

SUPREME COURT OF NIGERIA
17TH JUNE, 2011. SC.262/2005
CORAM:- W. S. N. ONNOGHEN, F. F. TABAI, J. A. FABIYI,
O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC

HARKA AIR SERVICES (NIG.) LIMITED APPELLANT
AND
EMEKA KEAZOR ESQ. RESPONDENT

APPEALS - Briefs - Reply - Failure to reply on issue raised - Effect - Reply brief is limited to answering any new points arising from respondent's brief - Party who failed to file same - Is deemed to have conceded the new points (H1)

APPEALS - Aviation matters - Plane crash - Evidence - Unchallenged at trial court - Effect - Supreme Court relied on same to hold that appellant was guilty of wilful misconduct (H2)

AVIATION LAW - Treaties - Domestic application - Warsaw Convention of 1929 domesticated pursuant to s.315 of 1999 Constitution - Is applicable and relevant to Nigeria legal system - Except when repealed (H3)

INTERNATIONAL LAW - Domestic application - Where domestic or common law right has been enacted into a statutory provision - It is to that statutory provision that resort must be had for such right - And not the domestic or common law (H4)

APPEALS - Concurrent findings - Supreme Court - It does not interfere - Except where the findings are perverse - Or there is a miscarriage of justice (H5)

DAMAGES - Award by trial court - Interference on appeal - Basis - Appellate court will not interfere - Unless trial court acted under a misrepresentation of facts or law - Or that failure to interfere will amount to injustice (H6)

JURISDICTION - Powers of Court of Appeal - Consequential orders
- S.16 Court of Appeal Act empowers it to make any order - Necessary for determining the real issue in controversy (H7)

JUDGMENTS - Damages - Award in foreign currency - Propriety of
- Nigerian Courts have jurisdiction to make an award in foreign currency - Court of Appeal was correct to have invoked the right process of law - By awarding the damages in foreign currency (H8)

FACTS

On 24th of January 1995, plaintiff /respondent in the instant appeal boarded Harka Air Services Limited on its flight No.TU134 from Kaduna to Lagos. There was bad weather at the point of embarking as a result of which all other commercial airlines cancelled their flight and there was none operating two hours before the defendant's/appellant's flight took off. The flight to Lagos was turbulent. The descent in Lagos was irregular, as the aircraft finally crash-landed. This was followed by a smoke and fire out break in the cabin which caused panic and confusion as passengers stampeded for safety. Respondent had a traumatic experience, coupled with sustaining injuries and body pain. He lost his hand luggage and personal effects. The serious nature of the injuries required medical attention. He suffered loss professionally and financially as the injuries curtailed his day to day activities. Respondent was convinced that the crash was due to the negligence, carelessness and recklessness of appellant, its servants, agents and employees in maintaining, controlling and operating the said aircraft on the fateful day. Respondent wrote to appellant for compensation. The claim was unheeded.

Consequently, respondent filed this action at Federal High Court, Lagos. At the trial, respondent called two witnesses, himself and one of the air accident investigators. In his considered judgment, the learned trial Judge found in favour of respondent and awarded N1,257,840.00 (One million, Two hundred and Fifty Seven thousand, Eight hundred and Forty naira) as special and general damages as well as costs of the action. Aggrieved by decision of the Court, appellant appealed to Court of Appeal, Lagos. The Court allowed the appeal in part having found that there was sufficient evidence of willful misconduct on the part of appellant. The Court found that the

Federal High Court was in error to have awarded damages in naira when it was specifically pleaded in US Dollars. The Court thus awarded \$11,000 (Eleven thousand Dollars) as an appropriate compensation for general damages. The claim for special damages failed and was set aside. Dissatisfied, appellant made a further appeal to Supreme Court.

ISSUES FOR DETERMINATION

1) Whether the learned justices of the Court of Appeal were right in affirming the decision of the trial court by holding that the appellant (defendant) was guilty of willful misconduct as provided in Article 25 of the Warsaw Convention of 1929.

2) Whether the learned justices of the Court of Appeal were entitled to award a sum of \$11,000 (Eleven Thousand Dollars) as general damages in favour of the respondent.

HELD (Unanimously dismissing the appeal per **ADEKEYE JSC**)

Reply brief - Failure to reply on issue raised

1. A reply brief is filed when an issue of law or argument raised in the respondent's brief usually by way of a preliminary objection calls for a reply. Where a reply brief is necessary, it should be limited to answering any new points arising from the respondent's brief. Although the filing of a reply brief by an appellant is not mandatory, where a respondent's brief raises issues or points of law not covered in the appellant's brief, an appellant ought to file a reply as failure to file one without an oral reply to the points raised in the respondent's brief may amount to a concession of the points of law or issues raised in the respondent's brief. It is not proper to use a reply brief to extend the scope of the appellant's brief or raise issues not dealt with in the respondent's brief. A reply brief is not meant to have a second bite of the cherry, which is exactly the purpose of the appellant's reply brief in this appeal. Since the appellant used the reply brief to extend the scope of his argument and submission in the two issues raised for determination, it is utterly irrelevant to this appeal.

(p. 1781 G)

APPEALS - Evidence - Unchallenged at trial court - Effect

2. It is however apt to examine the position of the law and the definition of willful misconduct relied upon by the two lower courts in

their respective findings of fact. The salient facts not disputed are that the respondent boarded the appellant's plane from Kaduna which crash landed in Lagos and the facts revealed by PW2, a member of the investigation panel into the accident in the Interim Report. The learned trial Judge aptly described this at pages 178-180 of the record

B that *"There is unchallenged, uncontradicted and credible evidence in this matter, uncontradicted that the defendant operated its flight on the 24th day of June 1995 from Kaduna to Lagos when other Air-*

C *lines refused to do so and cancelled their flights. It is also on record that it rained on the morning of the 24th day of June 1995. The ill-*

D *fated aircraft was not given any clearance to land at all by the Air Traffic Controller when it reached the threshold. The aircraft involved herein was a height above the normal and regular height. The pilot did not respond to the inquiry of the Air Traffic Controller whether*

E *he was landing or carrying out a missed approach. The interim report of the investigation was subpoenaed and it is part of the record in this suit. It has also been shown by credible evidence that at the time this aircraft came in contact with the runway, it had already passed more than 60% of the total runway distance. According to the evidence of PW2, it was impossible to make a safe landing with the type of approach made by the ill-fated aircraft.*

F *I am therefore absolutely satisfied that the defendant herein is guilty of willful misconduct as provided in Art. 25. I am fully satisfied that the pilot being a servant of the defendant had knowledge that damage, death or injury were probable result from the way he handled this ill-fated aircraft. I therefore so hold."*

Knowledge would be imputed where the nature of the damage would ordinarily flow from the reckless conduct of the pilot. In other words,

G from the foregoing prevailing circumstances and especially the pleadings of the respondent having been culminated by the evidence thereon, it is glaring without more that the learned trial Judge was right in holding that the defendant/appellant was guilty of misconduct as provided in Section 25 of the Warsaw Convention of 1929.

H (p. 1785 A/1790 E)

AVIATION LAW - Treaties - Domestic application

3. The Warsaw Convention 1929 which is applicable and relevant to the instant appeal was domesticated as a Nigerian law by the Car-

riage by Air (Colonies, Protectorates and Trust Territories) Order 1953 Vol. XI Laws of the Federation 1958, as amended by the Hague Protocol. It is still part of the existing law in Nigeria pursuant to Section 315 of the 1999 Constitution as it has not been repealed by any law or rendered invalid or incompetent by any court of competent jurisdiction. B

“An important International convention like the Warsaw Convention cannot be said to be impliedly repealed when the country is still taking advantage of its provision and has not promulgated similar enactment to replace it. The convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system. It is a notorious fact that all air travelling tickets, whether domestic or international contain notices alluding to the provision of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under Section 74 (1) (a) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria. C D

The Warsaw Convention is an International treaty, an International agreement, a compromise principle which the high(sic) contracting States have submitted to be bound by the provisions. They are therefore an autonomous body of law whose terms and provisions are above domestic legislation. Thus, any domestic legislation in conflict with the Convention is void. The purpose and intention of the Warsaw Convention is to remove those actions governed by the Warsaw Convention as amended by the Hague Protocol from the uncertainty of the domestic laws of the member States. F

(p. 1786 F)

INTERNATIONAL LAW - Domestic application G

4. The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right and not the domestic/common law. Hence, an air passenger is not at liberty to choose as between the provisions of the convention and the domestic/common law for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to the terms and conditions of the convention and cannot be pursued under any other law. H

(p. 1787 E)

APPEALS - Concurrent findings - Interference

5. In the surrounding circumstances of this case - I agree with the concurrent findings of the two lower courts and I find their conclusion in this matter, that the appellant is guilty of willful misconduct impeccable. Concurrent findings of fact of both the trial court and
B the Court of Appeal would not be disturbed by the Supreme Court except there are cogent and compelling reasons shown to justify disturbing the findings of fact. Such as where the findings cannot be supported by evidence or are perverse, patently erroneous, where
C there is a miscarriage of justice or not the result of a proper exercise of judicial discretion. (p. 1790 G)

DAMAGES - Award by trial court - Interference on appeal

6. I have to commence my reasoning in this issue by laying emphasis
D on the notorious fact that the award of damages is essentially the duty of a trial court and will not be interfered with except unless certain circumstances exist:-
a. Where the trial court acted under a misapprehension of facts or law
E b. Where it failed to take into account relevant matter.
c. Where the amount awarded is too low or too high.
d. Where failure to interfere would amount to injustice.
(p. 1792 F)

F ***JURISDICTION - Powers of Court of Appeal***

7. Consequently, Section 16 gives the court of appeal power to deal with any case before it on appeal, which power includes the jurisdiction of a court of first instance. The section confers on the lower court
G wide power to enable it make order which the High Court would have made in a matter of jurisdiction of the High Court i.e. a precondition for the invocation of the provision of Section 16 by the Court of Appeal. The section stipulates that the Court of Appeal may from time to time; make any order necessary for determining the
H real question in controversy in the appeal. It is amply obvious that the lower court invoked Section 16 of the Court of Appeal Act so as to determine the real question in controversy in the appeal - which is the currency in which the damages flowing from the established willful misconduct of the appellant would be awarded. (p. 1795 G)

JUDGMENTS - Damages - Award in foreign currency

8. It is firmly established that the evidence of the respondent in Naira cannot be used and did not support his averments in U.S. Dollars without corresponding evidence of the conversion rate of one currency to the other - while there was no evidence that damages was granted by the trial court as per the respondent's statement of claim. Another vital question arising in the circumstance is when the Nigerian Courts and particularly the lower court have the jurisdiction to enter judgment and make awards in foreign currency. There are Nigerian authorities to answer that question in the positive. In the case of Koya v. U.B.A. (1997) 1 NWLR (pt.481) pg.251 the Supreme Court per M.E. Ogundare, JSC of blessed memory had this to say

"It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currency are claimed. The old rule in England, as well as in Nigeria, is judge-made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England more so that the difficulties hitherto experienced in enforcing such judgments no longer apply."

The trial and lower courts having identified that there is proof of a breach of a legal duty resulting in proved injury, the law automatically presumes damages to flow. The lower court was therefore in order to have invoked the right process of law to award the damages in foreign currency in line with the statement of claim of the respondent. I resolve Issue Two in favour of the respondent. (p. 1797 B)

NOTABLE POINTS OF INTEREST

ADEKEYE JSC

1. Aircraft accident - Meaning and liability of carrier

I have given due consideration to the submission of both parties on this issue. The substance of the submission of the appellant is that the evidence of the respondent and his witness did not prove willful misconduct; all it can at best establish is negligence or carelessness in the absence of conclusive investigation into the air crash according to the evidence of PW2. In the cases of Oshevire v. British Caledonian Air Ltd. (1990) 7 NWLR (pt.163) pg.507 and Horebin v. BOAC (1952) 2 All ER pg.1006, the definition of willful misconduct comprises of

the act or omission to act as well as the mental element. The averments in the statement of claim of the respondent at pages 12-15 of the record of appeal do not reflect the definition. Willful misconduct came into the pleadings by way of the particulars. The respondent justified the lower court's finding of willful misconduct based on the case of *Goldman v. Thai Airways International Limited* (1983) 3 All ER pg.693. Since there was finding of willful misconduct, issue of damages is left at large. The two lower courts believed the averments in the pleadings and the oral evidence led by the two witnesses of the respondent as to the accident and the resultant effect on the respondent. (p. 1784 E)

2. Interpretation of "willful misconduct"

Under the Aviation Law, an aircraft accident is an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked in which (a) a person suffers a fatal or serious injury as a result of being in the aircraft, Annex 13 to the Chicago Convention, dealing with Aircraft Accident and Incident Investigation. The Civil Aviation (Investigation of Accidents) Regulation 2 (1) (d), Regulation (2) (1) Civil Aviation (Investigation of Air accidents and Incidents) regulations U.K. Statutory Instrument No.2798, 1996.

There are laws regulating the liability of the carrier to its passengers. An airline's liability to its passengers or customers could arise as a result of

- a) Injury sustained on board an aircraft or
- b) Death arising from the course of a journey or
- c) Damage or loss of goods
- d) Delayed or denied boarding or
- e) Interactions in the course of preparing for or the actual conduct of flight operations.

Section 48 of the Civil Aviation Act 2006, Warsaw Convention 1929, Montreal Convention 1999. (p. 1786 A)

REPRESENTATION

Mr. Rotimi Seriki, for the Appellant

Mr. John Duru, for the Respondent

CASES REFERRED TO

- Ojomu v. Ajao (1983) 9 SC pg.22 at pg.53
 Lokoyi v. Olojo (1983) 8 SC pg.61 at pg.68
 Abidoye . Alawode (2001) 3 SC pg.1 at pg.9
 Sidhu v. British Airways (1997) 1 All ER pg.193
 Uka v. Irolo (2002) 7 SC (pt.11) pg.97 at pg.108 B
 Iroegba v. Okwordu 1990 6 NWLR pt. 159 pg. 643
 Popoola v. Adeyemo (1992) 8 NWLR (pt.257) pg.1
 Olafisoye v. FRM (2004) 4 NWLR (pt.864) pg.580
 Longe v. F.B.N. Plc. (2010) 6 NWLR (pt.1189) pg.1 C
 Shuiabu v. Mailodu (1993) 3 NWLR (pt.284) pg.748
 Okonkwo v. Okonkwo (1998) 10 NWLR pt. 571 pg. 554
 Okoya v. Santilli (1990) 2 NWLR (pt.130) pg.172 at pg.207
 El Al Israel Airlines Ltd. v. Tseng 919 F. Supp 155 S.D.N.Y. 1996
 Cameroun Airlines v. Abdulkareem (2003) 11 NWLR (pt.830) pg.1 D

STATUTES & RULES REFERRED TO

- Arbitration and Conciliation Act Cap.19 LFN 1990
 Admiralty Jurisdiction Decree 1991, s.7
 Carriage by Air (Colonies, Protectorates & Trust Territories) Order E
 1953 vol. xi L. F. N. 1958 (amended by The Hague Protocol)
 Civil Aviation Act 2006, s.48
 Civil Aviation (Investigation of Air Accidents & Incidents) United King-
 dom Statutory Instrument No.2798 1996, regulation 2 (1) (d) F
 Constitution of Federal Republic of Nigeria 1999, s.315
 Court of Appeal Act Cap. C36 L. F. N. 2004, s.15
 Evidence Act Cap.112 L. F. N. 2004, s.74 (1) (a)
 Exchange Control Act 1962
 Foreign Currency (Domiciliary Accounts) Act Cap. 151 LFN 1990 G
 Foreign Judgments Reciprocal Enforcement Act Cap.152 LFN 1990
 Warsaw Convention 1929, article 17, 22, 25 (1) (2)
 Court of Appeal Rules 2002, O.3 r.23 (1) (2)

LEAD JUDGMENT BY ADEKEYE JSC

H

In the writ of summons issued at the Federal High Court Lagos, Emeka Keazor as plaintiff, claimed against the defendant, Harka Air Services Nigeria Limited as follows:-

- 1) The sum of \$5,000,000.00 (Five Million United States

Dollars) being compensation and damages arising from the lost luggage and personal effects and injuries sustained by the plaintiff on board the defendant’s aircraft which crash landed in Lagos on the 24th day of June, 1995.

2) Interest at the rate of 21% from the 24th day of June 1995 until judgment and thereafter at the rate of 10% per annum until final payment.

In the twelve paragraph of his statement of claim filed on the 1st of February, 1996, the plaintiff pleaded his Particulars of Special Damage

Loss of checked in luggage	\$5,000
Loss of baggage carried	\$2,000
Filing fees	\$1,000
Expenses incurred up to filing action	\$30,000
	\$38,000

The background facts of this case are that on the 24th of January 1995, the plaintiff now respondent in the instant appeal boarded Harka Air Services Limited on its flight No.TU134 from Kaduna to Lagos. There was bad weather at the point of embarkation as a result of which all other commercial Airlines cancelled their flight and there was none operating two hours before the defendant’s flight took off. The flight to Lagos was turbulent. The descent in Lagos was irregular, as the air craft finally crash-landed. This was followed by a smoke and fire out break in the cabin which caused panic and confusion as passengers scampered for safety. The plaintiff/respondent had a traumatic experience, coupled with sustaining injuries and body pain. He lost his hand luggage and personal effects. The serious nature of the injuries required medical attention. He suffered loss professionally and financially as the injuries curtailed his day to day activities. As the plaintiff/respondent was convinced that the crash was due to the negligence, careless and recklessness of the defendant/appellant, its servants, agents and employees in maintaining, controlling and operating the said aircraft on the fateful day, he wrote to the defendant/appellant for compensation. As his claim was unheeded, he filed an action at the Federal High Court, Lagos. At the trial before the Federal High Court, the plaintiff called two witnesses, him self and one of the air accident investigators. In his considered judgment, the learned trial Judge found in favour of the plaintiff and awarded

N1,257,840.00 (one million, two hundred and fifty-seven thousand, eight hundred and forty Naira) as special and general damages as well as costs of the action. Being aggrieved by the decision of the trial court, the defendant/appellant appealed to the court of Appeal, Lagos. In the judgment delivered on the 17th of March, 2005, the court of Appeal allowed the appeal in part having found that there was sufficient evidence of willful misconduct on the part of the appellant, it found that the trial court was in error to have awarded damages in naira when it was specifically pleaded in US Dollars. The lower court awarded \$11,000 US Dollars as an appropriate compensation for general damages; the claim for special damages failed and was set aside. The appellant made a further appeal to this court based on the Notice of Appeal dated the 21st of March, 2005.

Parties exchanged briefs and when the appeal was heard on the 21st of March 2011. The appellant in the appellant's brief filed on 6/2/06 distilled two issues for determination as follows: -

1) Whether the learned justices of the Court of Appeal were right in affirming the decision of the trial court by holding that the appellant (defendant) was guilty of willful misconduct as provided in Article 25 of the Warsaw Convention of 1929.

2) Whether the learned justices of the Court of Appeal were entitled to award a sum of \$11,000 (eleven thousand Dollars) as general damages in favour of the respondent.

In the respondent's brief deemed filed on the 14/10/09, the respondent adopted the two issues raised by the appellant for determination in this appeal.

The appellant filed a Reply brief on 11/11/09 adopted and relied on same in the argument of this appeal. The appellant in the brief made further submission on the two issues for determination in the appeal. The appellate courts had in many decided cases laid emphasis on when a reply brief is necessary and what it should address. ***A reply brief is filed when an issue of law or argument raised in the respondent's brief usually by way of a preliminary objection calls for a reply. Where a reply brief is necessary, it should be limited to answering any new points arising from the respondent's brief. Although the filing of a reply brief by an appellant is not mandatory, where a respondent's brief raises issues or points of law not covered in the appellant's***

brief, an appellant ought to file a reply as failure to file one without an oral reply to the points raised in the respondent's brief may amount to a concession of the points of law or issues raised in the respondent's brief. It is not proper to use a reply brief to extend the scope of the appellant's brief or raise issues not dealt with in the respondent's brief. A reply brief is not meant to have a second bite of the cherry, which is exactly the purpose of the appellant's reply brief in this appeal. Since the appellant used the reply brief to extend the scope of his argument and submission in the two issues raised for determination, it is utterly irrelevant to this appeal.

(Olafisoye v. FRM (2004) 4 NWLR (pt.864) PG.580.

Popoola v. Adeyemo (1992) 8 NWLR (pt.257) pg.1.

Longe v. F.B.N. Plc. (2010) 6 NWLR (pt.1189) pg.1.

D Shuabu v. Mailodu (1993) 3 NWLR (pt.284) pg.748.)

Issue One

Whether the learned justices of the Court of Appeal were right in affirming the decision of the trial court by holding that the appellant was guilty of willful misconduct as provided in Article 25 of the Warsaw Convention of 1929.

The appellant submitted on this issue that the relevant statute applicable to the respondent's claim at the trial court is the provision of the Carriage by Air (Non-International) Colonies, Protectorates and Trust Territories Order of 1953 which incorporated the terms and conditions of the Warsaw Convention of 1929 are Articles 22 (1) and 25 of the Warsaw Convention. By virtue of Article 25 of the Warsaw Convention, the appellant was entitled to rely on the limitation of its liability except the respondent was able to prove that the damages he suffered was caused by the willful misconduct of the appellant or its agents acting within the scope of their employment. The act or omission must also be shown to have been done with knowledge that damage would probably result. Thus where a pilot did not know that damage would probably result from his omission, the court is not entitled to attribute to him knowledge which another pilot might have possessed or which he himself possessed.

Oshevire v. British Caledonian Air Ltd (1990) 7 NWLR (pt.163) pg.507.

The appellant adopted the definition of Willful Misconduct as

portrayed in the English case of *Horabin v. BOAC* (1952) 2 All ER (pg.1006). The appellant contended that willful misconduct in the definition combined the act or omission to act as well as the mental element. Such definition is not pleaded in the Respondent's Statement of Claim at pages 12-15 of the record of appeal. Willful misconduct was only incorporated by way of particulars and the learned justices of the Court of Appeal were wrong in holding that willful misconduct was pleaded. The appellant concluded that the evidence led by the respondent and PW2 was clearly at variance with the facts pleaded in paragraph 10 of the Statement of claim and relates to facts not pleaded and such evidence goes to no issue. No evidence was led at the trial to prove the particulars of the averments in paragraph 10 of the Statement of Claim. Paragraph 10 of the statement of claim is deemed abandoned. The learned justices have no evidence to support their finding of willful misconduct. Paragraph 11 of the statement of claim and evidence of PW2 at pages 132 and 138 of the record before the trial court show that investigation into the air crash have not been completed. The evidence of the two witnesses for the respondent does not prove willful misconduct it at best proves negligence or carelessness on the part of the appellant. The two lower courts have no justification to hold that the appellant was guilty of willful misconduct. The court is urged to resolve this issue in favour of the appellant.

The respondent replied that the lower court in its judgment considered the provision of Article 25 of the Warsaw Convention. Once the court can make a finding of willful misconduct, damages are left at large. The lower court adopted the definition of willful misconduct in the case of *Goldman v. Thai Airways International Limited* (1983) 3 All ER pg.693. The lower court therefore expatiated on when knowledge would be imputed. The lower court made concurrent findings of fact with the trial court that the appellant was guilty of willful misconduct. The respondent explained that what is before this court is the concurrent findings of fact by the trial court and the Court of Appeal, which should not be disturbed by this court unless there are cogent and compelling reasons shown to justify interfering with these findings of fact. The respondent cited the cases of -

Ogbu v. Wokoma (2005) 7 SC (pt.11) pg.123.

Oleke v. Agbodiye (1999) 12 SC (pt.11) pg.101.

Ibenye v. Agwu (1998) 9-10 SC pg.18.

Alakija v. Abdulai (1998) 5 SC 1.

The appellant has also not shown that the findings of fact of the two lower courts are perverse, patently erroneous or not the result of a proper exercise of judicial discretion. He cited the cases of-

B Abidoeye . Alawode (2001) 3 SC pg.1 at pg.9.

Lokoyi v. Olojo (1983) 8 SC pg.61 at pg.68.

Ojomu v. Ajao (1983) 9 SC pg-22 at pg.53.

The respondent defined a perverse decision as stated in decided cases of this honourable court like-

C Uka v. Irolo (2002) 7 SC (pt.11) pg.97 at pg.108.

State v. Ajie (2000) 7 SC (pt.1) pg.24

Misr v. Ibrahim (1975) 5SC Pg.55.

Incar Ltd. v. Adegboye (1985) 2 NWLR (pt.8) pg.453.

D Ramonu Atolugbe v. Shorun (1985) 1 NWLR (pt.2) 1 NWLR (pt.2) pg.360; (1985) 4 SC (pt. II) 250 at Pg.282.

As this court has no reason to interfere with the findings of fact of the two lower courts. The respondent urged the court to resolve this issue against the appellant.

E I have given due consideration to the submission of both parties on this issue. The substance of the submission of the appellant is that the evidence of the respondent and his witness did not prove willful misconduct; all it can at best establish is negligence or carelessness in the absence of conclusive investigation into the air crash according to the evidence of PW2. In the cases of Oshevire v. British

F Caledonian Air Ltd. (1990) 7 NWLR (pt.163) pg.507 and Horebin v. BOAC (1952) 2 All ER pg.1006, the definition of willful misconduct comprises of the act or omission to act as well as the mental element. The averments in the statement of claim of the respondent at pages 12-15 of the record of appeal do not reflect the definition.

G Willful misconduct came into the pleadings by way of the particulars. The respondent justified the lower court's finding of willful misconduct based on the case of Goldman v. Thai Airways International

H Limited (1983) 3 All ER pg.693. Since there was finding of willful misconduct, issue of damages is left at large. The two lower courts believed the averments in the pleadings and the oral evidence led by the two witnesses of the respondent as to the accident and the resultant effect on the respondent.

It is however apt to examine the position of the law and the definition of willful misconduct relied upon by the two lower courts in their respective findings of fact. The salient facts not disputed are that the respondent boarded the appellant's plane from Kaduna which crash landed in Lagos and the facts revealed by PW2, a member of the investigation panel into the accident in the Interim Report. The learned trial Judge aptly described this at pages 178-180 of the record that "There is unchallenged, uncontradicted and credible evidence in this matter uncontradicted that the defendant operated its flight on the 24th day of June 1995 from Kaduna to Lagos when other Airlines refused to do so and cancelled their flights. It is also on record that it rained on the morning of the 24th day of June 1995. The ill-fated aircraft was not given any clearance to land at all by the Air Traffic Controller when it reached the threshold the aircraft involved herein was a height above the normal and regular height. The pilot did not respond to the inquiry of the Air Traffic Controller whether he was landing or carrying out a missed approach. The interim report of the investigation was subpoenaed and it is part of the record in this suit. It has also been shown by credible evidence that at the time this aircraft came in contact with the runway, it had already passed more than 60% of the total runway distance. According to the evidence of PW2, it was impossible to make a safe landing with the type of approach made by the ill-fated aircraft."

I am therefore absolutely satisfied that the defendant herein is guilty of willful misconduct as provided in Art. 25. I am fully satisfied that the pilot being a servant of the defendant had knowledge that damage, death or injury were probable result from the way he handled this ill-fated aircraft. I therefore so hold."

The lower court held that the respondent's statement of claim particularly paragraphs 10 (a) - (r) have graphically spelt out the particulars of willful misconduct which evidence the trial court described as unchallenged, uncontradicted and credible. The lower court supported the foregoing with cases -

Adejumo v. Ayantegbe (1989) 3 NWLR (pt.110) pg.417.

F.C.D.A. v. Noibi (1990) 3 NWLR (pt.138) pg.270.

Obimiami Block & Stone (Nig.) Ltd. v. A.C.B. Ltd. (1992) 2 NWLR (pt.229) pg.260

Under the Aviation Law, an aircraft accident is an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked in which (a) a person suffers a fatal or serious injury as a result of being in the aircraft, Annex 13 to the Chicago Convention, dealing with Aircraft Accident and Incident Investigation. The Civil Aviation (Investigation of Accidents) Regulation 2 (1) (d), Regulation (2) (1) Civil Aviation (Investigation of Air accidents and Incidents) regulations U.K. Statutory Instrument No.2798, 1996.

There are laws regulating the liability of the carrier to its passengers. An airline's liability to its passengers or customers could arise as a result of

- a) Injury sustained on board an aircraft or
- b) Death arising from the course of a journey or
- c) Damage or loss of goods

d) Delayed or denied boarding or

e) Interactions in the course of preparing for or the actual conduct of flight operations.

Section 48 of the Civil Aviation Act 2006.

Warsaw Convention 1929

Montreal Convention 1999

The Warsaw Convention 1929 which is applicable and relevant to the instant appeal was domesticated as a Nigerian law by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 Vol. XI Laws of the Federation 1958, as amended by the Hague Protocol. It is still part of the existing law in Nigeria pursuant to Section 315 of the 1999 Constitution as it has not been repealed by any law or rendered invalid or incompetent by any court of competent jurisdiction.

In the case of Ibidapo v. Lufthansa (1997) 4 NWLR (pt.498) pg.149 at paragraph H, the Supreme Court per Wali JSC (as he then was) said: -

“An important International convention like the Warsaw Convention cannot be said to be impliedly repealed when the

country is still taking advantage of its provision and has not promulgated similar enactment to replace it. The convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system. It is a notorious fact that all air travelling tickets, whether domestic or international contain notices alluding to the provision of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under Section 74 (1) (a) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria.

The Warsaw Convention is an International treaty, an International agreement, a compromise principle which the high contracting States have submitted to be bound by the provisions. They are therefore an autonomous body of law whose terms and provisions are above domestic legislation. Thus, any domestic legislation in conflict with the Convention is void. The purpose and intention of the Warsaw Convention is to remove those actions governed by the Warsaw Convention as amended by the Hague Protocol from the uncertainty of the domestic laws of the member States.

The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right and not the domestic/common law. Hence, an air passenger is not at liberty to choose as between the provisions of the convention and the domestic/common law for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to the terms and conditions of the convention and cannot be pursued under any other law.

(Cameroun Airlines v. Abdulkareem (2003) 11 NWLR (pt.830) pg.1, El Al Israel Airlines Ltd. v. Tseng 919 F. Supp 155 S.D.N.Y. 1996, Sidhu v. British Airways (1997) 1 All ER pg.193, Air France v. Saks 105 S.C. 1338 470 U.S., 392 84 L.Ed 2d 289 (1985).)

I shall now refer to and consider the relevant and appropriate provisions of the Warsaw Convention as amended by the Hague Protocol.

By virtue of Article 17 of the Warsaw Convention, the Carrier

is liable for the damages sustained in the event of the death or wounding of a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. To establish liability, the claimant must prove that:

- B (a) the passenger must have been wounded or suffered bodily injury
- (b) the injury must have arisen from the accident
- (c) the accident must have occurred on board the aircraft or
- C during the course of embarking or disembarking.

Article 22 makes provision for the limitation of the liability of the carrier for each passenger and for registered baggage and cargo. It reads-

- D (1) In the carriage of passengers, the liability of the carrier for each passenger is limited to the sum of 125,000 francs.

Where in accordance with the law of the courts seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed
 E 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

- (2) In the carriage of registered luggage and of goods, the liability of the carrier to the sum of 250 francs per kilogram unless the consignor has made, at the time when the package was handed over
 F to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the
 G consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier is limited to 5,000 francs per passenger.

- (a) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 % milligrams gold of millesimal fineness
 H 900. The sums may be converted into any national currency in round figures.

Article 25 stipulates that -

- (1) The carrier shall not be entitled to avail himself of the provisions of this convention, which exclude or limit his liability, if the

damage is caused by his willful misconduct or by such default on his part as in accordance with the law of the court seised of the case, is considered to be equivalent to willful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment. B

By virtue of Article 25 (1), the carrier shall not be entitled to avail himself of the provisions of this convention which limit or exclude his liability if the damage is adjudged by a court seised of the case to be caused by his willful misconduct. Similarly the carrier shall not be entitled to avail himself of the provisions if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment. Where there is default of such magnitude that it amounts to a willful misconduct, the limits provided by the convention to liability of the carrier are not applicable. For the definition of willful misconduct, the two lower courts relied on the definition in the case of *Horabin v. BOAC* (1952) 2 All ER (1006) as follows - C

“Misconduct is misconduct which the will is a party and it is wholly different from mere negligence or carelessness, however gross that negligence or carelessness may be... To be guilty of willful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be, all the problems must be evidence in the light of that definition.” E
F

The lower court cited and relied upon the case of *Goldman v. Thai Airways International Limited* (1983) 3 All ER 693 where willful misconduct was amplified as follows -

“For damage awarded against the carrier to be at large in accordance with the provision of Article 25 of the Convention ... it is not sufficient for the act or omission that is relied on to have been done recklessly, it must be shown to have been done with knowledge that damage would probably result. Thus where a pilot did not know that damage would probably result from his omissions, the court is not entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed.” G
H

Oshevire v. British Caledonian Airways Ltd (1990) 7 NWR (pt.163) pg. 507 The trial court referred to the unchallenged, uncontradicted

and credible evidence establishing the willful misconduct on the fateful day as follows -

(1) The airline operated its flight when other airlines cancelled their flight due to bad weather.

B (2) The defendant's air craft was not given clearance to land when it reached the threshold, as it was at a height above normal and regular.

(3) The pilot did not respond to the Air Traffic Controller whether he was landing or carrying out a missed approach.

C The Interim Report of Investigation tendered by PW2 under subpoena shows that -

(1) As at the time the aircraft hit the runaway, it had passed more than 60% of the entire runway - which made it impossible for it to make a safe landing.

D The trial Judge concluded that the pilot as a servant of the appellant had knowledge that damage, death or injury were probable to result from the way he handled the ill-fated aircraft.

The lower court held that -

E *"The probability of the result must be as qualifying the nature of the act and if the nature of the act is to make the damage probable, provided the concurrent circumstances for impact or damage are there, then the probability of damages is fulfilled"*

Knowledge would be imputed where the nature of the damage would ordinarily flow from the reckless conduct of the pilot.
F **In other words, from the foregoing prevailing circumstances and especially the pleadings of the respondent having been culminated by the evidence thereon, it is glaring without more that the learned trial Judge was right in holding that the defendant/appellant was guilty of misconduct as provided in Section 25 of the Warsaw Convention of 1929.**
G

In the surrounding circumstances of this case - I agree with the concurrent findings of the two lower courts and I find their conclusion in this matter, that the appellant is guilty of willful misconduct impeccable. Concurrent findings of fact of both the trial court and the Court of Appeal would not be disturbed by the Supreme Court except there are cogent and compelling reasons shown to justify disturbing the findings of fact, such as, where the findings cannot be supported by evi-
H

dence or are perverse, patently erroneous where there is a miscarriage of justice or not the result of a proper exercise of judicial discretion.

(Ogbu v. Wokoma (2005) 7SC (pt.11) pg.123.

Alakija v. Abdulai (1998) 5 SC 1.

Uka v. Irolo (2002) 7 SC (pt.11) pg.97.

Okonkwo v. Okonkwo (1998) 10 NWLR (pt.571) pg.554

Atolagbe v. Shorun (1985) 1 NWLR (pt.2) pg.360

Ncar v. Adegboye (1985) 2 NWLR (pt.8) pg.453

Abidoye v. Alawode (2001) 3 SC 1 pg.9

Ojomu v. Ajao (1983) 9 SC Pg.22)

I resolve Issue One in favour of the respondent.

Issue Two

Whether the learned justices of the Court of Appeal, were entitled to award a sum of \$1 1,000 (Eleven Thousand Dollars) as general damages in favour of the respondent?

The appellant submitted that the lower court in allowing the appellant's appeal in part set aside the award of special and general damages in Naira made by the trial court in favour of the respondent. The award of \$11,000 awarded by the court of appeal in favour of the respondent as general damages tantamount to a variation of the judgment of the trial court in the absence of a cross-appeal or respondent's notice tantamount to a court granting a relief not sought by the plaintiff/respondent. The appellant submitted further that while it is not in dispute that a court can award judgment in foreign currency, the bone of contention in this appeal is whether it can award judgment in foreign currency when the contract the subject-matter of the suit is in Naira (the Nigerian Local Currency) and the evidence in support of the claim. The lower court invoked Section 15 of the Court of Appeal Act Cap C36 Laws of the Federation of Nigeria 2004 which only empowers the Court of Appeal to make an order which the Court below could have made, and does not allow the Court of Appeal to make an order which the trial court could not have made in resolving the controversy between the parties in a particular case. The Warsaw Convention 1929 has no provision for the award of damages in dollars. The award of \$11,000 Dollars is not only arbitrary but also unsupported by the evidence adduced at the trial court. The case of Saeby Jernstoberi M.F.A. A/S v. Olaogun Enterprises Ltd.

(1999) 14 NWLR (pt.637) pg.128 relied upon by the lower court is not only distinguishable from this suit but also inapplicable. This court is urged to set aside the award of \$11,000 as general damages in favour of the respondent.

The respondent by way of Reply submitted that the court of Appeal is empowered to give appropriate relief on the hearing of an appeal without being restricted by the relief specifically sought in the notice of appeal provided that they are necessary for the final determination of the appeal before it. By the combined effect of order 3 Rule 23 court of Appeal Rules 2002 applicable at the time of the hearing of the appeal and section 16, now 15 of the Court of Appeal Act, the court is empowered to substitute the orders of the lower court with its own orders, if such an order was one that it considers the lower court would have rightly made and if it is one that the justice of the case requires. The court of Appeal does not require filing of a cross-appeal or a respondent's Notice. The respondent referred to cases

Mogaji v. Military Administrator of Ekiti State (1988) 2 NWLR (pt.538) pg.425, Bunyan v. Akingboye (1999) 5 SC (pt.11) pg.91 at 99, A-G Bendel State v. Aideyan (1989) 4 NWLR (pt.118) pg.646, ACB v. Apugo (2001) 2 SC Pg.215, C.G.G. (Nigeria) Ltd. v. Ogu (2005) 2 SC (pt.11) pg.50, Onuaguluchi v. Ndu (2001) 3 SC 48. The court is urged to resolve this issue in favour of the respondent and dismiss the appeal.

I have to commence my reasoning in this issue by laying emphasis on the notorious fact that the award of damages is essentially the duty of a trial court and will not be interfered with except unless certain circumstances exist:-

a. Where the trial court acted under a misapprehension of facts or law

b. Where it failed to take into account relevant matter

c. Where the amount awarded is too low or too high

d. Where failure to interfere would amount to injustice.

(Ogunkoya v. Peters (1954) 14 WACA 504

Agaba v. Otubusin (1961) 2 SCNLR 13

Bala v. Bankole (1986) 3 NWLR (pt.27) pg.141

Saleh Boneh Overseas (Nig.) Ltd. v. Ayodele (1989) 1 NWLR (pt.99) pg.549)

Both the trial court and the lower court made concurrent findings of willful misconduct against the appellant, consequently damages are left at large. At the Federal High court Lagos which has exclusive jurisdiction over aviation related causes of action, the trial Judge entered judgment in favour of the respondent against the appellant for a cumulative sum of N1, 257,840.00 (one million, two hundred and fifty-seven thousand, eight hundred and forty Naira). The Court of Appeal Lagos in its judgment delivered on the 17th of March 2005, allowed the appeal in part, set aside the judgment of the trial court and instead awarded a sum of \$11,000 (eleven thousand dollars) in favour of the respondent as damages. B
C

The lower court approached the issue of damages by concluding that the respondent had suffered great injuring arising from the willful misconduct of the appellant. It is fair, just and equitable that he should and ought to be compensated. The court drew the conclusion that the respondent was entitled to general damages in foreign currency. D

They based their perception on two authorities of the Supreme Court - the cases of

Saeby Jernstoberi M.F. A/S v. Olaogun Enterprises Ltd. (1999) 14 E NwLR (pt.637) Pg.128 at Pages 145-146.

Koya v. United Bank for Africa (1997) 1 NwLR (pt.481) pgs.251-269

The lower court further thereafter proceeded to invoke the provision of Section 15 of the Court of Appeal Act Cap 36 Laws of the Federation of Nigeria 2004 by which the lower court assumed full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance. The court concluded that - F
G

“Consequently therefore it is my humble view that the issue of general damages lies within the jurisdiction of this court to award, with due consideration therefore to the whole circumstance of the pains and suffering experienced by the respondent on the evidence adduced before the lower court, I would assess the sum of eleven thousand U.S. Dollars (\$11, 000) as an appropriate compensation for general damages.” H

The bone of contention of the appellant relates to whether the learned trial court was entitled to give judgment in naira having re-

gard to the respondent’s claim being in Dollars and also with the respondent having no corresponding naira equivalent claim in Dollars. In order to relate the court’s finding to the claim before it, it would be necessary to reproduce the relevant paragraphs of the respondent’s claim -

B Paragraph 8 -

“The plaintiff was therefore required to seek medicine and medical attention and to be hospitalized for a very long period of time, immediately after the crash, the plaintiff was hospitalized at Eko Hospital, Lagos. The plaintiff has continued to attend the aforementioned hospital as an out-patient. The plaintiff has suffered extreme pain and mental anguish and wit in the future continue to suffer pain and mental anguish ail to his damage to the tune of \$5,000,000.”

C Paragraph 12

D “In view of the foregoing, the plaintiff reserves the right to add to his claim any other findings that could become public as a result of the investigation being carried out as to the cause and circumstance of the air crash.

Particulars of Special Damage

E	Loss of checked in luggage	\$5,000
	Loss of baggage carried	\$2,000
	Filing fees	\$1,000
	Expenses incurred up to filing action	\$30,000
		\$38,000

F Paragraph 13

“The plaintiff shall at the trial rely on all correspondence, recording transcripts letters, manuals in proof of the averments.”

Paragraph 14

G “Whereof the plaintiff claims judgment against the defendant in the sum of \$5,000,000.00 (U.S. Dollars).”

The poser raised by the court’s judgment is as follows -

- a. whereas the respondent’s claim was in Dollars, there was no indication of the claim in Naira equivalent.
- H b. There is no evidence on record of the conversion of any currency whether from Franc to Naira or from Dollars to Naira.
- c. The submission of both counsels in respect of the currency rate of conversion was not heeded.
- d. The issue of the exchange rate of the Naira to the Dollar is a

matter of fact which must be proved by evidence.

e. Where a party has proved his case to be entitled to the reliefs claimed, it is incumbent on the trial court to grant the reliefs in the same manner in which they are sought in the pleadings.

From the foregoing, it is apparent that parties were at cross-roads as to the propriety or not of the currency differentials between the claim and the eventual relief awarded which are at variance in the absence of an evidential harmonizing factor. The lower court went further to hold that such deficiency is obviously detrimental to the respondent's case. The lower court therefore held that it was not open to the trial court to have awarded the reliefs in Naira where the claim was in United States Dollars a different currency, as the special damages suffered by the respondent was in United States Dollars and not in Naira as awarded by the trial court. The lower court invoked section 16 of the Court of Appeal Act, to give the damages in U.S. Dollars.

The purport and intent of Section 16 of the Court of Appeal Act Cap 36 Laws of the Federation 2004 is as described by Agbaje JSC (of blessed memory) in the case of Okoya v. Santilli (1990) 2 NWLR (pt.130) pg.172 at pg.207 that-

"By virtue of section 16 of the Court of Appeal Act, the lower court has all the powers of the trial court i.e. the powers of the Federal High Court has in the matter before it which is now before us on appeal. So in my view, the lower court, in order to settle completely and finally the matters in controversy between the parties to this appeal in the matter before the lower court and in order to avoid multiplicity and legal proceedings concerning any of those matters, can grant such remedies as any of the parties may appear to be entitled to. However, in my judgment, a party will appear to be entitled to such a remedy only after a claim to it has been plainly made out though not formally claimed and dealt with according to the relevant principles such a claim if it has been formally made."

Consequently, Section 16 gives the court of appeal power to deal with any case before it on appeal, which power includes the jurisdiction of a court of first instance. The section confers on the lower court wide power to enable it make order which the High Court would have made in a matter of jurisdiction of the High Court i.e. a precondition for the invo-

cation of the provision of Section 16 by the Court of Appeal. The section stipulates that the court of Appeal may from time to time; make any order necessary for determining the real question in controversy in the appeal.

- Jaiyesimi v. Okotie-Eboh (1986) 1 NWLR (pt.16) pg.264, Adeleke v. Cole (1961) 1 All NLR 55, Union Bank of Nigeria Limited v. Fajube Foods and Poultry Farms (1994) 5 NWLR (pt.344) pg.325, Chief Igiebon v. Omorogie (1993) 2 NWLR (pt.276) pg.398, Chief Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (pt.39) pg.1, Chief Uzokwu v. Igwe Ezeonu II (1991) 6 NWLR (pt.200) pg.708, Kokore-Owo v. Ogunbambi (1993) 8 NWLR (pt.313) pg.627, Professor Olutola v. University of Ilorin (2004) 18 NWLR (pt.905) pg.416, Faleye v. Otapo (1995) 3 NWLR (pt.381) pg.1

It is amply obvious that the lower court invoked Section 16 of the Court of Appeal Act so as to determine the real question in controversy in the appeal - which is the currency in which the damages flowing from the established willful misconduct of the appellant would be awarded.

- The respondent referred to Order 3 Rule 23 Court of Appeal Rules 2002 which provides that - Rule 23 (1)

“The court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs.”

Rule 23 (2)

- “The powers contained in paragraph (1) of this rule may be exercised by the court notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties may not have appealed from or complained of the decision.*

The combined reading of Section 16 of the Court of Appeal Act and Order 3 Rule 23 Court of Appeal Rules 2002 gives the Court of Appeal powers in Civil Appeals of the court of first instance and in order to settle completely and finally the matters in controversy between the parties and to avoid multiplicity of legal proceedings, has powers to grant any remedy or make any orders to which any of the parties before it may appear to be entitled to or make such variation

of the orders of the trial court as may be necessary to avoid multiplicity of proceedings and to make the judgment effective so far as that can be done without injustice.”

Bunyan v. Akingboye (1999) 5 SC (pt.11) pg.91.

A-G Bendel State v. Aideyan (1989) 4 NWLR (pt.118) pg.646

A.C.B. v. Apugo (2001) 2 SC Pg.215

It is firmly established that the evidence of the respondent in Naira cannot be used and did not support his averments in U.S. Dollars without corresponding evidence of the conversion rate of one currency to the other - while there was no evidence that damages was granted by the trial court as per the respondent's statement of claim. Another vital question arising in the circumstance is when the Nigerian Courts and particularly the lower court have the jurisdiction to enter judgment and make awards in foreign currency. There are Nigerian authorities to answer that question in the positive. In the case of Koya v. U.B.A. (1997) 1 NWLR (pt.481) pg.251 the Supreme Court per M.E. Ogundare, JSC of blessed memory had this to say -

“It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currency are claimed. The old rule in England, as well as in Nigeria, is judge-made and in the light of present day circumstances of extensive international commercial relationships that rule should give way to a new rule as now in England more so that the difficulties hitherto experienced in enforcing such judgments no longer apply.”

My Lord had in the foregoing judgment supported the foregoing conclusion with reasons as follows -

(1) The Exchange Control Act 1962 has been repealed and the Naira allowed to float on market forces may determine.

(2) By Section 7 of the Admiralty Jurisdiction Decree 1991 - the Federal High Court is given jurisdiction to award judgments in foreign currency.

(3) The Arbitration and Conciliation Act Cap 19 Laws of the Federation of 1990, provides that the courts in Nigeria can enforce arbitrary awards in foreign currency.

(4) The Foreign Currency (Domiciliary Accounts) Act Cap 151,

Laws of Nigeria 1990 authorises citizens, corporate bodies, diplomats, foreign diplomatic missions and international organizations to import foreign currency and deposit same in a designated local bank account maintained in an approved foreign currency.

B (5) The Foreign Judgments Reciprocal Enforcement Act Cap 152 allows for the enforcement in Nigeria of judgments given in foreign countries in their currency. These legislation are still intact and applicable and there are cases to support that the courts, in appropriate cases, have power to enter judgment in favour of a party in any foreign currency claimed.

C (Saeby Jernstoberi M.F. A/S v. Olaogun Enterprises Ltd.(1999) 14 NWLR (Pt.637) Pg.128, Koya v. United Bank for Africa Ltd. (1997) 1 NWLR (pt. 481) pg.251, Nwankwo v. Ecumenical Development Company Society (2002) 1 NWLR (Pt.749) Pg.513, Broadline Enterprises Ltd. v. Monetary Maritime corporation (1995) 9 NWLR (pt.417) Pg.1)

E ***The trial and lower courts having identified that there is proof of a breach of a legal duty resulting in proved injury, the law automatically presumes damages to flow. The lower court was therefore in order to have invoked the right process of law to award the damages in foreign currency in line with the statement of claim of the respondent. I resolve Issue Two in favour of the respondent.***

F In sum this appeal lacks merit and it is hereby dismissed. I assess the cost of this appeal as N50, 000.00 in favour of the respondent.

G **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother ADEKEYE, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

H I accordingly dismiss same and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

TABAI JSC

I have had the benefit of reading, in draft, the lead judgment of my learned brother ADEKEYE, JSC and I agree with the reasoning and conclusion that the appeal lacks merit.

The facts are so lucidly recapitulated in the lead judgment that I need not repeat them. The fundamental issue is whether the Appellant, through its agent, the pilot, guilty of willful misconduct as provided in Article 25 of the Warsaw Convention of 1929.

Article 25 of the Warsaw Convention 1929 provides:-

“(i) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by willful misconduct or by such default on his part as; in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

“(ii) Similarly, the earner shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.”

On this issue of willful misconduct, the trial court in the course of its judgment at page 178 noted and found as follows:-

“There is unchallenged, uncontradicted and credible evidence in this matter that the Defendant operated its flight on the 24th day of June, 1995 from Kaduna to Lagos when other Airlines refused to do so and cancelled their flights. Learned counsel to the Plaintiff referred to them as safety conscious Airlines. It is also on record that it rained on the morning of the 24th day of June, 1995. The ill-fated aircraft was not given any clearance to land at all by the Air Traffic Controller when it reached the threshold and aircraft involved therein was at a height above the normal and regular height. The Pilot did not respond to the inquiry of the Air Traffic Controller whether he was landing or carrying out a missed approach.”

Still on the willful misconduct of the Appellant through its agents, the trial court continued at page 179 of the record in the following terms:-

“It has also been shown by credible evidence that at the time this aircraft came in contact with the runway it had already passed more than 60% of the total runway distance. According to the evidence of PW2 it was impossible to make a safe landing with the type

of approach made by this ill-fated aircraft. PW2 also told the court that the risk of fire would have been diminished to 10 - 30% if the aircraft had maintained a straight course, as is the normal practice in inevitable emergency situations, rather, this Pilot chose to veer off to the left of the runway thereby causing the fuel tanks of the aircraft to rupture as a result which the whole aircraft was consumed by fire.

It is part of the interim report of the investigators submitted to the Government shown that if this aircraft touches down in the first 1,500ft of the threshold it takes almost 80% of the runway to bring it to a total halt. At page 3 of the interim report it is stated that had the aircraft maintained a straight course and not skidded to the left the fuel tanks on the right would not have ruptured. All similar overrun where the captains maintained the centre-line it did not result in an outbreak of fire."

The above findings are supported by evidence which the trial court described as credible. They are not contradicted in any way and it is not surprising therefore that the court below also affirmed the findings. I have no reason whatsoever to disturb these concurrent findings of the two court below. I also hold and affirm that the Appellant was, through its Pilot, guilty of willful misconduct.

The cabin crew of the Appellant aircraft did not help matters. The trial court gave its impression of their role graphically as follows:-

"Available evidence also shows that the cabin crew members did not render any assistance to the passengers on board. Rather, they partook in the ensuing melee and confusion. One of the female crew members was shown to be screaming hard. The worst part of it the Pilot too jumped out of the front emergency exit and left the passengers in a state of utter hopelessness. None of the ground staff of the Defendant made any moves to rush the injured to the hospital not to talk of paying for their medical expenses. In fact they were nowhere near the site of the crash. The cabin crew members without any exception are under a duty to see and supervise the observance of all emergency procedures in situations like this."

Again, it is my view that these findings are unassailable.

With respect to the 2nd issue, it is my view that there is no substance in the argument of learned counsel for the Appellant. It is my view that the court below was rather gracious to reduce the award rendered by the trial court.

On the whole and particularly having regard to the strong and uncontradicted evidence on record, I also hold that the appeal lacks merit. For the foregoing reasons and the fuller reasons in the lead judgment, I also dismiss the appeal. And I abide by the order on costs in the lead judgment.

B

FABIYI JSC

I have read before now the judgment just delivered by my learned brother - Adekeye, JSC. I agree with the reasons advanced therein to arrive at the conclusion that the appeal lacks merit and should be dismissed.

I wish to chip in a few words of my own. Put briefly, the respondent herein, as the plaintiff at the Federal High Court in Lagos, claimed for injuries sustained and loss incurred while on board of the appellant's aircraft which crash-landed in Lagos on 24/06/95. The appellant tried to take cover under the provision of Article 25 of the Warsaw convention of 1929 which, in the main, stipulates that willful misconduct must be established against it or its agent to make damages be at large.

The learned trial Judge garnered evidence and was properly addressed on applicable salient points of law. He found that willful misconduct on the part of the appellant's agent; the pilot was established and awarded special damages in the sum of N1, 257,840.00 in favour of the respondent.

On appeal to the Court of Appeal, Lagos Division, the stated sum awarded as special damages was set aside. Instead, the sum of \$11,000 was awarded in favour of the respondent as general damages for his lost items and suffering.

The appellant has decided to appeal to this court. As usual, the parties exchanged briefs of argument and relied on same when this appeal was heard on 21st March, 2011. The two issues formulated by the appellant read as follows:

"1) whether the learned justices of the court of Appeal were right in affirming the decision of the trial court by holding that the appellant [defendant] was guilty of willful misconduct as provided in Article 25 of the Warsaw Convention of 1929.

2) Whether the learned justices of the Court of Appeal were

entitled to award a sum of \$11.000 (Eleven Thousand Dollars) as general damages in favour of the respondent”.

It is apt at this point to set out the provision of Article 25 of the Warsaw convention of 1929 for ease of reference and application. It reads as follows:

B “Art. 25 (1) The carrier shall not be entitled to avail himself of the provisions of this convention, which exclude or limit his liability, if the damage is caused by his willful misconduct or by such fault on his part as in accordance with the law of the court seized of the case, is considered to the equivalent to willful misconduct.

C (2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment”.

Misconduct has been defined as that carried out, in which the D will is a party. To be guilty of misconduct, the person concerned must appreciate that he is acting wrongfully and yet persists in so acting regardless of the consequences, or acts with reckless indifference as to what the result may be. See *Horabin V. BOAC* (1952) 2 ALL ER 1006. For damages, awarded against a carrier to be at large, it is not E sufficient for the act or omission that is relied upon to have been done recklessly, it must be shown to have been done with knowledge that damage would probably result. See *Goldman V. Thai Airways International Limited* (1983)3 ALL ER 693.

F It is extant in the record of appeal and rightly found by the learned trial Judge that the appellant operated its flight on 24th June, 1995 from Kaduna to Lagos when other safety conscious airlines refused to do so and cancelled their flights as it rained early that day.

The pilot was not given any clearance to land by the Air Traffic G Controller when he reached the threshold. The aircraft was at a height above the normal and regular height. The pilot did not respond to the inquiry of the Air Traffic Controller whether he was landing or carrying out a missed approach. At the time the aircraft came in contact with the runway, it had already passed more than 60% of the H total runway distance.

The learned trial Judge, rightly in my opinion, found that willful misconduct was established to make damages be at large. At every turn of event during the ill fated journey, the appellant’s pilot embarked upon risky venture. He appreciated that he was acting wrong-

fully and yet persisted in so acting regardless of the consequences. He acted with reckless indifference as to what the result may be.

The court of Appeal was at one with the stance of the trial court. I feel that they are correct. This court will not temper with such pragmatic concurrent findings of fact which are not in any respect perverse. See *Kale V. Coker* (1982) 12 SC 752; *Seatrade V. Awolaja* (2000) 2 SC (pt.1) 35. In short, I resolve issue 1 against the appellant and in favour of the respondent.

The appellant complained that the Court of Appeal, after setting aside the award of special damages, went ahead to award \$11,000.00 as general damages for loss of hand luggage and expenses for injury which were duly established.

There is no gain-saying the fact that court orders which appear incidental and necessary for a proper determination of the cause can be made. See *Nneji v. Chukwu* (1988) 3 NWLR (PT.78) 184 at 209. The award of general damages made by the court of Appeal satisfies the dictates of *ubi jus ibi remedium* doctrine in my considered opinion. Where there is a proven legal right, as in this case, there should be a remedy. The respondent, who established a legal right should not be made to go away empty handed.

In short, I support the commendable stance of the court below. I resolve the 2nd issue against the appellant and in favour of the respondent.

For the above stated reasons and those carefully set out by my learned brother, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly and endorse all the consequential orders contained in lead judgment; that relating to costs inclusive.

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RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment prepared by my learned brother, Adekeye, JSC. I agree with the reasoning and conclusions. I propose to add only a few observations.

The Warsaw Convention as amended at The Hague 1955 is the relevant Legislation. It is applicable in Nigeria by virtue of the carriage by Air (Colonies, Protectorates and Trust Territories) Order

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1953. It came into operation on the 1st day of January 1954, and it can be found in the Laws of the Federation of Nigeria and Lagos 1958 Vol. XI

Article 25 supra states that:

B 1. The carrier shall not be entitled to avail him self of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as in accordance with the Law of the court seized of the case, is considered to be equivalent to willful misconduct.

C 2. Similarly the carrier shall not be entitled to avail him self of the said provisions, if the damage is Caused as aforesaid by any agent of the carrier acting within the scope of his employment”.

Article 22 makes provision or the limitation of the liability of the carrier for each passenger and for registered baggage and cargo.

D 1. The liability of the carrier for each passenger is limited to 125, 000 francs.

2. The liability of the carrier for registered luggage and goods is limited to 250 francs.

E 3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

1, 2, and 3 above do not apply if there was willful misconduct by the carrier. The learned trial Judge found that there was willful misconduct, and the court of Appeal agreed with the learned trial Judge.

F This is what the learned trial Judge had to say:

G *“There is unchallenged, uncontradicted and credible evidence in this matter uncontradicted that the defendant operated its flight on the 24th day of June 1995 from Kaduna to Lagos when other Airlines refused to do so and cancelled their flights. It is also on record that it rained on the morning of the 24th day of June 1995. The ill-fated aircraft was not given any clearance to land at all by the Air Traffic Controller when it reached the threshold the aircraft involved herein was a height above the normal and regular height. The pilot did not respond to the inquiry of the Air Traffic Controller whether he was landing or carrying out a missed approach. The interim report of the investigation was subpoenaed and it is part of the record in this suit. It has also been shown by credible evidence that at the time this aircraft came in contact with the runway, it had already passed more than 60% of the total runway distance. According to*

the evidence of PW2 it was impossible to make a safe landing with the type of approach made by the ill fated aircraft. I am therefore absolutely satisfied that the defendant herein is guilty of willful misconduct as provided in Article 25. I am fully satisfied that the pilot being a servant of the defendant had knowledge that damage, death or injury were probable result from the way he handled this ill-fated aircraft." B

In *Cameroon Airlines v. Otutuizu* 2011 4 NWLR pt. 1238 pg 512.

I held that the act of the appellant (Cameroon Airlines) flying the respondent to South Africa (instead of to Manzini, Swaziland) with no justifiable reason for doing so and knowing fully well that the respondent did not have a transit visa, apart from being a clear breach of the agreed route, amounts to a negligent breach of contract. A willful misconduct in the extreme. C

The respondent was thrown in jail by the South African immigration officials and deported because he did not have a transit visa. D

Willful misconduct is a deliberate wrongly (sic) acts by a pilot, airline staff, or its agent which gives rise to a claim for damages by passengers. When staff of an airline act with reckless indifference, such unacceptable behaviour especially by a professional person amounts to willful misconduct. A Pilot that lands his plane without clearance from the control tower to my mind is guilty of willful misconduct, and both courts below were correct to so find. The position of the law is that concurrent findings of fact by the courts below would not be upset by this court except they are perverse or cannot be supported from the evidence before the court or there is/was miscarriage of justice, or violation of some principle of law or procedure. E

(See. *Iroegba v. Okwordu* 1990 6 NWLR pt. 159 pg. 643 F
Okonkwo v. Okonkwo 1998 10 NWLR pt. 571 pg. 554) G

The learned trial Judge and the Court of Appeal were correct to come to the conclusion that a pilot who lands his plane without clearance from the control Tower to land his plane is guilty of willful misconduct. This finding from the evidence before the court is unsailable. The Court of Appeal awarded the sum of \$11,000 (Eleven thousand United State Dollars) as general damages to the respondent. H

My lords, the basis for judgment in foreign currency is that

currencies are no longer stable. They all swing around with every gust that blows. Once parties plead their case properly, judgments should be given in any currency provided it is fair and just. I would dismiss this appeal with costs of N50, 000 to the respondent.

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