the two barges were moored near the new bridge. By the time the plaintiff sought to take delivery of the barges he discovered they had been taken away by the defendant to Ologbo where the defendant put them to use. The plaintiff then instituted an action to recover the barges at Sapele in the High Court of the former Mid-Western State but his action was dismissed. He then appealed to the Supreme Court where by consent judgment it was ordered as follows: F

“(a) The plaintiff/appellant shall pay to the defendant/respondent the sum of N900.00 being the present price agreed to by the parties in respect of both barges constituting the subject matter of appeal. H

(b) After payment of the said amount of N900.00 by the plaintiff/appellant to the 2nd defendant/respondent, the 2nd defendant/respondent

shall permit the plaintiff/appellant to take possession of the said barges and remove same for his own use and benefit.

(c) The plaintiff/appellant shall pay to the 2nd defendant/respondent the cost of this appeal assessed at N500.00."

B The plaintiff/appellant promptly complied with the above judgment by paying the sum of N1,040.00 into the defendant/respondent's account (i.e. N900.00 and cost of N500.00) which the respondent refused to accept by sending a cheque for the same sum back to him on 9th April, 1976. The appellant then paid this same sum into the Registry of the High Court in respondent's
C favour but despite notice to this payment, the respondent still refused to collect the sum. The appellant then demanded the return of the barges as ordered by the Supreme Court but this demand was not heeded. This led to the suit that found its way from the High Court through the Court of Appeal to this court.

D The High Court entered judgment in favour of the plaintiff on the issue of liability for not handing over the barges to the appellant, finding in conversion rather than in detinue. He awarded N2,000.00 as damages for loss of use for four days detention. Against the award of damages the plaintiff/
E appellant appealed to the Court of Appeal which dismissed the appeal; he has thus with leave appealed to this court. One of the reasons why the Court of Appeal dismissed the appeal was that the evidence of the cost of each barge or its replacement was not before the court and that Exhibit P1, a quotation for a new barge from the boat builders was not properly before the court. The appellant therefore in support of his grounds of appeal formulated the follow-
F ing issues for determination:

"1. Were the learned Justices of the Court of Appeal right to affirm the judgment of the learned trial Judge assessing and awarding damages on the basis of plaintiff's case being founded on conversion which their Lordships held to be wrong?

G *2. Were the learned Justices of the Court of Appeal right in their view that the plaintiff did not prove strictly the value of the barges to which the plaintiff is entitled?*

*3. Having found that plaintiff's Claim is based on detinue, were the learned Justices of the Court of Appeal right to say that the plaintiff did not
H appeal against the failure to order return of the barges when there was no such failure?"*

Court of Appeal adverted to the issues between the parties when it held:

"Where, however, the learned Judge appear to have gone wrong, in my respectful view, was when he decided that appellant's action was more in

the nature of conversion rather than detinue. It is crystal clear from appellant's claim that he based his action on detinue and not on conversion." By Supreme Court judgment in suit SC/384/74 "Exhibit B2" the appellant was entitled to the ownership and possession in respect of the two barges and pay N900 to the respondent. Notwithstanding the plaintiff paying this amount to the defendant, the latter impudently refused handing over ownership ..." B
See Page 156 Line 39 to Pages 147 Lines 1-10."

There was a marked distinction between the first action which went to Supreme Court from High Court when there was no intermediate appellate court and the present action now in issue. The previous action was based on conversion but once the Supreme Court entered the consent judgment al- C
 luded to earlier the present action has taken a new turn.

Detinue is based on history of development of Common Law. It is based on the defendant's wrongful detention of plaintiff's chattel, with the evidence of defendant's refusal to deliver up the chattel on demand by the D
 plaintiff. The redress is not strictly for the wrong but for the return of the chattel or its value; and since the second half of last century the loss of use of the chattel [See common Law Procedure Act 1852 for the transformation that took place in the issue of detinue]. Detinue is now an action only in tort for failure to deliver up the plaintiff's chattel and it entails claim for the return of E
 the chattel or its value and damages for its detention.

Since the Supreme Court entered the consent judgment the plaintiff has been entitled to the return of the barges. He made the demand for their return which was ignored by the defendant. His action, rightly, is in detinue. Nowadays it is even possible to ask for specific return of the chattel if it is still F
 in possession of the defendant rather than its value, and damages for its detention [See for example the analysis in General and Finance Facilities Ltd VS. Cooks Cars (Romford) Ltd. (1963) 1 WLR 644, 650.] But more appropriately it is up to the plaintiff to decide which course to follow among the following:

1. value of chattel and damages for its detention. The value of the G
 chattel is as proved at the time of judgment in trial court and the onus is on the plaintiff to prove the value. He is also to show by evidence the damage suffered by the detention.

2. the return of the chattel and damages. In this case the judgment H
 on proof of the detention is for the return of the chattel and damages for its retention.

3. for the return of the chattel or its value as assessed, and damages for its detention. This seems to be the best form of action for if the chattel has

otherwise been removed from jurisdiction or hidden away and out of sight of the sheriff there is no alternative other than a distraint for the value of the chattel as assessed plus of course damages for its detention.

The Court of Appeal having resolved the issue as that based on detinue curiously erred by dismissing the appeal of the plaintiff. Conversion
 B as distinct from detinue attracts damages in the form of value of chattel up to the time of conversion; in detinue it is as at the date of judgment. Trial court refused to award damages for detention of the chattels for more than four days believing and so holding that the action was based on conversion. Court
 C of Appeal rightly in my view held the action was in detinue but it failed to proceed on the appropriate assessment of damages. The Court of Appeal erred in this regard.

The next question is whether the Court of Appeal was right in holding that the plaintiff did not prove strictly the value of the barges. Court of Appeal relied on the English case of *Hali v. Barclay* (1937) 3 All ER 620, 623
 D that when goods in issue are not readily available in the market the claimant is entitled to the cost of replacement of the good. The only evidence of the plaintiff on the value of the barges (which certainly are not readily available in the market) is that of Julius Olofinsao who tendered Exhibit P1. quotation for the building of similar barges if ordered through Thermosteel Nigeria Limited.
 E It is pertinent to reproduce part of this witness' testimony, to wit.

"Our line is a specialised one. I see Exhibit P1. It was signed by the Managing Director Mr. Guido Zamblere. I did not sign Exhibit P1. I know him very well. He is my Chief Executive. The said Managing Director is trained in this special field. He is still in the service of the Company in this country."
 F

Earlier this witness testified that he actually prepared Exhibit P1. There was objection to the tendering of Exhibit P1 the defendant relying on S. 90(3) Evidence Law of then Bendel State. The objection was overruled. The main purport of the objection is that Exhibit P1 was signed by Mr. Zamblere and thus he was the maker and not Mr. Olofinsao; that extrinsic evidence
 G cannot be used to contradict what is glaring on the document. Section 90 provides for admissibility of certain facts e.g. a statement in document, if the maker is called as a witness. The contention here is that Exhibit P1 was not signed by Mr. Olofinsao (P. W.1) and thus he was not the maker and as Mr. Zamblere was not called as a witness Exhibit P1 was inadmissible. It is clear
 H that the respondent made too much over the Exhibit P1 in relation to P.W.1. P.W.1(Olofinsao) said he made the document for Mr. Zamblere, his Managing Director to sign. Evidence Act in Section 90 (4) provides:

"(4) For the purposes of this section a statement in a document shall not be deemed to have been made by a person unless the document or

material part thereof was written made or produced by him with his own hand or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible”.

Mr. Olofinsao (P.W.1) stated clearly in cross-examination and in his evidence in chief that he was responsible for the accuracy of Exhibit P1 as he prepared it for his Managing Director to sign. Exhibit P1 was in response to an inquiry and request, for quotation for two barges identical to the ones in issue. It did not seem P.W.1 prepared it for purpose of litigation; the suggestion was even never made to him in cross-examination. In the realm of company’s administrative practice it is not unusual for the Managing Director to sign documents on behalf of the company when such documents are produced by his subordinates. That is the purport of Section 90 (4) Evidence Act. Exhibit P1 was properly admitted in evidence. The Exhibit put the value of a similar barge at N315,530.00 that evidence remains uncontradicted. That was the value at the time of the action and at the time of the judgment. See Odulaja V. Haddad (1973) 11 S.C. 357, 362; Okeke V. Obidife (1965) NMLR 113, 115; Yesufu Na Maduga v. Hamza Mohammed Kofar Bai (1987) 3 NWLR (Pt.62) 635, 642. Since the trial court admitted Exhibit P1 the defendant never made any attempt to contradict its contents and the value placed by plaintiff on each barge has remained unchallenged. Obi Obembe v. Wemabod Estates Ltd. (1977) 5 S.C. 115, 140.

As for the third issue for the appellant the Court of Appeal was of the view that there ought to be an appeal against failure of trial court to make an order for return of the barges. It is clear trial court ordered only the payment for value of the barges plus four days damages for their detention. It is to be observed that the appeal to Court of Appeal, and to this court, is on inadequacy of damages. Once Court of Appeal found the matter to be an issue not in conversion but in detinue, it ought to have proceeded by virtue of section 16 Court of Appeal Act to make the order the trial court ought to have made had it found in detinue, i.e. the value of the chattels and damages for their detention.

With greatest respect to counsel for the respondent, I cannot find anything in the grounds of appeal and issues for determination in the appellant’s brief of argument that are inconsistent with each other. A lot was attempted to be made out of this proposition but certainly not justified by the facts of this case. As for concurrent findings of the two lower courts, they are based on law not on facts as the issue was whether this matter was in conversion or in detinue. Elf vs. sillo (1994) 1 NWLR (Pt.350) 258, 263 refers to concurrent findings of facts only and it is not relevant to this case. So are several similar

cases cited but not having any bearing on the present case. Issue of law can be raised at any stage.

In an action like this, where chattel is withheld by defendant from the plaintiff, the action in detinue is for either the return of the chattel plus damages for its retention; or the value of the chattel plus damages for its retention.

B Thus the defendant even cannot deprive the plaintiff of his right to damages for detention of the chattel simply because he was not earning anything from its use. [See NO.7 Steam Sand Pump Dredger (Owners) vs Greta Holme (Owners). The Greta Holme (1897) A.C. 596 for Lord Halsbury's speech].

In the present case the plaintiff merely showed by pleadings what was likely to be his earning per day on each barge and without more; this was speculative evidence. By normal principle of pleadings the plaintiff without more would have been entitled to his claim once his averment is untraversed or unrebutted by evidence. In a case in detinue, however, the court will award what is reasonable as damages for retention of the chattels by the defendant.

D The measure of damages in detinue therefore has always been the value the chattel (if unreturned or lost) and the damages for its detention. Each case is determined by its facts and special circumstance as it is still an uncharted field Strand Electric etc CO. v. Brisford Ltd (1952) 1 All ER 796,799.

But all along, the principle is that in a claim for damages, whether in tort or in contract the plaintiff recovers only what he has lost; this is subject to the rule of remoteness. Thus where the defendant has deliberately refused to deliver up the chattels and in the process has continued to make profit by its retention, he will pay the plaintiff damages which will be substantial; this is not the case here. But where the plaintiff has chance to mitigate his damages, the court will give what is reasonable in the circumstance. See Liesbosch, Dredger v. Edison 5.5. (1933) A.C. 449; Slater v. Hoyle & Smith (1920) 2 K.B. 11. There is no question here of the defendant being presumed to hire the barges from the plaintiff because the defendant seemed to have disposed of the barges earlier.

G In all civil matters where damages have been suffered the complainant must try in earnest to mitigate his loss. Once the plaintiff discovered he could not recover the barges despite the consent judgment at the Supreme Court, having sent the N900.00 and N500.00 ordered in that judgment to the defendant and the defendant refusing to accept the money and at the same time H refusing to release the barges to the plaintiff, he ought to have taken steps to mitigate his loss. It is in the light of this that I find one hundred and eighty days (six months) as reasonable period for the plaintiff to have adjusted himself to the fact that the barges could not be returned to him and for him to mitigate his loss.

I therefore find merit in this appeal. I set aside the decision of Court of Appeal which dismissed the appeal before it. I allow this appeal and make the following orders in consequence:

1. The defendant/respondent to pay N315,530.00 for each barge, making a total of N631,060.00 for the two barges as at the date of judgment at the trial court. B

2. The defendant/respondent to pay N500.00 per day for one hundred and eighty days being damages for retention of the barges that being a reasonable period within which the appellant ought to have concluded mitigating his loss as a result of the detention of the barges. This amounts to N90,000.00. C

3. I award N 1,000.00 as costs in this court N300.00 as costs in the Court of Appeal and the costs awarded by the trial High Court is reinstated.

BELLO C.J.N

I have had the advantage of reading in advance the lead judgment of my learned brother, Belgore, J.S.C. I agree. I also allow the appeal and set aside the judgment of the Court of Appeal affirming the award of damages by the High Court. Judgment shall be entered for the plaintiff/appellant in the sum of N631,060 being the cost for the replacement of the barges and in addition in the sum of N90,000 for the loss of their use for six months. D

I shall only add a few words on the measure of damages in actions in conversion and detinue. In a judgment by consent delivered on 17th December, 1975 the Supreme Court ordered the defendant/respondent to return the two barges to the plaintiff/appellant and since then the former failed to return either. In consequent thereof, the plaintiff/appellant instituted this suit on 23rd March, 1985 claiming in his Amended Statement of Claim: E

(a) An order enjoining the defendant to deliver to the plaintiff the two galvanised steel barges or two identical galvanised steel barges, failing which their value N2,000.000 F

(b) Loss of use of the said barges since 10/4/76 N525,000.00 G

In his judgment, the trial Judge correctly stated the principles for the assessment of damages in actions in conversion and detinue as follows:

"It is my view, that the right thus created judgment (Exhibit P2), can be anchored on Detinue, conversion or trespass. These three actions have one common factor that is there must be wrongful interference with the plaintiffs' goods possession or right to possession. The other incedents are different and the measure of damages are not the same. It is settled, for example, that where the action is founded on detinue, the court may award H

the loss of use up till the date of judgment since the plaintiff claims for the return of the said goods or the value of the said goods. In such a case, the measure of damage if the goods are of commercial nature, will be based on the market value of the goods so detained up to the time of judgment. But if
 B *the action is founded on Conversion, the loss of use if the Goods are of commercial nature or of hiring, the measure of damage will be based on the market price of the goods up to the time of conversion."*

After reviewing the evidence, he concluded that the plaintiff/
 C appellant's claim was founded on the right created by the consent judgment hinged on conversion and accordingly he awarded to the plaintiff/appellant N8,000.00 as damages for conversion.

"1. The sum of N4,000.00 being the value of the two galvanised barges at N2,000.00 each.
 D *2. The sum of N4,000.00 for loss of use from 5/4/76 to 9/4/76 at N500.00 per day per barge. N4,000.00"*

On appeal against the judgment of the trial court, the Court of Appeal held, quite rightly in my view, that the Judge had erred in law in holding the plaintiff/appellant's claim to have been founded on conversion. Delivering
 E the lead judgment to which Salami and Musdapher, J.C.A., agreed, Ogundare J.C.A., as he was then observed as follows:

"Where, however, the learned Judge appears to have gone wrong, in my respectful view, was when he decided that appellant's action was more in the nature of conversion rather than detinue. It is crystal clear from
 F *appellant's claim that he based his action on detinue and not on conversion.*

By Supreme Court judgment in Suit SC./384/74 "Exhibit B2" the appellant was entitled to the ownership and possession in respect of the two barges and pay N900.00 to the respondent. Notwithstanding the plaintiff paying this amount to the defendant, the latter rather impudently frustrated
 G *that judgment by claiming in Exhibit P4 that it had sold the Barges."*

However, the Court of Appeal erred in law in holding that the plaintiff/appellant did not discharge the burden of proof in respect of the value of the barges and in affirming the award of N8,000.00 made by the trial Judge for the following reasons stated by the Court of Appeal thus:

H *"In the absence of any other evidence as to the value of the goods, the trial court was left with the value to the appellant of N900.00 for the two barges as contained in the judgment of the Supreme Court (Exhibit P1) and the value of N2,000.00 per barge given by the defence as the price for which*

the respondent alleged it sold the barges. The learned trial Judge chose the figure more favourable to the appellant. It is my view that the learned Judge has been most fair to the appellant notwithstanding his failure to discharge the duty on him to prove the value of the barges at the time of the detainee complained of Damages for loss of use.

The learned trial Judge awarded the sum of N4,000.00 for loss of use for 4 days at the rate of N500.00 per barge per day. The appellant complained about the award as being too small. While a plaintiff in an action of detainee is entitled to damages for the detention of his goods, damages for loss of use are not, however, recoverable unless the loss of use is consequential on some wrongful damage to the goods. There was no claim for damages for wrongful detention in this case but as the claim for damages for loss of use was not based on any wrongful damage to the barges the award under this head of claim was wrongly made. However, as the respondent did not appeal against the award, it will not be interfered with."

In his lead judgment, Belgore J.S.C., has fully considered the evidence relating to the cost of replacement of the two barges established by P.W.1 and Exhibit P1. I am satisfied the plaintiff/appellant proved the cost to be N631,060. I also endorse the reasons stated by him that the plaintiff/appellant is entitled to N90,000 for the loss of use of the two barges for a period of six months which under the circumstances of the case is a reasonable period within which the plaintiff/appellant could have replaced them from the time the defendant/respondent failed to comply with the consent judgment.

It is pertinent to emphasize that in an action in detainee, the court may order the return of the chattel and damages for its detention. In the alternative, the court may order as damages payment of the value of the chattel and also damages for the loss of its use. The measure of damages for the chattel is its value or the cost of its replacement at the time of its recovery while the measure of damages for the loss of use is the actual loss suffered by the plaintiff for its detention which depends on the circumstances of each case: see Odumosu v. A.C.B. (1976) S.C. 55 and Stich v. A-G Federation and Ors. (1986) 5 NWLR (Pt.46) 1007.

KUTIGI, JSC

I am in complete agreement with the judgment just delivered by my learned brother Belgore, J.S.C. which I was privileged to read before now. I also allow the appeal and subscribe to the orders made by him.

ADIO JSC

I have had the advantage of reading, in draft, the judgment just read by my learned brother, Belgore, J.S.C., and I entirely agree with his reasoning and conclusion. I too allow this appeal and abide by the consequential orders, B including the order for costs.

IGUHJSC

My learned brother, Belgore, J.S.C. in the lead judgment just delivered and which I had the privilege of reading in draft has dealt exhaustively C with all the issues involved in this appeal.

I agree entirely with the reasoning and conclusions therein and adopt the same as mine.

I wish however to make a brief comment by way of emphasis only with regard to one or two issues for determination in this appeal. The plaintiff's D claims against the defendant at the Sapele High Court of Justice were for-

“(a) An order enjoining the defendant to deliver to the plaintiff the two galvanised steel barges or two identical galvanised steel barges failing which their value N2,000,000.00

(b) Loss of use of the said barges since 10th April, 1976
E *N1,000,000.00*

Total N3,000,000.00”

At the conclusion of trial, the learned trial Judge entered judgment for the plaintiff on the issue of liability, holding that the action was founded on F conversion and not in detinue. Accordingly, he proceeded to award to the plaintiff the sum of N4,000.00 being the “value” of the two galvanised barges at N2,000.00 each as at the time of the alleged conversion with N4000.00 damages for loss of use of the barges for four days at N500.00 per day per barge. The plaintiff being dissatisfied with this judgment appealed to the Court of G Appeal which on the 11th May, 1990 dismissed the appeal and affirmed the decision of the trial court. The plaintiff has with the leave of the Court of

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Appeal further appealed to this court against the said decision of the court

I think it ought to be observed that both the trial court and the Court of Appeal, rightly in my view, found for the plaintiff on the issue of the defendant's liability. The first, and perhaps, the main issue for determination in this appeal is whether the cause of action in the case is in detinue, as he plaintiff maintains, or in conversion, as the trial court held, and whether the Court of Appeal was right to have upheld the trial court's award to the plaintiff on the basis of conversion, The Court of Appeal in dealing with this issue observed as follows:-

"The liability of the respondent to the appellant for unlawful detention of the two barges in question in this case is not in dispute in this appeal. What is in issue is the measure of damages applied by the learned trial Judge. The learned Senior Advocate appearing for the appellant contends that being an action in detinue, the learned trial Judge applied the wrong measure by applying the measure of damages in an action for conversion. What then is the measure of damages applicable in this case?"

The gist of liability in detinue is the wrongful detention of the plaintiff's chattel by the defendant after the plaintiff has made a demand for its return. In conversion, on the other hand, the person entitled to the possession of a chattel is permanently deprived of that possession and the chattel is converted to the use of someone else. In the latter case, the wrong is not merely an interference with the plaintiff's possessory interest in his chattel but also an injury to his right or title in them. The Court of Appeal gave the issue due consideration and resolved the same in favour of the plaintiff. Said the court -

"Where, however, the learned Judge appears to have gone wrong, in my respectful view, was when he decided that appellant's action was more in the nature of conversion rather than detinue. It is crystal clear from appellant's claim that he based his action on detinue and not conversion. By the Supreme Court judgment in SC.384/1974 (Exhibit P. 2) the appellant was entitled to ownership and possession of the two barges in dispute on his paying the sum of N900 to the respondent. Notwithstanding payment of this sum to the respondent the latter rather impudently frustrated that judgment by claiming in Exhibit P.4 that it had sold the barges after the "protracted legal tussle in Sapele High Court", that is, presumably before the Supreme Court judgment. If this were so respondent's counsel would not have agreed to clause (2) of the Terms of Settlement which formed the basis of the said judgment. The irresistible inference to be drawn from the Terms of Settlement is that the barges were still in possession of the respondent at the time the Terms of Settlement were drawn up and also at the time of the consent judgment of the Supreme Court based on those terms."

I must with respect, state that I fully endorse the above views which are amply supported by the claims before the court, the facts in support thereof and the entire evidence before the trial court.

There can be no doubt that the judgment of the learned trial Judge was founded on the erroneous basis that the plaintiff's action was founded on conversion instead of detinue. I accept the contention of the learned Senior Advocate for the appellant that once the learned trial Judge was faulted on his fundamental finding that the plaintiff's course of action was founded in conversion instead of detinue, the Court of Appeal could not be right on dismissing the appeal and affirming his judgment as it did in this case.

The Court of Appeal, however, tried to justify its stand when it observed as follows:-

"Notwithstanding that detinue, at common law, has a larger remedy than conversion, the principles for the assessment of damages in both actions remain the same since they are based on the value of the chattels concerned. To this extent, therefore, I am not prepared to say (as learned Senior Advocate for the appellant would want me) that by applying the measure of damages in conversion, the learned trial Judge committed an error in law occasioning a miscarriage of justice."

With profound respect to the Court of Appeal, the above passage of its judgment does not appear to represent the correct position of the law. There is a definite difference in law in the assessment of damages in an action in detinue as against an action in conversion. The law in detinue is the recovery of the chattel itself or, if it cannot be returned, then its value as at the date of judgment not the date of the defendant's refusal to return it. See *Resenthal v. Alderton and Sons Ltd. (1946) K.B. 374*. The plaintiff is additionally entitled to damages for its detention. See *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd. (1952) 1 All E.R. 796 at 801* and *S.C.O.A Motors v. Abumchukwu (1973) 4 S.C. 51*. In conversion, on the other hand, the operative date for the assessment of the chattel is as at the date of conversion. The Court of Appeal was therefore in error when it held that the principles for the assessment of damages in an action in detinue as against an action in conversion remain the same since they are based on the value of the chattel concerned. The court below was further in error when it affirmed the judgment of the learned trial Judge who had wrongly found the plaintiff's claim to be grounded on conversion and proceeded to make his awards thereunder. The plaintiff's claims were clearly in detinue and the Court of Appeal having rightly so held, was in error by upholding the award made to the plaintiff company by the trial court on the basis of conversion which was not the claim before it.

The second issue is whether the Court of Appeal was right in holding

that the plaintiff did not prove strictly the value of the two barges claimed.

In general the damages to which a plaintiff who has been deprived of his chattel is entitled are prima facie the value of the chattel, together with any special loss which is the natural and direct result of the wrongful act. See *Re Simons* (1934) 1 Ch. 1. A successful plaintiff in an action on detinue may obtain judgment which entitles him to the return of the chattel or its value, and also damages for its detention. Where the chattel concerned is one which can be readily purchased in the open market, a plaintiff whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar chattel in the market. See *J & E. Hall Ltd. V. Barclay* (1937) 3 All E.R. 620. But where, as in the present case, one could not easily come by the chattel in issue, such as a barge, which has to be specially ordered from the manufacturers and there is therefore absence of its ready market price, the plaintiff is entitled to damages measured by the cost of replacement. See too *J and E. Hall Ltd. V. Barclay*, supra.

In the present case, the plaintiff called P.W.1, Julius Akinloye Olofinsao, a director in Thermosteel Nigeria Ltd., builders of seagoing barges to testify on his behalf. In his evidence, he testified inter alia as follows:

"Sometime last year, we received from the plaintiff a request to quote for the fabrication of a four hundred and twenty two loading capacity cargo barge. We sent to him a written quotation. This quotation now shown to me was the one we sent to the plaintiff."

He tendered Exhibit P1 dated the 29th September, 1985 after an objection by the learned Senior Advocate, K.S. Okeaya-Inneh Esq. for the respondent was rightly overruled by the trial court.

Dealing with the evidence of this witness, the Court of Appeal posed the question and answered as follows:-

"The question now arises: is the evidence of this witness sufficient to discharge the duty on the appellant to prove strictly the value of the barges in dispute? I rather think not. First, the witness was not the maker of Exhibit P1, the maker though available was not called and thus the respondent was unable to cross-examine on Exhibit P1. Secondly, the value given in Exhibit P1 was the value in September 1985 which value was, according to Olofinsao, less than the value at the time he was testifying in March 1986 but obviously would be higher than the value in April 1976 when appellant complained respondent unlawfully refused to deliver to him the barges. The weight of judicial opinion favours taking the time of the wrongful detention as the time at which the market value is to be assessed:'"

There is no doubt that the evidence of this witness together with the contents of Exhibit P1 was of vital importance on the issue of the replacement

value of the two barges in issue. Said the witness:-

“At the time I prepared Exhibit P1, the value of the barge made of mild steel as quoted would be N315,530.00. As at now, the value of the barge should be higher as cost (of) material now attracts 30% import levy. We do not have the facility of making galvanized barges. The galvanised steel is higher in value than mild steel.”

The question is whether the Court of Appeal was right in holding that his evidence did not sufficiently establish the said replacement value of the barges.

Two reasons were advanced by the Court of Appeal for arriving at its conclusion. These are -

(1) That P.W.1 was not the maker of Exhibit P1 and that the maker though available was not called.

(2) That the value given in Exhibit P1 was the value of the barges as at September 1985 and not the value as at the date of wrongful detention in April 1976.

With due respect to the Court of Appeal, I am unable to accept the above two reasons as well founded. In the first place, Exhibit P1, on the unchallenged evidence before the trial court, was prepared by P.W.1. It was therefore a document the accuracy of which he was responsible. Although it was signed by his Managing Director and not by himself, it is in law, a document made by the witness. See section 90(4) of the Evidence Act.

In the second place, I have already pointed out that in an action in detinue, the value of the chattel claimed but not returned is assessed as at the date of judgment or verdict. See *Resenthal v. Alderton and sons Ltd.*, supra at p.377. The second reason advanced by the court below for holding that the value of the barges was not sufficiently proved by the plaintiff is, with respect, therefore, untenable and misconceived. The relevant time for ascertaining the replacement value of the barges is the time of judgment and not the date of the defendant's refusal to return the same. On the evidence of P.W.1, the replacement value of each barge would be much higher than the N315,530.00 quoted in Exhibit P1 which was only in respect of a barge made of mild steel. According to the witness, and this was not controverted, the galvanised steel barge is higher in value than the mild steel barge and it is not in dispute that the barges in issue in this case were made of galvanized steel. This value testified to by P.W.1 was not controverted by the defendant and the same must be accepted as proof of the replacement value of the chattel in issue. See: *Odulaja v. Haddad* (1973) 11 S.C. 357; *Olukade v. Alade* (1976) 1 All NLR 67; *Maduga v. Bai* (1976) NWLR (Pt.62) 635 at 642; *Boshali v. Allied Commercial Exporters Ltd.* (1962) 2 SCNLR 322; (1961) All NLR 917 at 921, etc.

On the plaintiff's claim of N525,000.00 in respect of loss of use of the said barges, it is not in dispute that it was on the 10th April, 1976 that the plaintiff unsuccessfully made a demand on the defendant for the return of the two barges. It was on that date therefore that the cause of action in the suit arose. Where the chattel detained is one which is normally let out on hire by the plaintiff, as in the present case, the plaintiff is entitled to a reasonable charge for the hire of the chattel during the period of its detention, and this sum will not be affected by the actual benefit obtained from the chattel by the defendant during that period. See Strand Electric Engineering Co, Ltd. v. Brisford Entertainments Ltd, supra at 801.

In the present case the plaintiff gave evidence of his losses and the trial court found as follows:-

"The plaintiff had given evidence of the rate of hire of such barges but the defendant did not seriously challenge this. They did not suggest what the rate of the hire of such barges could be. I therefore accept the plaintiff's case that the rate of the hiring of such a barge is about N800.00 and I so hold."

The plaintiff did not however give evidence of the cost of fuel or maintenance of the said barges nor did he state how much he would pay the driver. There was no signed contract to guarantee this. In the circumstance, I hold on the facts that N500.00 per barge per day is not unreasonable."

It is my view that the hiring charge of N500.00 per day per barge found by the trial court and affirmed by the Court of Appeal is clearly on the conservative side and entirely reasonable. The period of detention of the barges from the 10th April, 1976 to the date of judgment in the case covered a period of ten years. It seems to me however that the plaintiff cannot be allowed to recover damages for loss of use for the whole length of time involved. This is because it is the plaintiff's duty in law to minimise his damage as far as possible, and therefore, anything which must be ascribed to his failure to do so is not recoverable from the defendant. See British Westinghouse Co. Ltd. v. Underground Railways Ltd, (1912) A.C. 673 and Dutton v. Bognor Regis Urban District Council (1972) 1 Q.B. 373 at 412-413.

In this regard, I ask myself how long it will take a reasonably prudent business man to replace the plaintiff's two barges from the date his cause of action arose on the 10th April, 1976. There is unfortunately no evidence on the point. However, having regard to the fact that this class of chattel is not readily available for quick replacement, I am prepared to hold that a period of 6 months, that is to say, 180 days may not unreasonably be held to be a fair length of time for the plaintiff to replace the barges. Accordingly I will set aside the four days loss of use granted to the plaintiff by the trial court as

affirmed by the court below as this was erroneously computed on the basis of an award in conversion. I will award to the plaintiff the sum of N90,000.00 for loss of use of the two barges for a period of six months or 180 days from the 10th April, 1976 to 6th October, 1976 at the rate of N500.00 per barge per day.

It is for the above and the more detailed reasons set out in the lead
B judgment of my learned brother Belgore, J.S.C. that I too, allow this appeal. I abide by the consequential orders inclusive of the order as to costs contained in the said judgment.

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