

**SUPREME COURT OF NIGERIA**  
FRIDAY 7TH JUNE, 2002. SC. 250/2000  
**CORAM:- I. L. KUTIGI, M. E. OGUNDARE, S. U. ONU,**  
**U. A. KALGO, E. O. AYOOLA, JJSC**

1. THE M. V. “CAROLINE  
MAERSK” SISTER VESSEL TO ..... APPELLANTS  
MV “CHRISTIAN MAERSK”  
& 2 ORS  
AND  
NOKOY INVESTMENT LIMITED ..... RESPONDENT

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ADMIRALTY - Courts - Findings of facts - Effect - Reliance on rule 8 of Article III Hague Rules did not affect - The courts’ approach to determination of the carrier’s liability - And same is of no consequence to the result of the case (H1)

ADMIRALTY - Evidence - Misdirection in - Effect - Misdirection in regard to date when the vessel arrived - When the material issue is date when same was discharged - Is inconsequential (H2)

ADMIRALTY - Ship agent - Liability of - Though agent is not vicariously liable for default of his principal - But by s. 16(3) Admiralty Jurisdiction Act - Agent may be personally liable - In respect of anything done in Nigeria (H3)

ADMIRALTY - Ship agent - Liability of - Proof - To have a cause of action against the agent - The act or default complained of must be in respect of anything done in Nigeria by the ship - And same must be alleged and proved (H4)

DAMAGES - Award - Error - Effect - Erroneous assumption of additional award is inconsequential - Since Court of Appeal did not make an award of its own (H5)

**FACTS**

Plaintiff/respondent (Nigerian company carrying on business of exporting of sea foods) entered into an agreement with 3<sup>rd</sup> defen-

dant/appellant (Maersk Nigeria Ltd) to ship 1,202 cartons of frozen Atlantic gold shrimps valued at US\$71,516.50 in a vessel called Christian Maersk, owned by 2<sup>nd</sup> defendant/appellant from Lagos Port to Algeciras Port in Spain. The consignee of the shrimps was Tako Fish Corporation, Panama. The shrimps were of good consumable quality when they were shipped under a bill of lading from Lagos. They were sealed in a container under acceptable temperature of 18<sup>o</sup>c/20<sup>o</sup>c. When the goods eventually arrived in Spain, the Spanish Health Authority issued two reports to the fact that the shrimps were no longer suitable for consumption. Respondent therefore instituted this action against appellants at the Federal High Court, Lagos. Respondent claimed among other things, several monetary damages against appellants.

At the trial, respondent claimed that the shrimps became bad during the period of carriage by sea. Appellants on the other hand argued that the shrimps deteriorated after 30 days of arrival in Spain as a result of late collection of same. Appellants also counter-claimed for the cost of repatriation of the cargo to Nigeria. At the end of hearing, the court preferred the testimonies of respondent and held that appellants failed to discharge the burden of proving that the cargo had arrived in good condition. On the question of quantum of damages, the court also held in favour of respondent by awarding the sum of \$71,516.50 USD or in the alternative the sum of 120,200.00 British pounds sterling. Appellants' counter-claim was dismissed. Being dissatisfied, appellants filed appeal at the Court of Appeal, Lagos. The court dismissed the appeal and confirmed the award made by the trial court. Aggrieved further, appellants appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

The broad issues which arise from this appeal concern the quantum of damages awarded; the nature of the liability of the carrier and the circumstances in which the 3<sup>rd</sup> defendant, an agent of the carriers, could be liable for the acts or omission of the ship.

**HELD** (Unanimously dismissing the appeal per lead judgment of **AYOOLA JSC**)

*Courts - Findings of facts - Effect*

**1. Reliance on rule 8 of Article III to describe the liability of the defendants as strict, even if erroneous, is not of any consequence to the result of the case. Both the trial Chief Judge and the court below accepted that absence of want of due care may be a defence available to the carrier. Their finding that such defence was not established is enough to make the issue raised by the defendants on this appeal as to the nature of the liability of the defendants an academic exercise. Although Galadima, JCA, who delivered the leading judgment of the court below said: “The carrier is strictly responsible for all loss or damages that occur in transit.”, and had earlier stated that: “Article 3(8) provides for strict liability.”, these statements did not affect his approach to the determination of the carrier’s liability, for he also said: “The appellants (i.e. the carriers) as bailees have failed to discharge the burden of proving that they were not negligent.” (p. 1776 H)**

*Evidence - Misdirection in - Effect*

**2. The second point taken on the issue of liability is whether misdirection by the trial Chief Judge on an aspect of the evidence of the 1st defence witness in regard to the date when the vessel on which the shrimps were carried arrived in Spain did not occasion a miscarriage of justice. The misdirection was that although the witness testified that the vessel arrived in Spain on 10th February, 1994, the Chief Judge proceeded on the footing that he had said that it arrived on the 18th of February, 1994 and rejected his evidence for this reason among other reasons. Although that, indeed, as a misdirection, it is trite law that not every misdirection is fatal to a decision. From the definition of “carriage of goods” in Article 1 of the Rules as covering “a period from the time when the goods are loaded on to the time when they are discharged from the ship”. The evidence relevant to the defence of the carrier who normally is liable for loss of or damage to the goods during the period of the carriage of the goods is evidence of the date of discharge of the goods. There is a material difference between the date of arrival of a ship and the date of discharge of**

**its cargo. In *NNSL v. Emenike* (1987) 4 NWLR (Pt 63) 77 Nnaemeka-Agu, JSC, said: “It is common knowledge that the date of arrival of a ship is usually a long time prior to discharge.” In this case there was no evidence of the date of discharge of the cargo. A misdirection as to evidence in regard**  
B **to the date when the vessel arrived when the material issue is the date when the cargo was discharged, is inconsequential.**  
(p. 1777 D)

C *ADMIRALTY - Ship agent - Liability of*

**3. One final point taken on the question of liability is as regards the liability of the 3rd defendant which was, admittedly, an agent of the ship. Normally, an agent is not vicariously liable for the default of his principal. However, section 16(3) of**  
D **Admiralty Jurisdiction Act creates special liability of the agent in the following terms:**

**“A person who acts as an agent of the owner, charterer, manager or operator of a ship may be personally liable irrespective of the liability of his principal for the act, default,**  
E **omissions or commission of the ship in respect of anything done in Nigeria.”** (p. 1778 A)

*ADMIRALTY - Ship agent - Liability of - Proof*

F **4. The liability of the agent in terms of section 16(3) is dependent on whether the act, default, omissions or commission was (or were) in respect of anything done or to be done in Nigeria. That the act, default etc was in respect of anything done or to be done in Nigeria by the ship is an essential part**  
G **of the cause of action and is a material fact that ought to be alleged and proved. Speculation as to where such event happened will not do. It is clear that in this case the 3rd defendant had been sued as an agent and that as such he could only be liable pursuant to section 16(3) of the Admiralty Jurisdiction**  
H **Act. The act, default, omissions or commission of the ship for which the ship was sued could have been in or outside Nigeria. There was no allegation that any such event happened in Nigeria. In these circumstances, there was really no basis for making the 3rd defendant liable. In my judgment, the appeal**

*DAMAGES - Award - Error - Effect*

**5. Counsel for the defendants and the court below had proceeded on an erroneous assumption that the Chief Judge had awarded #120,200 in addition to the first claim. But the error was inconsequential. Since the court below did not make an award of its own, the award made by the Chief Judge and confirmed by the court below was the award against the defendants, notwithstanding that there may have been a misconception of counsel or the court below as to what that award was. The jurisdiction of the court below was not invoked either by the plaintiff by a cross-appeal to vary the award made by the Chief Judge by converting an alternative award to an additional award. The court below did not vary the award either.**

**For avoidance of doubt, it is expedient to be clear as to the damages awarded by the Federal High Court. These were; (i) \$71,516.50 and (ii) in the alternative to (i), #120,200. Although the plaintiff had claimed “further, or in the alternative” what was awarded were not “further” damages but “alternative” damages.** (p. 1779 G)

**NOTABLE POINT OF INTEREST**

**AYOOLA JSC**

***1. Categories of contractual liabilities***

Once the applicable principle is well understood and applied, no useful purpose is served by arguing on how the carrier’s liability was described. The common law regards many contractual liabilities as strict in the sense that, barring express and implied terms of the contract or contracts in which exercise of due diligence is of the essence of the contract, such as a contract between the doctor and his patient, when a party has undertaken to perform an obligation, that he did not perform it or could not perform it due to no fault of his does not exonerate him from the consequence of the breach. French law on the other hand recognizes that contractual obligation may be absolute, strict or based on negligence. Thus there is the contractual obli-

gation which requires a person to take reasonable care to achieve the result by the contract, there is a second category of contractual obligation which requires a person to achieve a particular result, though it allows the excuse for non-performance of force majeure, then, there is the third which requires a person to achieve a particular result come what may, so that he is liable for any failure even in the case of force majeure. I have adopted these categories from Bell, Boyron and Whittaker Principles of French law, [pub. 1998 Oxford University Press]. The liability of the carrier was placed in the second category. (p. 1776 A)

### **REPRESENTATION**

Babajide Koku for the appellants

J. C. Ejike, with him A. A. Eze and T. T. Nwazota for the respondent

### **CASES REFERRED TO**

NNSL v. Emenike (1987) 4 NWLR (Pt. 63) 77

Agidigbi v. Agidigbi (1996) NWLR (Pt. 454) 300

International Trustees for the Protection of Bondholders A. G. v. The King [1936] 3 All ER 407

Pyrene C. Ltd. v. Scindia Navigation Co. Ltd. [1954] 1 Lloyd's Rep 321

Feist v. Societe Intercommunale Belge D'Electricite [1934] AC 161

### **STATUTES & RULES REFERRED TO**

Admiralty Jurisdiction Act, s. 16(3)

Carriage of Goods by Sea Act Cap. 44, s. 4

Criminal Code, s. 34

Federal High Court (Civil Procedure) Rules 1976 O. XXXI r. 7

Supreme Court Rule 1985 O. 6 r. 5(1)

### **LEAD JUDGMENT BY AYoola JSC**

This is an appeal from the decision of the Court of Appeal (Oguntade, Galadima and Sanusi, JJ.C.A) delivered on 10th April, 2000 affirming the decision of the Federal High Court Whereby judgment was entered for the plaintiff, Nokoy Investment Ltd. Its claim against the three defendants was as follows:-

*"1. Certificates/Invoice value of the 1202 boxes of frozen*

*shrimp USD\$ 71,516.50*

*Further, or in the alternative, the plaintiff claims at the rate of #100.00 (One hundred pounds sterling) lawful money of the United Kingdom” for each of the 1202 packages of shrimp ..... #120,200.00*

*3. Further, or in the alternative, the plaintiff relies on Bill of lading No. LOSE 09233 to claim the value of the net weight of 24,040 kgs, as against the gross weight of 27,040 kgs, at the rate of US\$20.00 (Twenty U.S. Dollars) per kilo... US\$480,800.00.*

*4. Damages for delayed delivery, spoilage, deterioration of cargo, one acceptance of the aforesaid boxes by the consignee and the Spanish Exterior Trade Inspection Center as well as opportunity and embarrassment caused to the plaintiff by the defendant...US\$50,000.00.*

*5. Interest at the rate of 20% per annum until judgment and thereafter at the rate of 4 per cent”.*

The respondent (referred to in this judgment as “the plaintiff”) a registered Nigerian company carrying on business of exporting of sea foods, entered into an agreement with the Maersk Nigeria Ltd, the 3rd defendant, to ship 1,202 cartons of frozen Atlantic gold shrimps valued at US\$71,516.50 in a vessel called Christian Maersk, owned by the 2nd defendant from Lagos Port to Algeciras Port in Spain. The consignee of the shrimps was Tako Fish Corporation, Panama. The shrimps were of good consumable quality when they were shipped from Lagos. They were sealed in a container under acceptable temperature of 18<sup>o</sup>c/20<sup>o</sup>c. The goods were carried under a bill of lading issued in Lagos. The Spanish Health Authority issued two reports on the condition of the shrimps. In the first, issued on 14th February, 1994, it was stated that the shrimps were “*not suitable in the first inspection due to abnormal odor, unsatisfactory appearance and high volatile nitrogen.*” In the second, issued on 4th March, 1994, it was stated: “*Not suitable (second inspection) due to abnormal odor, unsatisfactory appearance and melanoies.*”

It was common ground that the shrimps became bad. What was in dispute was when the shrimps deteriorated. The plaintiff claimed that it was during the period of carriage by sea, while the defendants asserted that the shrimps deteriorated after their arrival in Spain and because by the nature of the shrimps they should have been col-

lected within 2 days but were not collected more than 30 days after arrival. The trial Chief Judge, Belgore, CJ, preferred the plaintiff's version and found that the defendants have failed to discharge the burden on them of proving that the cargo had arrived in good condition. After thus disposing of the main issue of fact essential to the liability of the carrier, the learned Chief Judge turned to questions of law which were essentially on the question of quantum of compensation, which he resolved in favour of the plaintiff. In the result, he entered judgment against the defendants for the rest of the claim after rejecting the 3rd and 4th heads of claim. He dismissed the defendants' counter-claim for the cost of repatriation of the cargo back to Nigeria and return of the container to the defendants.

The defendants appealed to the Court of Appeal which dismissed their appeal and confirmed the decision of the Federal High Court. This appeal is from the decision of the Court of Appeal.

The broad issues which arise from this appeal concern the quantum of damages awarded; the nature of the liability of the carrier and the circumstances in which the 3rd defendant, an agent of the carriers, could be liable for the acts or omission of the ship.

In regard to the first question the defendant put their case in several ways which I summarize thus:

(i) Whereas, the Federal High Court had awarded ₦120,200 as an alternative to an award of US. \$71,516.50 made in favour of the plaintiff, the court below awarded the former in addition to the latter which was the invoice value of the cargo. This was wrong because the plaintiff was not entitled to a further award in the absence of a cross appeal by the plaintiff. Furthermore, the award of both sums, being double compensation, was erroneous.

(ii) The Carriage of Goods by Sea Act (Cap. 44: LFN 1990) contains the law and the Hague Rules Applicable to the contract of carriage between the parties whereas the Federal High court and the court below had erroneously applied the version of the Hague Rules not adopted by the Act.

(iii) On the footing that the applicable law was the Carriage of goods by Sea Act the liability of the carrier was limited to N200 per package in accordance with the provisions of Article IV Rule 5 of the Hague Rules as adopted by that Act in the absence of evidence that the parties had contracted out of its provisions pursuant to para-

graph 3 of Rule 5.

(iv) The limitation of damages to #100 per package provided for in the carriage of Goods by Sea Act should not have been interpreted as meaning gold value of #100 sterling but as meaning, simpliciter, what it says, #100 now equivalent to N200.

In regard to the broad question of the liability of the defendants, the three contentions pressed upon this court by counsel for the defendants were: first, that the liability of the carrier was not strict and the plaintiff must, but did not, establish negligence against the carrier, that is to say, against the 2nd defendant; secondly, that the trial court misconceived the evidence led in support of the defendants' case; and, thirdly, that the 3rd defendant being the agent of the 1st and 2nd defendants should not have been held liable as there was neither evidence nor finding that the damage occurred in Nigeria, whereas by virtue of section 16 (3) of the Admiralty Jurisdiction Act the liability of an agent of the ship was limited to an act or omission done or failed to be done in Nigeria. B  
C  
D

It is expedient to dispose of the question of liability first. The nature of the liability of the carrier determines, to some extent, apart from the general burden of proof on the plaintiff, the particular burden of proof on the carrier. It is clear from the judgment of Belgore CJ, that he did not attempt to categorize the nature of the liability of the carrier. He was content to apply principles when he said: E

*"The case of Ogugua v. Armels Transport Ltd cited by the plaintiff restated the principle that the Plaintiff needs not specifically plead negligence once it has proved that the defendant failed to deliver the quality or quantity of the cargoes he undertook to deliver or did not deliver them at all. It is for the defendant to satisfy the court the reason for what he delivered or what was not delivered and in this case the defendant has failed to do so."* F  
G

The principle so stated is in accord with the statement of the law as contained in the passage from William Tetley: Marine Cargo Claims at pages 133-134 cited and quoted in the appellants' brief filed by the defendants thus: H

*"It is the first principle of marine cargo claim that the carrier is prima facie liable for loss or damage to cargo received in good order and out-turned short of in bad order.*

*The carrier having received the goods in good order under a*

*clean bill of lading and having received bad order receipts on delivery is prima facie liable for the loss or damage. Prima facie (at first sight) means that the proof is rebuttable so that the carrier has a burden of making proof sufficient to overturn claimant's prima facie case."*

Once the applicable principle is well understood and applied,  
 B no useful purpose is served by arguing on how the carrier's liability  
 was described. The common law regards many contractual liabilities  
 as strict in the sense that, barring express and implied terms of the  
 contract or contracts in which exercise of due diligence is of the es-  
 C sence of the contract, such as a contract between the doctor and his  
 patient, when a party has undertaken to perform an obligation, that  
 he did not perform it or could not perform it due to no fault of his  
 does not exonerate him from the consequence of the breach. French  
 law on the other hand recognizes that contractual obligation may be  
 D absolute, strict or based on negligence. Thus there is the contractual  
 obligation which requires a person to take reasonable care to achieve  
 the result by the contract, there is a second category of contractual  
 obligation which requires a person to achieve a particular result,  
 though it allows the excuse for non-performance of force majeure,  
 E then, there is the third which requires a person to achieve a particular  
 result come what may, so that he is liable for any failure even in the  
 case of force majeure. I have adopted these categories from Bell,  
 Boyron and Whittaker Principles of French law, [pub. 1998 Oxford  
 University Press]. The liability of the carrier was placed in the second  
 F category.

Article III Rule 8 of the Rules in the schedule to the Carriage of  
 Goods by Sea Act on which the court of Appeal relied to hold that  
 the liability of the carrier is strict reads as follows:

G *"Any clause, covenant or agreement in a contract of carriage  
 relieving the carrier or the ship for loss or damage to or in connection  
 with goods arising from negligence, fault or failure in the duties and  
 obligations provided in this article or lessening such liability otherwise  
 than as provided in these Rules, shall be null and of no effect."*

H Although, for my part, I fail to see the immediate significance  
 of the above provisions of Article III rule 8 to the question whether  
 the contractual obligation of the carrier is strict or not, I think they  
 show that a carrier cannot contract out of liability for negligence,  
 whether such negligence is presumed or actual. **Reliance on rule 8**

of Article III to describe the liability of the defendants as strict, even if erroneous, is not of any consequence to the result of the case. Both the trial Chief Judge and the court below accepted that absence of want of due care may be a defence available to the carrier. Their finding that such defence was not established is enough to make the issue raised by the defendants on this appeal as to the nature of the liability of the defendants an academic exercise. Although Galadima, JCA, who delivered the leading judgment of the court below said: *"The carrier is strictly responsible for all loss or damages that occur in transit."*, and had earlier stated that: *"Article 3(8) provides for strict liability."*, these statements did not affect his approach to the determination of the carrier's liability, for he also said: *"The appellants (i.e. the carriers) as bailees have failed to discharge the burden of proving that they were not negligent."*

The second point taken on the issue of liability is whether misdirection by the trial Chief Judge on an aspect of the evidence of the 1st defence witness in regard to the date when the vessel on which the shrimps were carried arrived in Spain did not occasion a miscarriage of justice. The misdirection was that although the witness testified that the vessel arrived in Spain on 10th February, 1994, the Chief Judge proceeded on the footing that he had said that it arrived on the 18th of February, 1994 and rejected his evidence for this reason among other reasons. Although that, indeed, as a misdirection, it is trite law that not every misdirection is fatal to a decision. From the definition of "carriage of goods" in Article 1 of the Rules as covering *"a period from the time when the goods are loaded on to the time when they are discharged from the ship"*. The evidence relevant to the defence of the carrier who normally is liable for loss of or damage to the goods during the period of the carriage of the goods is evidence of the date of discharge of the goods. There is a material difference between the date of arrival of a ship and the date of discharge of its cargo. In *NNSL v. Emenike* (1987) 4 NWLR (Pt 63) 77 Nnaemeka-Agu, JSC, said: *"It is common knowledge that the date of arrival of a ship is usually a long time prior to dis-*

*charge.” In this case there was no evidence of the date of discharge of the cargo. A misdirection as to evidence in regard to the date when the vessel arrived when the material issue is the date when the cargo was discharged, is inconsequential.*

*One final point taken on the question of liability is as regards the liability of the 3rd defendant which was, admittedly, an agent of the ship. Normally, an agent is not vicariously liable for the default of his principal. However, section 16(3) of Admiralty Jurisdiction Act creates special liability of the agent in the following terms:*

*“A person who acts as an agent of the owner, charterer, manager or operator of a ship may be personally liable irrespective of the liability of his principal for the act, default, omissions or commission of the ship in respect of anything done in Nigeria.”*

*The liability of the agent in terms of section 16(3) is dependent on whether the act, default, omissions or commission was (or were) in respect of anything done or to be done in Nigeria. That the act, default etc. was in respect of anything done or to be done in Nigeria by the ship is an essential part of the cause of action and is a material fact that ought to be alleged and proved. Speculation as to where such event happened will not do. It is clear that in this case the 3rd defendant had been sued as an agent and that as such he could only be liable pursuant to section 16(3) of the Admiralty Jurisdiction Act. The act, default, omissions or commission of the ship for which the ship was sued could have been in or outside Nigeria. There was no allegation that any such event happened in Nigeria. In these circumstances, there was really no basis for making the 3rd defendant liable. In my judgment, the appeal of the 3rd defendant must be allowed.*

I now turn to the amount of damages that the plaintiff could be entitled to. The plaintiff’s claim was for US\$71,516.50, “further or in the alternative” #120,200.00 and, “further or in the alternative” US\$486,800. The Chief Judge rejected the third alternative claim but, as regards the first two, after awarding the first of the remaining alternative claims, he said about the second:

*“The second alternative claim of #120,200.00 is also awarded*

against the Defendant, but in alternative to the first alternative claim of US\$ 71,516.50 the invoice price is awarded.” (Emphasis mine)

The defendants’ counsel’s understanding of the decision of the Chief Judge was that he had awarded both the principal and alternative claims. It was on this basis that he had argued that the learned Chief Judge had been wrong in doing so. Galadima, JCA, who delivered the leading judgment of the court below said:

“However, the question in issue No. 2, is whether the trial court was correct in awarding both \$71,5116.50 the principal claim and the sum of #120,200.00 as an alternative claims (sic). In paragraph 23 (2) the claim is couched thus:

‘2. Further, or in the alternative, the plaintiff claims at the #100 (One hundred pounds sterling lawful money of the United Kingdom) for each of the 1202 packages of shrimps... #120.200.’

To my mind this second claim is a further claim to the first head of claim.” (Emphasis mine)

Having so held he concluded that he did not have any cause to disturb the award of #120.200. However, at the end of the day, the court below did not vary the award made by the Chief Judge which was an award of the first claim and of the second in the alternative only. An alternative award is an award which can also be made instead of another. It is not an additional or a further award. The court below merely dismissed the appeal of the defendants without making any fresh award of its own.

In this appeal counsel on behalf of the defendants formulated an issue thus:

“Whether the Court of Appeal is correct in awarding as damages the principal claim of \$71,516.50 and the sum of #120,200, as a further claim.” (Emphasis mine)

**Counsel for the defendants and the court below had proceeded on an erroneous assumption that the Chief Judge had awarded #12,200 in addition to the first claim. But the error was inconsequential. Since the court below did not make an award of its own, the award made by the Chief Judge and confirmed by the court below was the award against the defendants, notwithstanding that there may have been a misconception of counsel or the court below as to what that award was. The jurisdiction of the court below was not invoked ei-**

***ther by the plaintiff by a cross-appeal to vary the award made by the Chief Judge by converting an alternative award to an additional award. The court below did not vary the award either.***

***For avoidance of doubt, it is expedient to be clear as to***  
 B ***the damages awarded by the Federal High Court. These were;***  
 (i) \$71,516.50 and (ii) in the alternative to (i), #120.200. ***Although the plaintiff had claimed “further, or in the alternative” what was awarded were not “further” damages but “alternative” damages.***  
 C Counsel for the defendants on this appeal went to great, but unnecessary, lengths to show that a court should not award what a party did not claim, and that double compensation should be avoided. He cited copious authorities in support of these indisputable and commonplace propositions of law and submitted that “*the*  
 D *lower court erred when it awarded #120,200 in addition to an award of US \$71,516.50 as damages against the appellants.*” As has been seen, there was no additional award of #120,200.

There is probably the need to elucidate the proper approach to claims made “further or in the alternative.” That a plaintiff may  
 E claim alternative reliefs is contained in several of our rules of civil procedure. Order XXXI r. 7 of the Federal High Court (Civil Procedure) Rules, 1976 (applicable at the material time) permitted a plaintiff to state the relief he claims “either simply or in the alternative.”  
 F Where a plaintiff sets up two or more inconsistent sets of material fact and claims relief on each of them in the alternative, he will be granted such relief as the set of facts he established would entitle him. Only one of two or more alternative reliefs will be granted. Where the plaintiff on a set of facts asks for a relief and a second relief “further,  
 G or in the alternative’ to the first, it is for the court to decide on the facts and on principle whether the grant of second relief as a further (additional) relief will not amount to double compensation for the same cause of action, in which case the second relief should not be granted. Where a plaintiff is uncertain whether the facts he relies on  
 H would entitle him to a relief either in addition to a first relief or merely as an alternative, he can claim the subsequent relief as a “further or alternative relief”. Where the first and principal relief is exhaustive of his remedy, there would be no need to grant the subsequent relief claimed as a “further or alternative relief.” It was in this sense that this

court said (per Kutigi, JSC) in *Agidigbi v. Agidigbi* (1996) NWLR (Pt. 454) 300,313:

*“Where a claim by a party to a suit succeeds and the court grants same, there will be no need to consider any alternative claim thereto.”*

However, there may be cases in which the trial judge though satisfied that the facts established are sufficient for a grant of a first relief claimed, wishes to leave his views on record as to the alternative relief, in case he was wrong on the first. In such cases it is a desirable practice that he considers the alternative relief in relation to the facts established, even though he should grant only the first. The advantage is that should the defendant appeal on the question of damages, the appellant court will have on record the findings and opinion of the trial court on the alternative relief, thus making it unnecessary to remit the case to the trial court for consideration of the alternative relief. A plaintiff who claims a principal relief and another in the alternative is to be taken as saying: *“On the facts alleged I am entitled to the principal relief, but even if on those facts I am not entitled to it, those facts will entitle me to this alternative relief.”* Where the trial court awards the principal relief and has pronounced the plaintiff entitled also to the alternative relief in case he was wrong as to the one he granted, on an appeal by the defendant on the question of damages, the plaintiff did not need to have cross-appealed for the appellate court to substitute the alternative relief for the relief granted, if the alternative relief is available and is the appropriate relief on the facts established. It is in this regard that it may be wiser for an aggrieved defendant to show that the plaintiff was not entitled to either of the reliefs.

That, as I understand the defendants' case on this appeal, is what the defendants have sought to do.

In considering the award made by the trial court and confirmed by the court below, the starting point is whether the award of US \$71,516.50 was correct and, if not, whether the plaintiff was entitled to the alternative ward in substitution. The trial Chief judge relied on clause 6 (2) of the Combined Transport Bill of Lading (Exhibit A) which (as quoted in the judgment of the Chief Judge) provides:

*“6(2) Where the Hague Rules apply hereunder the carrier's*

*maximum liability shall in no event exceed GBP 100.00 lawful money of the United Kingdom per package or unit, unless the nature or value of such goods have been declared by the shipper before shipment and inserted on the reverse side of this bill and extra freight paid.*

B (a) *Subject to Clause 5, 7 and sub-paragraphs 2, 3, and 4 of this Clause, when the carrier is liable for compensation shall be calculated by reference to the invoice value of the goods plus freight charges and insurance if paid.*

C (b) *If there is no invoice value of the goods such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the merchant in accordance with the contract or should have been so delivered. The value of the goods shall be fixed according to the commodity exchange price or if*  
D *there be no such price, according to the current market price by reference to the normal value of goods of the same kind and quality.*

*(c) Compensation shall not exceed USD 2.00 per kilo of gross weight of the goods lost or damaged.*

E (d) *Higher compensation may be claimed only when with the consent of the carrier the value of the goods declared by the shipper upon delivery to the carrier exceeds the limits laid down in this Bill of Lading. In that case the amount of the declared value shall be substituted for this limit. Any partial loss or damage shall be adjusted pro*  
F *rata on the basis of such declared value."*

By virtue of clause 6 (2) of the bill of lading, where the Hague Rules apply the carrier's liability cannot be in excess of "B GBP 100.00 lawful money of the United Kingdom per package or unit" unless the nature or value of such goods has been declared by the shipper before shipment and inserted on the reverse side of the bill. Other provisions of clause 6 (2) dealt with further calculation of compensation. There is a basic flaw in the plaintiff's claim as formulated when it claimed in the alternative at the rate of #100 and arrived at an amount of #120.200.

H In awarding US \$71,516.50 claimed as invoice value of the cargo the trial Chief Judge must have decided that the "unless clause" of clause 6 (2) existed so as to make an award of invoice value appropriate. The defendants in their appeal to the court below challenged the basis of the award. It was there???? argued that the award

was in disregard of Article IV rule 5 of the Carriage of Goods by Sea Act, Cap 44. (The Act)

That argument did not find favour with the court below. Galadima, JCA, who delivered the leading judgment of that court held that “*the court below relied on the Hague Rules and did not discountenance Article 4 (5)*”, and that “it was aptly applied to the peculiar facts of the case and based on available documentary and oral evidence presented before it.” The learned justice reasoned thus: since clause 6 (2) of the Bill of Lading permitted the full invoice value to be awarded, the Chief Judge was right to have awarded the full invoice value, Article IV rule 5 of the schedule to the Act was not mandatory but facultative because it had provided that the carrier etc and the shipper may by agreement fix another maximum amount provided the maximum amount shall not be less than the figure named in the article, and, that, in any event, the gold clause in article IX should apply.

The court below having held that there was no doubt that the Act gave legal effect to the Hague Rules ‘which Nigeria Acceded to in 1930’ and that the Hague Rules have become the autonomous law of Nigeria ‘which is elevated above local legislation’, the decisive question creased to be whether the Act applied, but whether the decision was in consonance with the provisions of the Rules in the schedule to the Act that apply in Nigeria, titled “Rules Relating to bills of Lading: and is now referred to in this judgment as “the Rules.”

Article IV rule 5 of the Rules provides:

*“5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding N200 Per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.*

*This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.*

*By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.*

*Neither the carrier nor the ship shall be responsible in any event*

*for loss or damages to or in connection with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.”*

In my opinion, apart from the currency in which the limit of compensation is expressed, clause 6(2) and Article IV rule 5 are capable of harmonious reading. It is provided in both that an award of invoice value is permissible, such award not limited by any upper limit, provided there has been a declaration of and insertion in the bill of lading of the nature and value of the goods. The parties are at liberty to agree to a higher, but not lower, limit of liability than that stated in the Rules.

In this case, counsel for the defendants is right when he submitted that the value of the goods was not declared and inserted in the bill as required by the bill of lading and the Rules. The issue raised by the defendants in the court below namely: “*Whether the learned trial judge was right in entering judgment for the plaintiff against the defendants in disregard of the statutory provision of Article 4 Rule 5 of the Carriage of Goods by Sea Act cap 44.*” encompassed, in a way, the totality of the award made by the Chief Judge. When, therefore, counsel for the defendants argued in the court below that there was no evidence of declaration, prior to shipment, of the value of the consignment by the plaintiff, it was a challenge to the award based on invoice value of the goods. But then, the amount pleaded as the value of goods was also the same as that said to be the invoice value. The whole tenor of the argument on the first issue for determination in the court below was that of the two options in Article IV Rule 5, that is, of awarding the invoice value unlimited by the Rules or of awarding compensation limited by the Rules, the only one available to the plaintiff was the latter, that is to say, an award of compensation based on a limit of N200 per package. That, as I see it, is the crux of this appeal.

It is clear that in order to justify an award calculated on the invoice value the plaintiff must have shown that, in terms of Article IV Rule 5 of the Rules, the invoice value had been declared by the shipper before shipment and inserted in the bill of lading. That has not been done. A shipper who claims that he is entitled to damages unlimited by the provisions of the first part of Article IV Rule 5, or similar terms in a bill of lading must aver that the conditions are satis-

fied.

Although arguments on both sides have ranged over a seemingly wide field, the truth of the matter is that the question of limitation of the amount of compensation to which the carrier can be made liable does not arise unless and until the amount of compensation to which the shipper would have been entitled but for the limitation is first ascertained. By putting the emphasis of their argument on what the limit of compensation should be, the defendants seem to have proceeded on the footing that the value of the goods damaged exceeded the limit of permissible compensation either as agreed in the bill of lading or by the Rule. No reading of clause 6(2) of the bill of lading or of Rule 5 of Article IV could reasonably lead to the view that regardless of the fact that the ascertained value of the goods is less than the limit stipulated, the plaintiff should still be awarded the upper limit which is a ceiling. It is in this regard that the formulation of the plaintiff's claim as if the claim is by a prescribed fixed rate is flawed. Any claim to compensation computed without regard to the value of the goods and arrived at merely by multiplying the number of packages by #100 sterling and arriving at a sum of #120,200 was, thus, erroneous. The trial court having proceeded on the footing that the value of the goods was US \$71,650.50 the next question is whether that value is beyond the stipulated limit for which the carrier could be liable in the absence of compliance with the "unless clause" of Article IV rule 5. Taking judicial notice of the fact that US \$71, 650.50 is far less than #120.200 as I do. I feel no hesitation in holding that the alternative award of #120.200 was erroneous in any event.

It is for this reason that, in my opinion, the range of permissible award should really be between US \$71,650.50 at the highest, if the limit of N100.00 sterling per package is accepted, and N240,400 at the lowest, if the limit is N200.00 (nominal value) per package. Between these two ranges is the amount that may be awarded should N200 per package mentioned in the Rules be calculated at gold value and should the gold value of N240,400 be found to be less than US \$71,650.50 but more than the nominal value of N240,400. So, the question really is how is the limit of the carrier's liability to be determined? Is it at #100 per package, or at N200 (nominal value) per package or, yet, at N200 (gold value) per package? The answer turns on whether the applicable limit is, as stated in clause 6(2) of the bill of

lading, “GBP 100 lawful money of the United Kingdom per package or unit”, or, as provided in Article IV rule 5 of the Rules, N200 per package or unit and, if the latter, whether the value of naira, so stated, is nominal value or, in terms of Article IX of the Rules, gold value.

There is no doubt that the Carriage of Goods by Sea Act (Cap B 44) gives effect to Convention which gave birth to the Hague Rules. As far as our domestic laws are concerned the domesticated “Hague Rules” are the rules contained in the “draft Convention for the unification of certain rules relating to bills of lading” but “with modifications in the Schedule to this Act.” embodied in the Rules in the Schedule to the Act. In regard to those Rules section 4 of the Act provides as follows:

*“Every bill of lading or similar document of title issued in Nigeria, which contains or is evidence of any contract to which the Rules D apply, shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.”*

That the intention of the makers of the Act is to make the Rules superior, at least as regards bills of lading or similar documents issued in Nigeria, is thus clear.

E It cannot be reasonable to construe clause 6(2) of the bill of lading as meaning that where our Rules, and not the Hague Rules, apply, the carrier’s maximum liability would be nevertheless 100 pounds sterling per package or unit even though the Rules had fixed it at N200. It must be noted that the figure N200 in the Rules was F arrived at as a result of the Decimal Currency Act (Cap 92 LFN 1990) whereby #100 was converted to N200 on an assumption, I believe, that the Nigerian pound was at par with the British pound:

Whichever way one may look at the matter, the conclusion G seems inescapable that the limitation on the amount of damages that should be applied is the one provided for in Article IV Rule 5 of the Rules. If the Hague Rules referred to in clause 6(2) of the bill of lading are not the Rules in the Act, then the Hague Rules cannot be said to apply and the Rules in the Schedule to the Act must be applied. H If the Rules in the schedule to the Act are those inappropriately referred to as the Hague Rules in the bill of lading then the provisions of clause 6(2) are bad for internal inconsistency because if the Rules apply it would apply with the limitation of liability fixed at N200 per package. It is for these reasons that I am of the view that

apparent reliance by the trial Federal High Court and the court below on the principle of autonomy of contract, whereby those courts seem to have held that the parties had by their contract fixed a higher limit, does not justify the conclusion that the limit of compensation should be calculated in British pounds sterling. The proper calculation is as stipulated in Article IV Rule 5 of the Rules subject to Article IX of the same Rules. B

The remaining question is the effect of Article IX on the limitation of liability fixed at N200 per package Counsel for the plaintiff argued in the court below, and that court accepted the argument, that Article IV Rule 5 is subject to Article IX which provided that: C

*“The monetary units mentioned in these Rules are to be taken to be gold value.”*

*This is a gold value clause. Although the amount of limitation of liability is expressed in naira, the value of each naira is equivalent to the prescribed gold value. It is in this sense that in International Trustees for the Protection of Bondholders A. G. v. The King [1936] 3 All E. R. 407 at 419 (C.A.) the gold value clause has been described by Lord Wright as “a measuring rod of measure of liability”. D*

Counsel for the defendants argued that “it is with a view to avoiding the controversies surrounding the interpretation of the #100 in Article IV rule 5 of the Hague Rules that the legislature amended the 1958 Act” and expressed the carrier’s liability in our local currency. It was further argued that the clear import of Article IX was that the legislature had taken the gold value into consideration before arriving at the stated monetary units. For this submission reliance was placed on what Hobhouse, J, said in the *Rosa S* (infra) at p. 580 that: E F

*“The second sentence enables contracting states which do not wish to pass domestic legislation referring to the pound sterling to use a figure in article IV, Rule 5 expressed in their own currency. If they choose to do this it is clear that it is their obligation to take the sum in their own currency which corresponds to the fold value of sterling not some other nominal value.” H*

As rightly pointed out in the defendants’ appellants’ brief the second sentence of Article IX referred to, which was not, and could not have been, part of our Article IX, reads:

*“Those contracting states in which the pound sterling is not a*

*monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.”*

The Hague Rules in its domesticated version had been received into our laws in 1926 long before 11990 when by revision of our laws ‘#100’ in Article IV rule 5 was altered to read ‘N200’. The opinion of Hobhouse, J, quoted above, relates to the obligation of the contracting state in regard to the expression of the currency of limitation to maintain the value of #100 in whatever currency the limit was expressed. But that obligation is discharged at the initial stage of translating the sums indicated in the Convention into the terms of the monetary system of the contracting state. No obligation to keep adjusting the limit of liability of the carrier to bring it to the value of pound sterling is implied. It is a matter of choice for the contracting state to enact the gold clause if it thinks such better fulfills the intention of the obligation which, eventually, nominalism may defeat. It may quite be accurate to reason that ‘pound sterling’ in the Convention was ‘translated’ into naira in the Rules as they now stand pursuant to any enabling provision of the second sentence of Article IX of the Convention just quoted above. However, even if it is, that will not render the provision of Article IX otiose as the defendants’ counsel’s argument would seem to suggest.

The question which now arises whether N200 mentioned in Article IV rule 5 of the Rules was the nominal or paper value of naira would not have arisen had Article IX not been enacted. In such a case there would have been no doubt but that the principle of nominalism would apply to the monetary unit state. Some States have translated the sums indicated in the Convention into their national currency exercising the powers reserved in the Convention but without provision of a gold clause in their national legislation. An example is the United States which fixed the figure at \$500 in its Carriage of Goods by Sea Act, 1936. Another example was Canada which in its now repealed Carriage of Goods by Water Act C-27 by the Schedule to that Act fixed the limit of the carrier’s or ship’s liability at \$500 (art IV r.5) and made it clear in its article IX that “*the monetary units in these Rules are to be taken to be the lawful money of Canada.*” In England at the time when the gold clause was retained, the major operators of the Carriage of Goods by Sea Act, the

shipping and insurance industries, fashioned extra-legal solutions to the problem created by Article IX in the manner recounted by Dr. Mann in his work, "The Legal Aspect of Money" (4th Edition), thus (at pp 153-154):

*"It would appear that at least up to 1945, Art. IX was widely ignored in this country in that claims were customarily settled on the basis of a maximum liability of #100 without regard to the gold value, but in 1950, when the value of #100 gold was almost #300, a gentleman's agreement was made between the representative British shipping and insurance organizations, whereby the limit imposed by Art. IX was interpreted as #200 pound sterling lawful money and thus remained in force, although the value of #100 gold rose very considerably before the law was altered."*

In the same work Dr. Mann stated at p. 148:

*"Even in the absence of an express stipulation of 'value' it is now clear law in most countries and, particularly, in England that any gold clause almost invariably imports a gold value clause."*

In footnote 68 of the same page he illustrated this statement by reference to Art IX when he stated:

*"It should never have been open to doubt that certain statutory provisions made in consequence, but now superseded envisaged a value clause. This is in regard to the carriage of goods by sea Art. IX of the Schedule to the Carriage of Goods by Sea Act 1924 provided that sterling sum 'mentioned in these Rules are to be taken at gold value'." (Emphasis in bold italics mine)*

That the effect of Article IX of the Rules is to make the sum mentioned in the Rules gold value abound in several authorities. See *Pyrene C. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 1 Lloyd's Rep 321, 326. In *The Rosa S* [1988] 2 Lloyd's Rep 574 Hobhouse, J., said at p 581:

*"...a reference to gold value was specifically inserted in the 1924 Act even though it had not appeared in the draft Convention. This can only have been to underline as a matter of English law that what was being referred to in art. IV r 5 was the gold value of the pound sterling not its nominal or paper value."*

In my opinion, there is sufficient and convincing body of judicial pronouncements and academic opinion and the practical extra-legal approach of the shipping and insurance industries in England as

recounted by Dr. Mann, to justify a conclusion that the effect of Article IX in regard to Article IV r 5 is to make 'naira' mentioned there, naira at its gold value and not at its nominal and paper value.

Notwithstanding the doubt I entertain that provisions such as Article IX may have become anachronistic, that Article of the Rules remains part of our laws to which effect must be given. It may be that Art. IX had been retained to achieve the purpose of any gold clause which is to avoid the operation of the principles of nominalism. Be that as it may, where the provisions of a valid statute are clear and unambiguous and its application lead to no obvious absurdity, the court does not need to inquire into the motive or wisdom of the lawmaker before it applies its provisions nor, should the difficulty or complexity in working out the implications of the provisions stop the court from pronouncing is provisions part of the law.

I agree with the opinion of Galadima, JCA, in the leading judgment of the court below, when he said that: "*Nigeria has not done away with Article 9 that provides for the old gold clause. It cannot be ignored in this case.*" However, the question of the effect of Article IX of the Rules in terms of the quantification of the limit of compensation for which the carrier could be liable was not argued in the trial court and the court below before which it had been argued in the trial court and the court below before which it had been argued did not show how it affected the award made by the Federal High Court.

The effect of the conclusion to which I have arrived in agreement with the court below that naira in Art IV r 5 means gold value of naira is that until that value is ascertained it is not possible to know whether or not the value of the cargo put at US \$71,516.50 is in excess of that limit or not. There is no doubt that at the end of the day the plaintiff must be found entitled to US \$71,516.50 or the gold value of N240,400 at such valuation date as the court may find appropriate after taking due evidence, whichever is less. The latter has not been ascertained. I do not think sufficient materials have been placed before this court of the court below to enable this court to ascertain that value. Besides, there is the question which I do not think has been well addressed as to the relevant date of valuation of the naira in terms of its gold value. For my part, I would hesitate to thing that it is realistic to talk, as the court below had tried to do, about gold value of the naira in 1926 when at that time there had

been no currency known as the naira. I do not think commercial transactions and legislation permit of such level of abstraction or fiction.

If 1926 is relevant, as counsel for the parties would seem to think, the path of enquiry, complex and complicated as it may seem, would seem to be to ascertain the par value of the pound (as applied to Nigeria) in 1926 in gold and by the principle of 'recurrent linking' relate the current naira to that pound. For my part, I do not think that complex historical exercise is necessary. By virtue of section 1(2) of the Decimal Currency Act (Cap 92) the parity of the naira is equivalent to 1.24414 grams fine gold.

As the Rules now stand, by virtue of Article IX the monetary unit (Naira) in Article IV rule 5 is taken to be gold value. The effect of so doing, as far as I can see, adapting the order of the Privy Council in *Feist v. Societe Intercommunale Belge D'Electricite* [1934] AC 161, is that every 'naira, comprised in the nominal amount of N200 must be treated as representing the price of gold as specified in the Decimal Currency Act. It will be left to the trial High Court to determine, after further evidence and address, the market in which the price is determined and the date of calculation, i.e. whether at the date the carrier's obligation accrued or at the date when N200 was inserted in the rules or at the date of the bill of lading. These are issues on which I refrain from expressing an opinion.

For the reasons given, I would allow the appeal of the 1st and 2nd defendants to the extent only that the judgment of the trial Chief Judge awarding to the plaintiff US \$71,516.50 and, in the alternative, #120,200 and interests on the award is set aside. The appeal of the 3rd defendant succeeds in its entirety. Judgment entered against the 3rd defendant is accordingly set aside.

Since the appeal of the 1st and 2nd defendant fails on the question of liability, it is clear that the plaintiff is entitled to damages: but the amount still has to be properly ascertained after taking the effect of Article IX into account. In the result, I make the following orders:

(i) That the appeal of the 1st and 2nd defendants as far as the damages awarded against them are concerned, be allowed and the award of damages made by the Federal High Court and confirmed by the Court of Appeal be set aside.

(ii) That the case be remitted to the Federal High Court for that court to enter judgment for the amount of damages that the plaintiff may be entitled to after taking into consideration the limit set by Article IV rule 5 of the Rules and after taking further evidence as the parties may wish to adduce for the purpose of ascertaining the gold value of the naira mentioned in that Article pursuant to Article IX.

(iii) That the appeal of the 1st and 2nd defendants in respect of liability be dismissed.

(iv) That the appeal of the 3rd defendant be allowed in its entirety.

The 3rd defendant is entitled to the costs of this appeal and costs of the appeal in the court below which I assess at N10,000 and N5,000 respectively. I order that the other defendants bear their costs of the appeal in this court and in the court below.

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### **KUTIGI JSC**

I read in draft the judgment just delivered by my learned brother Ayoola, J.S.C. I agree with the reasons given and the conclusions reached by him in the judgment. I will also allow the appeal of the 1st and 2nd defendants only to the extent set out in the judgment. The 3rd Defendant's appeal wholly succeeds and the judgment entered against him is set aside. I endorse all the consequential orders made in the lead judgment.

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### **OGUNDARE JSC**

I agree with the reasoning and conclusions reached by my learned brother Ayoola JSC in his judgment just delivered. I too make the following orders:

1. That the appeal of the 1st and 2nd defendants as far as the damages awarded against them are concerned, be allowed and the award of damages made by the Federal High Court and confirmed by the Court of Appeal be set aside.

2. That the case be remitted to the Federal High Court for that Court to enter judgment for the amount of damages that the Plaintiff may be entitled to after taking into consideration the limit set by Ar-

title IV Rule 5 of the rules and after taking further evidence as the parties may wish to adduce for the purpose of ascertaining the gold value of

N200.00 mentioned in that Article pursuant to Article IX.

3. That the appeal of the 1st and 2nd defendants in respect of liability be dismissed. B

4. That the appeal of the 3rd defendant be allowed in its entirety.

The 3rd defendant is entitled to its costs in this appeal and to the costs of the appeal in the Court below which I assess at N10,000.00 and N5,000.00 respectively. I make no order as to costs in respect of the other parties. C

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**ONU JSC**

Having had the privilege to read in draft the judgment of my learned brother Ayoola, JSC just delivered, I agree with his reasoning and conclusions. D

Accordingly, I too make the following orders;

(i) That the appeal of the 1st and 2nd defendants as far as the damages awarded against them are concerned, be allowed and the award of damages made by the Federal High Court and confirmed by the Court of Appeal be set aside. E

(ii) That the case be remitted to the Federal High Court for that Court to enter judgment for the amount of damages that the Plaintiff may be entitled to after taking into consideration the limit set by Article IV Rule 5 of the Rules and after taking further evidence as the parties may wish to adduce for the purpose of ascertaining the gold value of the Naira mentioned in that Article pursuant to Article IX. F

(iii) That the appeal of the 1st and 2nd defendants in respect of liability be dismissed.

(iv) That the appeal of the 3rd defendant be allowed in its entirety. H

Costs of this appeal to the 3rd defendant are assessed at N10,000 and N5,000 respectively in this Court and in the Court below. The other Defendants to bear their costs in this Court and in the Court below.

**KALGO JSC**

I have had the opportunity of reading in draft the judgment of my learned brother Ayoola JSC in this appeal. I entirely agree with his reasoning and conclusions reached therein which I adopt as mine. I therefore find that there is merit in this appeal. I allow it and set aside the decisions of the two lower courts and give judgment to the plaintiff/respondent in the sum of N240,400.00 with N10,000.00 costs.

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