

COURT OF APPEAL LAGOS DIVISION
FRIDAY 11TH APRIL, 2014. CA/L/285/2011
CORAM:- A. A. AUGIE, J. S. IKYEGH, C. E. IYIZOBA, JJCA

EMIRATE AIRLINES APPELLANT
AND
1. TOCHUKWU AFORKA
2. TOBEST INVESTMENT CO. LTD RESPONDENTS

CARRIAGE BY AIR - Freight - Regulations - Montreal & Warsaw conventions had objectives of - Unifying the applicable Rules to ensure inter alia - A uniform standard of international air transport (H1)

CARRIAGE BY AIR - Freight - Liability - Is limited to 17 special drawing rights per kilogram - Unless consignor made special declaration of interest - In delivery at destination (H2)

CARRIAGE BY AIR - Freight - Limitation of liability - When applicable - Where carrier has taken control of cargo and issued airway bill - Any loss from then on is covered by the convention and limitation clause (H3)

CARRIAGE BY AIR - Freight - Liability - Negligence - Is inapplicable under Montreal Convention - Hence it was wrong to hold that there was no limitation of liability - On failure to rebut negligence (H4)

CARRIAGE BY AIR - Freight - Liability - Negligence - Proof - Claimant must plead and prove act that amounted to negligence - And that carrier knew that damage would probably result (H5)

CARRIAGE BY AIR - Freight - Liability - Declaration of value - Form of - The declaration is more than mere presentation of sales invoice - But ought to be in writing on airway bill (H6)

APPEALS - Respondent's notice - Filing - Respondent cannot challenge judgment of lower court given in his favour - Without first filing a cross appeal or respondent's notice (H7)

DAMAGES - General damages - Failure to claim - Award of the general damages not claimed by respondents is wrongful - As there is no indication as to how the trial Judge arrived at figures awarded (H8)

CONTRACTS - Breach - Damages - Claims for both special and general damages are not appropriate - In action for breach of contract - Except where there is agreement by parties to that effect (H9)

CONTRACTS - Breach - Special and general damages - Award of both damages amounts to double compensation - And is not allowed (H10)

CARRIAGE BY AIR - Freight - Limitation of liability - Extent of - Respondents' entitlement is in accordance with Montreal Convention s. 22(3) - And also cost for freight charges - Properly pleaded and proved (H11)

CARRIAGE BY AIR - Negligence - Res ipsa loquitur - Pleadings - The doctrine is pleaded either specifically - Or by making it known that plaintiff intends to rely on the loss - As evidence of negligence (H12)

FACTS

Before the Federal High Court sitting in Lagos, plaintiffs/respondents filed this suit against defendant/appellant for breach of contract. Respondents claim inter alia for the total value of his goods at 351,100 UAE Dirham and the freight charges of 11,675.00 UAE Dirham. Respondents had sometime in August 2007 purchased some ink cartridges through their agent in Dubai. The agent approached appellant to airfreight the goods to Murtala Mohammed Airport Lagos. It is estimated that the goods would arrive Lagos within a month from the date the freight was paid for. However, the goods never got to Lagos.

In its statement of defence, appellant admitted failure to deliver the goods but contended that the conditions governing the contract of carriage of respondents' cargo and the liability of appellant are as contained in Emirates General Conditions for Carriage of Cargo 2006 and the Montreal Convention 1999. Appellant argued that in line with these conventions, it offered respondents compensation for

the lost goods. Respondents however turned down the offer and rather chose to institute the action. In its judgment, the court held that non delivery of respondents' cargo amounted to negligent breach of contract and that no limitation of liability applied. Respondents were therefore awarded the sum of 29,319 Dirham for breach of contract, N5 Million in general damages. The court further held that because the goods did not leave Dubai, the terms of the contract of carriage did not apply. Aggrieved, appellant appealed to the Court of Appeal Lagos Division.

ISSUES FOR DETERMINATION

(a) Whether the limitation of liability as contained in the Montreal Convention and the Conditions of Carriage of Cargo of the Defendant is applicable in the circumstances of this case?

(b) Whether a Court can award General damages and also Special damages at the same time?

(c) Whether a court can base its judgment on facts that were neither pleaded nor on which no evidence was adduced in the course of trial?

HELD (Unanimously allowing the appeal per **IYIZOBA JCA**)

CARRIAGE BY AIR - Freight - Regulations

1. The preamble to the Montreal Convention recognised the Warsaw Convention which was the law in operation before the Montreal Convention. These Conventions had as their objectives the unification of certain Rules relating to International Carriage by air in order to ensure uniform standard, the orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation. (p.2819 B)

CARRIAGE BY AIR - Freight - Liability

2. The various Conventions made provisions for the limits of liabilities of carriers. Under the Warsaw Convention article 22(2) provides that “subject to the provisions of paragraph

4, the carriage of luggage of which the carrier takes charge and of cargo, the liability of the carrier in respect of destruction, loss and damage is limited to a sum of 250 francs per kilogram. "This has been superseded by Section 22(3) of the Montreal Convention.

B Article 22(3) of the Montreal Convention 1999 provides:

"22(3) In the carriage of Cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 special Drawing Rights per Kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires."

D In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

E The only way to escape the limitation of liability with respect to damage or loss of cargo is where the consignor at the time when the package was handed over to the carrier made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that situation the carrier will be liable to pay a sum not exceeding the declared sum. (pp. 2819 D/2820 C/2825 B)

CARRIAGE BY AIR - Freight - Limitation of liability

G 3. Article 18(1) of the Montreal Convention provides that the carrier is liable for damage sustained in the event of the destruction or loss of or damage to cargo. Article 18 (3) provides that the carriage by air within the meaning of paragraph (1) of article 18 comprise the period during which the cargo is in the charge of the carrier. The fact that the cargo has not been air lifted is consequently of no moment. Once the carrier has taken control of the cargo and issued the airway bill, any loss from then on is covered by the Convention and the limitation of liability clause subject to the stated exceptions as provided in the Convention. (p. 2821 F)

CARRIAGE BY AIR - Freight - Liability - Negligence

4. By these provisions negligence or willful misconduct seem to play no role in the case of carriage of cargo under the Montreal Convention. The learned trial Judge was consequently wrong in holding that there was no limitation of liability because the appellant was unable to rebut the presumption of negligence or the doctrine of *res ipsa loquitur*. B

The concept of negligence or willful misconduct obviously cannot work in the case of loss of cargo. It is difficult to prove willful misconduct as the Plaintiff is not in a position to know how the loss came about and no help is likely to come from the carrier in that regard. That must be why carriage of cargo was excluded in the provisions. C

From the exclusion of negligence and willful misconduct in the case of carriage of cargo in article 22 (5) and Article 30(3) I am of the firm view the Montreal Convention did not intend that those concepts should affect the limitation of liability with respect to carriage of cargo. (pp. 2822 F/2824 E/2825 A) D

CARRIAGE BY AIR - Freight - Liability - Negligence - Proof E

5. But even assuming but without conceding that negligence has a role to play, the case of *Cameroon Airlines v. Jumai Abdul-Kareem* (2003) 11 NWLR (Pt. 830) 1 throws more light on the point. There it was held that to be able to award damages at large, it is not enough to show that the damage was done intentionally or recklessly, it must also be shown that the carrier had knowledge that damage would probably result. This obviously is a tall order. The case is in my humble opinion authority for the view that the claimant cannot hide under the doctrine of *res ipsa loquitur*. He must plead and prove the act that amounted to negligence or willful misconduct and must go further to plead and prove knowledge that damage would result. The burden is squarely on the Claimant to prove negligence and not on the carrier to rebut negligence. But for Article 22(5) to apply to remove the limitation of liability it is not sufficient for the act or omission that is relied on to have been done negligently or recklessly; it must also be shown to have been done with knowledge that damage would F
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probably result. It is quite impossible to show through the doctrine of res ipsa loquitur that the Defendant did the act that gave rise to the loss with knowledge that the loss would occur. The truth is that Article 22 (5) which created the exemption clause excluded paragraph (3) which dealt with limitation of liability with respect to carriage of cargo. These matters have already been fully considered under issue one. The fact is that the particulars of negligence as pleaded are not adequate. But the issue is of no consequence in view of my conclusion that Article 22 (5) does not apply to carriage of cargo. To that extent, the learned trial Judge erred in the conclusions arrived at with respect to negligence and res ipsa loquitur. There were no sufficient pleading to justify his views and conclusions. Issue 3 is resolved against the Respondent.

D (pp. 2822 G/2833 D)

CARRIAGE BY AIR - Freight - Liability - Declaration of value - Form 6. It is my view that the special declaration envisaged in Article 22(3) means more than just presentation of the sales invoice and the packing list. The declaration of value ought to be in writing on the airway bill. DW1 in Re-examination had stated categorically that they rely on the Airway Bill and that no value was declared on it. In the case of Rembrandt Jewelry v. Air Canada (1985) O.J. No. 1382, it was held that a verbal statement of value made on the telephone is not a special declaration of value within the meaning of the convention. There is consequently no convincing evidence that the Respondent made a special declaration of the value of the goods. The limitation of liability as contained in the Montreal Convention and the Conditions of Carriage of Cargo of the Defendant is applicable in the circumstances of this case. Issue one is consequently answered in the affirmative and against the Respondent.

G (p. 2826 B)

H **APPEALS - Respondent's notice - Filing**

7. It appears then that what the Respondent is asking for is a variation of the judgment of the lower court with regard to damages and the award by this court of "appropriate and com-

mensurate damages.” The law is that the Respondents cannot challenge the judgment of the lower court given in their favour without first filing a cross-appeal or a Respondents Notice. The Respondents herein agree with the judgment of the lower court but they want the amount of damages awarded varied. They are not seeking for a reversal of the judgment. To that extent, they were right in filing a Respondent’s Notice. (pp. 2828 A/2828 G) B

DAMAGES - General damages - Failure to claim

8. What the Respondent pleaded and claimed for is the sum of 362,775.00 UAE Dirham and N2.5m paid to their Solicitors. There was no claim for general damages of N5m. How then did the learned trial Judge arrive at the figure of 29,319 UAE Dirham and N5m? There is no indication whatever in the judgment as to how the learned trial Judge came by those figures. To confound the situation, the Respondent never claimed general damages of N5m. What the Respondents claimed was N2.5m solicitors’ fees. Without much ado, I will quickly say that the award of N5m general damages not claimed by the Respondent is wrongful and must be set aside. (p. 2829 H) C
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CONTRACTS - Breach - Damages

9. Claims for both special and general damages or for solicitor’s fees are not appropriate in an action for breach of contract except where there is an agreement by the parties to that effect. F

Here the N5 million awarded by the trial Judge was not even claimed by the Respondent. The claim for Refund of the sum of N2.5m (Two million, five hundred thousand naira) paid by the Plaintiffs to its Solicitors is not recoverable because there was no agreement to that effect and it was not a loss foreseeable from the breach of contract. (p. 2830 C/G) G

CONTRACTS - Breach - Special and general damages

10. As far as breach of contract is concerned, the law is that award of special damages as well as general damages amounts to double compensation and is not allowed. (p. 2830 H) H

CARRIAGE BY AIR - Freight - Limitation of liability - Extent of

11. From the pleadings and evidence led in this case there is no justification or basis for the award of 29,319 UAE Dirham by the learned trial Judge. But the figure cannot be varied as
 B **prayed for by the Respondent because the Respondents are not entitled to the sum of 351,100 UAE Dirham being the value of the eighteen (18) missing ink Cartridges since the limitation of liability under the Montreal Convention is applicable.**
 C **Their entitlement would be in accordance with what is laid down in Section 22(3) of the Montreal Convention since there was no special declaration of the value of the cargo. They are also entitled to be paid back the freight charges of 11,675.00 UAE Dirham which was properly pleaded and relevant receipts**
 D **tendered.**

In the final result I hold that this appeal has merit. It is hereby allowed. The judgment of the lower court is set aside. In its place, the Respondent is awarded the sum limited by the Montreal Convention, that is 880 kilograms, the weight of the
 E **lost cargo multiplied by the dollar value of 17 Special Drawing Rights; as well as the sum of 11,675.00 UAE Dirham paid for freight and duly receipted. Both sums are to be paid with interest at the rate of 7-1/2% per annum until the entire sum is fully liquidated. I make no order as to costs.**
 F (pp. 2831 A/2833 H)

CARRIAGE BY AIR - Negligence - Res ipsa loquitur - Pleadings

12. As regards the doctrine of res ipsa loquitur, it can be
 G **pleaded in one of two ways - either specifically by reciting the Latin maxim or in the alternative by making it known that the Plaintiff intends to rely on the very loss of the cargo as evidence of negligence.** (p. 2833 C)

H **REPRESENTATION**

Ike Nwachukwu Esq., for the Appellant
 Michael Aboh Esq., for the Respondents

CASES REFERRED TO

- Cameroon Airlines v. Abdul-Kareem (2003) 11 NWLR (pt. 830) I
Cameroon Airlines v. Otutuizu (2011) 8 WRN 1
Harka Air Services (Nig) Ltd v. Keazor (2011) 13 NWLR (pt. 1264)
Ndika v. Chiejina (2003) 1 NWLR (pt. 802) 451
NDIC v. S.B.N. Plc (2003) 1 NWLR (pt. 801) 311 B
Oguma v. I.B.W.A. (1988) NWLR (pt. 73) 658
Ogunbadejo v. Owoyemi (1993) 1 NWLR (pt. 271) 517
Eliochin (Nig.) Ltd v. Mbadiwe (1986) 1 NWLR (pt. 14) 47
New Nigeria Bank Plc. v. Egun (2001) 7 NWLR (pt. 711) 1 C
Eze v. Obiefuna (1995) 6 NWLR (pt. 404) 639
Badmus v. Abegunde (1999) 11 NWLR (pt. 627) 493
Ekpenyong v. Nyong (1975) 2 SC 71
Achu v. C.S.C. Cross River State (1009) 3 NWLR (pt. 1129) 475
Hassan v. Mgt. Committee (1991) 8 NWLR (pt. 212) 738 D
Ibekendu v. Ike (1993) (pt. 299) 287

STATUTES REFERRED TO

- Civil Aviation Act 2006, s. 48(1)
Montreal Convention 1999, s. 22(3) E
Warsaw Convention

LEAD JUDGMENT BY IYIZOBA JCA

This is an appeal against the judgment of Archibong J. of the Federal High Court, Lagos in SUIT No: FHC/L/CS/127/2008 delivered on the 29th day of November, 2010. The Respondents sometime in August 2007 purchased some ink cartridges through their agent in Dubai. The agent approached the Appellant and contracted the airline to airfreight the goods to Murtala Mohammed Airport, Lagos. The goods were packed in 18 bags with a total weight of 880kg. The goods were to arrive within a month from the date the freight was paid for. The goods never got to Lagos. The Respondents as Plaintiffs instituted an action against the Appellant as Defendant for breach of contract claiming in their amended statement of claim at page 160 of the Record as follows:

1. The payment of the total sum of 362,775.00 United Arab Emirate Dirham being the sum of the value of the eighteen (18) missing bags of the Plaintiff's Ink Cartridges valued at 351,100 UAE

Dirham and the freight charges of 11,675.00 UAE Dirham paid by the Plaintiffs for the purchase and freight charges of the goods plus interest at the rate of 25% per annum till judgment is delivered and thereafter at the rate of 71/2% par annum till judgment sum is finally liquidated which the Defendant agreed to air freight to Lagos, Nigeria.

2. An Order of the Honourable Court that the failure, neglect and/or refusal of the Defendant to deliver the 18 bags of the Plaintiffs' Ink Cartridges to them amounts to breach of contract and willful misplacement.

3. Refund of the sum of N2.5m (Two million, five hundred thousand naira) paid by the Plaintiffs to its Solicitors to handle the matter and the cost of this action.

In their statement of Defence at page 185 of the Record, the Defendant admitted failure to deliver the goods but contended that the conditions governing the contract of carriage of the Plaintiff's cargo and the liability of the Defendant are as contained in Emirates General Conditions for Carriage of Cargo 2006 and the Montreal Convention 1999; in line with which the Defendant had offered the Plaintiffs compensation for the lost goods. The offer was turned down and the plaintiffs chose to institute this action. The trial Court in its judgment held that the non delivery of the Plaintiff's cargo amounts to a breach of its contract of carriage with the Plaintiffs and that no limitation of liability applies to the contract and therefore awarded to the Plaintiffs (i) The sum of 29,319 Dirham for complete failure and/ breach of contract by the Defendant (ii) N5 Million in general damages and further held that because the goods did not leave Dubai, the terms of the contract of carriage did not apply. The judgment is at pages 334 - 339 of the record of appeal.

Dissatisfied with the judgment, the Defendant appealed to this Court by Notice of Appeal dated 17th December, 2010 but subsequently amended by the order of this Court. From the five issues in the amended Notice of Appeal dated and filed 11/10/11 the appellant formulated three issues as follows:

(a) Whether the limitation of liability as contained in the Montreal Convention and the Conditions of Carriage of Cargo of the Defendant is applicable in the circumstances of this case?

(b) Whether a Court can award General damages and also

Special damages at the same time?

c) Whether a court can base its judgment on facts that were neither pleaded nor on which no evidence was adduced in the course of trial?

The Respondents in their brief formulated the following issues for determination:

(a) Whether the Defendant/Appellant is not in breach of its contract to the plaintiffs/Respondents having failed to deliver to the Plaintiff/Respondent the 18 cartons of ink cartridges.

(b) Whether the judgment of the trial court awarding 23,139 UAE to the Plaintiffs/Respondents as against the Plaintiff/Respondent's total claim of 362,775 UAE for the 18 cartons ink cartridges and 11,675.00 freight charges is not against the weight of evidence.

(c) Whether the limitations as contained in the Montreal convention and the condition of carriage of cargo of the Defendant/Appellant can avail the Defendant/Appellant's act of negligence.

There is no dispute as to whether or not the Appellant was in breach of the contract. The Appellant admitted non delivery of the 18 cartons of ink cartridges. The Respondent's issue 1 did not therefore arise from any of the grounds of appeal in the amended notice of appeal. The appellant's issues capture the essence of the appeal and also encompass the remaining two issues formulated by the Respondent. I shall adopt the appellant's issues in the determination of the appeal.

ISSUE 1

Whether the limitation of liability as contained in the Montreal Convention and the Conditions of Carriage of Cargo of the Defendant is applicable in the circumstances of this case?

APPELLANT'S ARGUMENTS:

Learned counsel for the Appellant in his brief submitted that the learned trial judge erred in law when after finding that the contract between the parties was an International Contract of Carriage by air and governed by the Montreal Convention as domesticated by Civil Aviation Act 2006 and that the particular contract of carriage was underpinned by the conditions of carriage of cargo of the Defendant's airline held that the non delivery of the Plaintiff's cargo amounts to a breach of its contract of carriage with the Plaintiffs and that no limitation of liability applied to the contract. Counsel referred

to Cameroon Airlines v. Jumai Abdul-Kareem (2003) 11 NWLR (Pt. 830) I, where the Court of Appeal per Chukwuma-Eneh, J.C.A. (as he then was) held as follows:

B *“For damages awardable against the carrier to be at large in accordance with the provisions of Article 25 of the convention as amended at the Hague, it is not sufficient for the act or omission that is relied on to have been done recklessly: it must also be shown to have been done with knowledge that damage would probably result:*

C *In the instant case, the Plaintiffs neither showed that the Defendant’s conduct was reckless nor done with the knowledge that damage would probably result to enable the trial court to award damages outside the liability limits.*

D *Article 29 of Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May, 1999) which was domiciled in Nigeria by the Civil Aviation Act, 2006 provides as follows: “in the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to*
E *the conditions and such limits of liability as are set out in this convention without prejudice to the question as to who are the persons who have the right to bring the suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”*
F

Counsel contended that notwithstanding this clear provision of the statute, the trial court awarded to the Plaintiff damages in excess of the liability limits. He submitted that the issuance and signing of the airway bill signifies that a contract of carriage has been entered
G into by the parties to the said transaction. From that point the rights and liabilities of the parties are governed by the conditions of carriage as envisaged by the terms of the contract of carriage. Any breach of same either by non-carriage or non-delivery will be governed by terms of the contract. Counsel urged us to so hold.

H **RESPONDENTS ARGUMENTS:**

In reply, learned counsel for the Respondent submitted that the conditions of the Montreal convention and the conditions of carriage of cargo of the defendant does not erase the fact that the appellants by misplacement of the Respondents cartridges was negligent

and that the provisions of the Montreal Convention cannot avail them where negligence caused the loss.

RESOLUTION:

The Appellant admitted liability for the loss of the Respondents' goods. It made an offer within the limits of the Montreal Convention and the conditions of carriage of cargo of the Defendant's airline B which the Respondents rejected. The issue therefore is whether by the provisions of the Montreal Convention 1999 domesticated in Nigeria by the Civil Aviation Act 2006; the Appellant's liability is limited as provided in the laws. ***The preamble to the Montreal Convention recognised the Warsaw Convention which was the law in operation before the Montreal Convention. These Conventions had as their objectives the unification of certain Rules relating to International Carriage by air in order to ensure uniform standard, the orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation. The various Conventions made provisions for the limits of liabilities of carriers. Under the Warsaw Convention article 22(2) provides that "subject to the provisions of paragraph 4, the carriage of luggage of which the carrier takes charge and of cargo, the liability of the carrier in respect of destruction, loss and damage is limited to a sum of 250 francs per kilogram."*** C D E F ***This has been superseded by Section 22(3) of the Montreal Convention.*** The relevant provisions of the Civil Aviation Act and the Montreal Convention are reproduced hereunder:

Section 48(1) of the Civil Aviation Act 2006 provides:

"The provisions contained in the convention for the unifica- G tion of certain rules relating to International carriage by air signed at Montreal on 28th May, 1999 set out in the Second Schedule 11 of this Act and as amended from time to time, shall from commencement of this Act have the force of law and apply to International carriage by air to and from Nigeria, in relation to any carriage by air H to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, and shall subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons"

The provisions of the Montreal Convention are in the Second Schedule of the Civil Aviation Act 2006. Article 29 of the Montreal Convention 1999 provides:

B *"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring the suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."*

Article 22(3) of the Montreal Convention 1999 provides:

D ***"22(3) In the carriage of Cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 special Drawing Rights per Kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires."***

E ***In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.***

F It is thus clear and indeed the parties are in agreement that the above provisions apply with full force in Nigeria. The point of disagreement is the extent of the liability of the Appellant. The appellant claims that its liability is as limited in the Montreal Convention, which is payment of 17 special Drawing Rights per Kilogram. The Respondents would not hear of that. They wanted to be paid the value of the lost goods including the amount they paid for freight and also the amount expended in legal fees. The learned trial Judge agreed with the Respondents but awarded less in the value of the goods and whooping N5m general damages, a relief not prayed for. In his judgment at page 338-339 of the Record of appeal, the learned trial Judge held:

"The cargo was lost in Dubai and never carried for delivery, and I so find that there was a breach of the contract of carriage. In the circumstances, what is the liability of the Defendant to the plain-

tiffs. It is a rebuttable presumption at this point that the loss of this cargo was caused by the gross negligence or willful misconduct of the Defendant. The *Res ipsa loquitur* principle is established by the contents of Exhibit 5. There is no rebuttal of the presumption of negligence or willful misconduct on the part of the Defendant in the testimony from the Defendant's sole witness; nor any of the evidence made available to the Court. We perused extensively the terms and general conditions of carriage of cargo of the Defendants, Exhibit 7. These relate in the main to loss and damage of cargo where there is carriage by the carrier. In this instance there is no carriage at all. The limitation of liability to the weight of cargo of undeclared value does not therefore apply in this situation I therefore find.

Particularly there is no disclosure or explanation on the part of the carrier as to what led to the loss of the cargo.

I award judgment in the sum of 29,319 Durhams for complete failure and/or breach of contract on the Defendant and N5million in general damages."

From the above the learned trial Judge was of the view that the limitation of liability did not apply because:

1. There was no carriage by the carrier as the goods were lost in Dubai and were never air lifted.

2. There was a presumption of negligence and willful misconduct which the appellant failed to rebut. Liability could not therefore be limited.

Article 18(1) of the Montreal Convention provides that the carrier is liable for damage sustained in the event of the destruction or loss of or damage to cargo. Article 18 (3) provides that the carriage by air within the meaning of paragraph (1) of article 18 comprise the period during which the cargo is in the charge of the carrier. The fact that the cargo has not been air lifted is consequently of no moment. Once the carrier has taken control of the cargo and issued the airway bill, any loss from then on is covered by the Convention and the limitation of liability clause subject to the stated exceptions as provided in the Convention.

Article 22 provides for the limits of liability in relation to delay, baggage and cargo loss. Paragraph 1 limits the liability of the carrier to each passenger in respect of damage caused by delay to 4150

Special Drawing Rights. By paragraph 2 the liability of the carrier in the case of destruction, loss, damage or delay of baggage is limited to 1000 Special Drawing Right to each passenger. Paragraph 3 deals with limitation of liability in the case of destruction, loss, damage or delay in the carriage of cargo already set out above. 17 Special Drawing

B Rights per kilogram. Paragraph 5 of Article 22 provides:

“The foregoing provisions of paragraph 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to
C *cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that such servants or agents was acting within the scope of its employment.*

It is important and noteworthy that the above paragraph excluded
D *paragraph 3 which deals with liability in the case of carriage of cargo. The clear intention to exclude carriage of cargo is confirmed by Article 30 which deals with actions brought against a servant or agent of the carrier. They are also entitled to the limits of liability under the Convention just as the carrier. But paragraph 3 of Article*
E *30 provides:*

“Save in respect of the carriage of cargo, the provisions of paragraph 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent
F *done with intent to cause damage recklessly and with knowledge that damage would probably result.”*

By these provisions negligence or willful misconduct seem to play no role in the case of carriage of cargo under the Montreal Convention. The learned trial Judge was consequently
G ***wrong in holding that there was no limitation of liability because the appellant was unable to rebut the presumption of negligence or the doctrine of res ipsa loquitur.***

But even assuming but without conceding that negligence has a role to play, the case of Cameroon Airlines v. Jumai
H ***Abdul-Kareem (2003) 11 NWLR (Pt. 830) 1 throws more light on the point. There it was held that to be able to award damages at large, it is not enough to show that the damage was done intentionally or recklessly, it must also be shown that the carrier had knowledge that damage would probably re-***

sult. This obviously is a tall order. The case is in my humble opinion authority for the view that the claimant cannot hide under the doctrine of *res ipsa loquitur*. He must plead and prove the act that amounted to negligence or willful misconduct and must go further to plead and prove knowledge that damage would result. The burden is squarely on the Claimant to prove negligence and not on the carrier to rebut negligence.

The case of Cameroon Airlines v. Otutuizu (2011) 8 WRN 1 or (2011) 4 NWLR (Pt. 1238) 512 is a good example where the passenger was able to prove willful misconduct on the part of the carrier entitling him to damages outside the limit imposed by the convention. At pages 539 - 540 F-A, 540 C of the NWLR, Rhodes Vivour, J.S.C. observed:

“It is well settled that the Appellant was in breach of contract as principal and agent in not flying the respondent to Manzini, Swaziland, (exhibits A and B). It is reasonably foreseeable that a passenger (the respondent) arriving in South Africa without a transit visa would be arrested, with grave consequences for the passenger. Consequently, the act of the Appellant flying the respondent to South Africa 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.

By the provision of Article 25 of the Convention a carrier (the appellant) loses its entitlement to rely on the limit set on its liability by Article 22(1) where a brief case containing \$20,000 and valuables of the respondent is taken away (and never returned) by South African Immigration officials as a result of the willful act by the appellant, in flying the respondent to South Africa, when it knew that the respondent did not have South African transit visa. When the carrier commits willful misconduct, the respondent is entitled to more damages than the limit set in Article 22 of the Convention. Oshevire v. British Caledonian Airways Ltd (1990) 7 NWLR (Pt. 163) 507...”

In Harka Air Services (Nig) Ltd v. Keazor (2011) 13 NWLR (Pt. 1264) 320, the carrier was unable to avail itself of the provisions of the Convention limiting liability because it was found that they acted recklessly. Fabiyi, JSC in his contribution observed:

“...For damages awarded against a carrier to be at large, it is not 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... 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
 B Air Traffic Controller when he reached the threshold. The aircraft was at a height above the normal and regular height and did not respond to inquiry of the Air Traffic Controller as to whether he was landing or carrying out a missed approach. At the time the aircraft
 C came into contact with the runway it had already passed more than 600% of the 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 events during the ill - fated journey, the appellant's pilot
 D embarked upon risky venture. He appreciated that he was acting wrongfully and yet persisted in so acting regardless of the consequences. He acted with reckless indifference as to what the result may be."

The above cases are examples of willful misconduct which would
 E deprive the carrier of the benefit of the limitation clause in the Conventions. **The concept of negligence or willful misconduct obviously cannot work in the case of loss of cargo. It is difficult to prove willful misconduct as the Plaintiff is not in a position to know how the loss came about and no help is likely to come**
 F **from the carrier in that regard. That must be why carriage of cargo was excluded in the provisions.**

It appears the position may have been different under the Warsaw Convention because there are decided authorities where
 G negligence and willful misconduct were considered in cases of loss of cargo. For example in Green Computer AB v. Federal Express Corp. et al (2004) FCA 111, which was a claim for loss of one carton of integrated circuits valued at \$50,000 carried by air from Sweden to Markham, Ontario. The Defendant air carrier argued inter alia that it
 H was entitled to limit liability pursuant to the terms of the Warsaw Convention to \$851. The Plaintiff argued that the defendant was not entitled to limit its liability as the Defendant had been guilty of willful misconduct pursuant to article 25. Specifically, the Plaintiff argued that an inference should be made that the lost cargo had been sto-

len. The Court was not prepared to draw any such inference and found that the Defendant had merely lost the shipment in transit, something which did not constitute willful misconduct. Judgment was granted in the limitation amount of \$851.

From the exclusion of negligence and willful misconduct in the case of carriage of cargo in article 22 (5) and Article 30 (3) I am of the firm view the Montreal Convention did not intend that those concepts should affect the limitation of liability with respect to carriage of cargo. B

The only way to escape the limitation of liability with respect to damage or loss of cargo is where the consignor at the time when the package was handed over to the carrier made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that situation the carrier will be liable to pay a sum not exceeding the declared sum. C
The Respondent had averred in paragraph 31 of the amended statement of claim at page 158 of the Record of Appeal as follows: D

“31. At the trial of this matter, the Plaintiffs would contend that the presentation of the Sales Invoice and the packing list by the Plaintiffs to the Defendant’s office in Dubai which contain the quantity, value and weight of the 18 cartons of Ink Cartridges, and in addition to payment of charges aforementioned in paragraph 8 by the Plaintiffs and which the Defendant accept (sic) to airfreight the goods to Lagos, Nigeria constitute a special declaration of interest in delivery at the destination having paid a supplementary sum aforementioned.” E F

In paragraph 20 of the Statement of Defence, the Respondents averred thus:

“20. The Defendants in specific response to paragraph 31 of the Statement of Claim states that the Plaintiff did not specifically declare the value of the alleged lost cargo to entitle it to such a claim.” G

In his evidence in chief, PW1 the sole witness of the Respondents testified that all necessary declarations were made. Under cross-examination he testified that he was not present when the goods were tendered to the Appellant for air freighting; that there was no declaration of value by Sola Ventures the consignees of the goods and the Respondents’ agent in Nigeria. In his examination in chief, DW1 testifying for the Appellants said there was no special declara- H

tion on the Airway Bill and that the procedure for declaring specially is that at the point of handing over the goods, the value of the goods is declared and that if the value is heavy, insurance is provided for it. He stated that no value was declared at the time of submission of the goods. Surprisingly for such an important aspect of the evidence, B there was no cross-examination of DW1 on the point.

It is my view that the special declaration envisaged in Article 22(3) means more than just presentation of the sales invoice and the packing list. The declaration of value ought to be in writing on the airway bill. DW1 in Re-examination had stated categorically that they rely on the Airway Bill and that no value was declared on it. In the case of Rembrandt Jewelry v. Air Canada (1985) O.J. No. 1382, it was held that a verbal statement of value made on the telephone is not a special declaration of value within the meaning of the convention. There is consequently no convincing evidence that the Respondent made a special declaration of the value of the goods. The limitation of liability as contained in the Montreal Convention and the Conditions of Carriage of Cargo of the Defendant is applicable in the circumstances of this case. Issue one is consequently answered in the affirmative and against the Respondent.

ISSUE TWO

F Whether a Court can award General damages and also Special damages at the same time?

APPELLANT'S ARGUMENTS:

G Learned counsel for the Appellant on this issue submitted that the learned trial judge erred in law when he awarded the sum of N5 Million general damages to the Plaintiff after awarding them the sum of 29,319 Dirham for complete failure and/breach of contract. Relying on *G. Chitex Ind. Ltd v. Oceanic Bank International (Nig.) Ltd.* (2005) 14 NWLR (Pt. 945) 392 at 395, Counsel submitted that the award of both special and general damages in breach of contract H cases amounts to double compensation.

Learned counsel further submitted that the Respondents did not claim general damages in any sum whatsoever, but the court on its own decided to award them N5 Million as general damages. Counsel contended that the trial court cannot give to the Respondents what

they have not asked for or more than what they asked for. Counsel cited the cases of *Ndika v. Chiejina* (2003) 1 NWLR (Pt. 802) 451 @ 458; *NDIC v. S.B.N. Plc* (2003) 1 NWLR (Pt. 801) 311 @ 330.

Counsel urged us to hold that the trial Judge erred in law in awarding general damages even when there was no such claim by the Respondents. B

RESPONDENTS' ARGUMENTS:

Learned counsel for the Respondent did not address Appellant's issue two directly but indirectly covered the issue in his own issue two which reads thus:

Whether the Judgment of the trial court awarding 23,139 UAE to the Plaintiffs/Respondents as against the Plaintiff/Respondents' total claim of 362,775 UAE for the 18 cartons of ink cartridges and 11,675.00 freight charges is not against the weight of evidence. C

Counsel submitted that the learned trial judge misdirected himself when he awarded the sum of 23,139 UAE Dirham to the Respondents as compensation for the missing 18 cartons of ink cartridges when in essence; the value of the 18 cartons of ink cartridges was 362,775 UAE Dirham. D

It was argued that the trial judge had no basis or justification for the paltry sum of 23,139 UAE Dirham awarded as damages. Counsel contended that the Respondents in the course of the trial tendered receipts as evidence of all the amounts claimed save for the cost of N2,500,000.00 solicitor's fees. Counsel argued that apart from tendering the receipts, the Respondents led evidence to show how they suffered financial loss, loss of goodwill, emotional & psychological trauma and even threat to life from his creditors. F

Learned counsel submitted that the amount awarded by the trial judge as compensation to the Respondents is too little to justify the time expended on litigation and is clearly against the weight of evidence. He submitted that it is a well known principle of law that a judge can only award to a party what was claimed but cannot give to a party what is not claimed. He argued that the Respondent claimed 362,775 UAE Dirham and 11,675 UAE Dirham and not 23,139 UAE Dirham. Learned counsel actually ended his brief by urging us to award appropriate and commensurate damages for the Respondents. H

RESOLUTION:

It appears then that what the Respondent is asking for is a variation of the judgment of the lower court with regard to damages and the award by this court of “appropriate and commensurate damages.” The law is that the Respondents cannot challenge the judgment of the lower court given in their favour without first filing a cross-appeal or a Respondents Notice.

See Oguma v. I.B.W.A. (1988) NWLR (Pt. 73) 658. The Respondent on 13/1/11 filed a Notice of Intention to Contend That the Decision of the Court below be varied. The Notice stated as follows:

“That the learned trial Judge misdirected himself when he awarded a paltry sum of 29,319 UAE as against the entire claim of the Respondents/Cross Appellants which is the sum of 362,775 UAE being the value of the missing 18 cartons (and not the 1.8 cartons as contained in the judgment) of Ink cartridges and the sum of 11,675 UAE being freight charges of the goods respectively with interest at the rate of 25% till judgment sum is liquidated.”

In the circumstances, was the Respondent right in filing Respondent’s Notice instead of a cross-appeal? In Ejura v. Idris (2006) 4 NWLR (Pt. 971) 538 @ 564-565 F-A the Court of appeal per Rhodes-Vivour, J.C.A. (as he then was) observed:

“...When a respondent agrees with the judgment appealed against but at the same time wants the judgment varied or affirmed on other grounds, he is duty bound to file a respondent’s notice. ...On the other hand, an appeal filed by a respondent is a cross appeal, and it is filed to correct an error, which if left to remain would be of a disadvantage to the respondent in the main appeal. It is also filed in situations where the Respondent seeks a reversal of the decision of the trial court.” Ogunbadejo v. Owoyemi (1993) 1 NWLR (Pt. 271) 517; Eliochin (Nig.) Ltd v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47; New Nigeria Bank Plc. v. Egun (2001) 7 NWLR (pt. 711) 1.

The Respondents herein agree with the judgment of the lower court but they want the amount of damages awarded varied. They are not seeking for a reversal of the judgment. To that extent, they were right in filing a Respondent’s Notice.

See Eze v. Obiefuna (1995) 6 NWLR (Pt. 404) 639. The Respondent/Cross appellant mentioned in the body of the notice shall be ignored as a mere typographical error.

The questions for determination here are as follows:

1. Was the lower court right in awarding the 23,139 UAE Dirham as special damages and also N5 million general damages?

2. Did the Respondents in the lower court plead or claim the relief of N5 million general damages?

In the case of Badmus v. Abegunde (1999) 11 NWLR (Pt. 627) 493, Onu, J.S.C. observed:

"It is trite law that the court is without power to award to a claimant that which he did not claim. This principle of law has time and again, been stated and re-stated by this court that it seems to me that there is no longer any need to cite authorities in support of it. We take the view that the proposition of the law is not only good law but good sense. A court of law may award less, and not more than what the parties have claimed. A fortiori, the court should never award that which was not claimed or pleaded by either party. It should always be borne in mind that a court of law is not a charitable institution, its duty in civil cases is to render unto every one according to his proven claim."

The Supreme Court in the above case has set out succinctly the position of the law in these matters.

For ease of reference, I will again set out the claims of the Respondent:

1. The payment of the total sum of 362,775.00 United Arab Emirate Dirham being the sum of the value of the eighteen (18) missing bags of the Plaintiff's Ink Cartridges valued at 351,100 UAE Dirham and the freight charges of 11,675.00 UAE Dirham paid by the Plaintiffs for the purchase and freight charges of the goods plus interest at the rate of 25% per annum till judgment is delivered and thereafter at the rate of 7 1/2% per annum till judgment sum is finally liquidated which the Defendant agreed to air freight to Lagos, Nigeria.

2. An Order of the Honourable Court that the failure, neglect and/or refusal of the Defendant to deliver the 18 bags of the Plaintiffs' Ink Cartridges to them amounts to breach of contract and willful misplacement.

3. Refund of the sum of N2.5m (Two million, five hundred thousand naira) paid by the Plaintiffs to its Solicitors to handle the matter and the cost of this action.

What the Respondent pleaded and claimed for is the sum

of 362,775.00 UAE Dirham and N2.5m paid to their Solicitors. There was no claim for general damages of N5m. How then did the learned trial Judge arrive at the figure of 29,319 UAE Dirham and N5m? There is no indication whatever in the judgment as to how the learned trial Judge came by those
B figures. To confound the situation, the Respondent never claimed general damages of N5m. What the Respondents claimed was N2.5m solicitors' fees. Without much ado, I will quickly say that the award of N5m general damages not claimed
C by the Respondent is wrongful and must be set aside. See *Ekpenyong v. Nyong* (1975) 2 SC 71; *Achu v. C.S.C. Cross River State* (1009) 3 NWLR (Pt. 1129) 475 @ 501 C-E; *Ndika v. Chiejina* (2003) 1 NWLR (Pt. 802) 451 @ 458; *NDIC v. S.B.N. Plc* (2003) 1 NWLR (Pt. 801) 311 @ 330. **Claims for both special and**
D general damages or for solicitor's fees are not appropriate in an action for breach of contract except where there is an agreement by the parties to that effect. In *G. Chitex Ind. Ltd v. Oceanic Bank International (Nig.) Ltd.* (Supra), the Supreme Court observed:
E "The courts of law when considering damages arising from a breach of contract are not required to award damages which are speculative or sentimental unless these are specifically provided for by the express terms of the contract. In the instant case, the appellant's claims for N3.5 million (three million, five hundred thousand naira) for "loss of credit facilities, goodwill, profits and future prospects" was
F clearly not specifically spelt out at the time of the contract of transferring only a sum of \$12,000 US Dollars to its business associates in Taiwan. The claim was therefore sentimental and speculative and not one that is recoverable. (Agbaje v. National Motors (1971) 1 UILR
G 119 referred to)"

In the above case, the Appellant did claim the N3.5 million. **Here the N5 million awarded by the trial Judge was not even claimed by the Respondent. The claim for Refund of the sum of N2.5m (Two million, five hundred thousand naira) paid by the**
H Plaintiffs to its Solicitors is not recoverable because there was no agreement to that effect and it was not a loss foreseeable from the breach of contract. As far as breach of contract is concerned, the law is that award of special damages as well as general damages amounts to double compensation and is

not allowed. From the pleadings and evidence led in this case there is no justification or basis for the award of 29,319 UAE Dirham by the learned trial Judge. But the figure cannot be varied as prayed for by the Respondent because the Respondents are not entitled to the sum of 351,100 UAE Dirham being the value of the eighteen (18) missing ink Cartridges since the limitation of liability under the Montreal Convention is applicable. Their entitlement would be in accordance with what is laid down in Section 22(3) of the Montreal Convention since there was no special declaration of the value of the cargo. They are also entitled to be paid back the freight charges of 11,675.00 UAE Dirham which was properly pleaded and relevant receipts tendered. Issue 2 which is whether the Court can award special and general damages is answered in the negative.

ISSUE THREE:

Whether a Court can base its judgment on facts that were neither pleaded nor on which no evidence was adduced in the course of trial?

APPELLANT'S ARGUMENTS:

On this issue learned counsel submitted that the learned trial judge erred in law when he held that the loss of the cargo was caused by the gross negligence or willful misconduct of the Defendant and also that the principle of *res ipsa loquitur* was established. Counsel submitted that the Respondents did not plead nor was any evidence led with regard to gross negligence or willful misconduct on the part of the Appellant. Relying on the case of *Hassan v. Mgt. Committee* (1991) 8 NWLR (Pt. 212) 738 @ 741 ratio 4 Counsel submitted that a litigant can only get what he claimed if both on the pleadings and the evidence, he has successfully made out and proved his claim. He submitted that in the present case, the Respondents have not discharged the burden of proving recklessness on the part of the Appellant, nor did they adduce evidence to show that the Appellant had knowledge that damage would probably result.

RESPONDENT'S ARGUMENTS:

As part of their arguments on issue 1, which they argued as their issue 3, learned counsel submitted that the conditions of the Montreal convention and the conditions of carriage of cargo of the defendant does not erase the fact that the appellant by misplacement

of the Respondents' cartridges was negligent and the provisions of the Montreal Convention cannot avail it.

Counsel argued that the general principle of law is that for negligence to be established, it must be shown that the defendant breached the duty of care which he owes to the plaintiff and that the plaintiff suffered adversely as a result of the breach of the duty of care, Counsel submitted that from the available facts, the Appellant who committed an act of negligence by misplacing the Respondents' Ink cartridges are trying to hide under the auspices of the Montreal convention and conditions of carriage of cargo. Counsel further submitted that the provisions as contained in the Montreal convention and conditions of carriage of cargo of the defendant cannot and should not be allowed to override the general principles of law of Contract and Negligence hence, the trial court was right in holding the Appellant liable in negligence as the Respondents adduced sufficient evidence of negligence of the Appellant.

RESOLUTION:

The question here is whether the Respondents pleaded the particulars of negligence and led such evidence as would justify the holding of the lower court that there is a rebuttable presumption that the loss of the cargo was caused by the gross negligence or willful misconduct of the Defendant; and that the *res ipsa loquitur* principle is established.

The Respondents had pleaded in paragraph 29 of the amended statement of claim at page 157 of the Record of appeal as follows:

"29. The Plaintiff shall further contend at the trial that the Defendant is guilty of willful misplacement and negligence in discharging their contractual responsibility to the plaintiffs who had dutifully discharged their contractual obligation to the Defendant for valuable consideration".

PARTICULARS OF NEGLIGENCE

(I) The Defendant as carrier of Air Baggage/Cargo for valuable consideration failed to take precautionary measure to protect or ensure that the Plaintiff's 18 bags contained cartridges packed in a big and massive pallet weighing 880 kilograms was not willfully misplaced or missing.

(II) That the misplacement or loss would have been avoided should the Defendant had exercised due care in handling the Plaintiff's

baggage weighing 880 kilograms.

(III) Further to the above, the Defendant treated the matter of the Plaintiff's claim with undue levity as contained in their Solicitor's letters of December 18th 2007 and January 18th 2008 respectively.

(IV) The Plaintiffs have expended substantial amount of money and interest rate in procuring about N4,000,000.00 (Four million Naira) to offset part of the money to his co-business partners just to allow him settle down to pursue this matter. B

The above averments are with respect not particulars of negligence.

As regards the doctrine of res ipsa loquitur, it can be pleaded in one of two ways - either specifically by reciting the Latin maxim or in the alternative by making it known that the Plaintiff intends to rely on the very loss of the cargo as evidence of negligence. Ibekendu v. Ike (1993) (Pt. 299) 287. But for Article 22(5) to apply to remove the limitation of liability it is not sufficient for the act or omission that is relied on to have been done negligently or recklessly; it must also be shown to have been done with knowledge that damage would probably result. It is quite impossible to show through the doctrine of res ipsa loquitur that the Defendant did the act that gave rise to the loss with knowledge that the loss would occur. The truth is that Article 22 (5) which created the exemption clause excluded paragraph (3) which dealt with limitation of liability with respect to carriage of cargo. These matters have already been fully considered under issue one. The fact is that the particulars of negligence as pleaded are not adequate. But the issue is of no consequence in view of my conclusion that Article 22 (5) does not apply to carriage of cargo. To that extent, the learned trial Judge erred in the conclusions arrived at with respect to negligence and res ipsa loquitur. There were no sufficient pleading to justify his views and conclusions. Issue 3 is resolved against the Respondent. C D E F G

In the final result I hold that this appeal has merit. It is hereby allowed. The judgment of the lower court is set aside. In its place, the Respondent is awarded the sum limited by the Montreal Convention, that is 880 kilograms, the weight of the lost cargo multiplied by the dollar value of 17 Special Draw- H

ing Rights; as well as the sum of 11,675.00 UAE Dirham paid for freight and duly receipted. Both sums are to be paid with interest at the rate of 7-1/2% per annum until the entire sum is fully liquidated. I make no order as to costs.

B

AUGIE JCA

I have read in draft the lead Judgment just delivered by Iyizoba JCA, and I agree with his reasoning and conclusion. A limitation of liability clause permits contracting parties to reduce or eliminate the potential for direct, consequential, special, incidental and indirect damages should there be a breach of contract and the Montreal Convention 1999 (Convention for the Unification of Certain Rules for International Carriage by Air) is a multilateral treaty adopted by a diplomatic meeting of the International Civil Aviation Organization (ICAO) Member States in 1999, which attempts to re-establish uniformity and predictability of the rules relating to international carriage of passengers, baggage and cargo. Article 29 of the said Convention provides -

E *“In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who*
F *have the right to bring the suit and what are their respective rights. In any such action, punitive’ exemplary or any other non-compensatory damages shall not be recoverable.”*

The object of an international treaty like the Montreal Convention is to provide a uniform international code in the areas that it covers - see *Cameroon Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512, where Rhodes-Vivour, JSC, added that - *“all countries that are signatories to it apply it without recourse to their respective domestic law”*. In this case, although the lower Court found that the contract was governed by the said Convention, it awarded damages in excess of the liability limits for reasons that cannot stand up to scrutiny. It is for this and the other reasons in the lead Judgment that I also allow the appeal and abide by the consequential orders in the lead Judgment.

IKYEGH JCA

I had the honour of reading before now the judgment prepared by my learned brother, Iyizoba, J.C.A., in which I concur that the Montreal Convention governed the contract of carriage by air between the appellant and the respondent and limited the liability of the appellant to the weight of the cargo carried multiplied by dollar value of 17 Special Drawing Rights together with the sum of money paid for freight by the respondent and duly receipted by the appellant, which are ably captured by the painstaking lead judgment.

In the result, I too would allow the appeal and abide by the consequential orders contained in the said lead judgment.

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