

**SUPREME COURT OF NIGERIA**

FRIDAY, 13TH JUNE, 2014. SC. 331/2010

**CORAM:- M. MOHAMMED, J. A. FABIYI, M. U. PETER-  
ODILI, M. D. MOHAMMED, K. M. O. KEKERE-EKUN, JJSC**

BRITISH AIRWAYS ..... APPELLANT  
AND

MR. P. O. ATOYEBI ..... RESPONDENT

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CARRIAGE BY AIR - Liability - Limit - Exception - In view of appellant's wilful misconduct - Its liability cannot be restricted to the amount in Article 22(2) of CAO - As damages is awarded once wilful misconduct is established (H1)

DAMAGES - Award - Purpose of - Damages are awarded to compensate plaintiff for the harm done to him - Or to punish defendant for his conduct in inflicting that harm (H2)

DAMAGES - General damages - Computation of - Such damages need not be specifically pleaded - As it arises by inference of law and must not be proved by evidence - And may be averred generally (H3)

DAMAGES - Special damages - Proof - Such damages must be specifically pleaded and strictly proved - As it is not presumed to be the consequence of defendant's act - But arises from special circumstances (H4)

DAMAGES - Award - Interference - Appellate court does not interfere with award - Save where trial court acted under a mistake of law - Or the amount awarded is either ridiculously low or high (H5)

DAMAGES - Award - Double compensation - A person fully compensated under one head of damages for a particular injury - Cannot be awarded damages in respect of same injury under another head (H6)

***FACTS***

This action was instituted at the Federal High Court Lagos by plaintiff/respondent, claiming special and general damages for wilful misconduct and negligent against defendant/appellant. Respondent

flew first class in appellant's British Airways flight No. 295 from London Heathrow Airport to Murtala Mohammed Airport Lagos on Sunday the 7th of May 2000. His checked in hand luggage was left behind in London as same was not delivered to him in Lagos. On several occasions ranging from 8<sup>th</sup> – 10<sup>th</sup> of May 2000 respondent went to the Lagos Airport with the hope of collecting his luggage, but to no avail. The luggage was later located at the London Airport.

On advice by appellant's official, respondent had cause to travel to London in order to pick up his luggage intact. As a result of the manner in which his case was handled, respondent wrote a letter to appellant requesting to be compensated for his stress and losses incurred. Appellant responded and offered a paltry sum as compensation. Angered by the stance of appellant, respondent approached the trial Court for redress. At the trial, respondent testified on his own behalf and did not call any other witness. Appellant called one witness and denied liability. It contended that respondent's claims are not cognizable under the provisions of the Warsaw Convention. At the end of trial, the Court found in favour of respondent. Appellant's appeal to the Court of Appeal was unsuccessful. Aggrieved further, appellant has appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

Whether or not the learned Justices of the Court of Appeal were right in affirming the judgment of the lower court in respect of assessment of damages and exclusivity of the Warsaw Convention 1929?

**HELD** (Unanimously allowing the appeal in part per **KEKERE-EKUN JSC**)

*CARRIAGE BY AIR - Liability - Limit - Exception*

***1. I am of the view that the averments in the paragraphs reproduced above clearly disclose an allegation of wilful misconduct on the part of the appellant. Though described as particulars of negligence, the facts set out in sub-paragraphs (a) to (e) of paragraph 21 are facts tending to illustrate the acts of wilful misconduct allegedly committed by the appellant. The respondent gave copious oral and documentary evidence in support of the above pleadings. The two lower courts, relying on these facts rightly concluded in my view, that having regard to the circumstances of the case, the appellant was not entitled to avail itself of the provisions of the CAO to limit or exclude its liability towards the respondent. I agree with the findings of***

**the two lower courts that the acts of the appellant in this case were reckless and deliberate. It not only failed to deliver the respondent's checked baggage upon his arrival in Lagos, after several fruitless trips by him to the airport in Lagos over a period of three days on the appellant's promise that the baggage would arrive, it deliberately refused to deliver the said baggage to his duly authorised agents in London when it was located at their office at Heathrow Airport, and continued to withhold it until the respondent had to travel back to the U.K. to retrieve it at great personal expense. It was clear from the evidence led at the trial that the appellant had no intention of delivering the respondent's baggage to him in Lagos, having abandoned it at its lost baggage store in London. It was on this basis that both courts considered the respondent's claim for damages. I agree with both courts that in view of the appellant's acts of wilful misconduct, it was not entitled to restrict or limit its liability to the amount provided for in Article 22 (2) of the CAO. By virtue of Article 25, once wilful misconduct was established, the respondent was entitled to damages.**

(p. 3443 H)

*DAMAGES - Award - Purpose of*

**2. In the instant case the respondent claimed both special and general damages. The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm. The rationale behind the compensatory theory for the award of damages is found in the maxim restitution in integrum. In other words, to restore the injured party to the position he or she was in prior to the injury.**

(p. 3444 F)

*General damages - Computation of*

**3. It is the law that general damages such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law and need not therefore be proved by evidence and may be averred generally.** (p. 3444 H)

*DAMAGES - Special damages - Proof*

**4. On the other hand, special damage is such loss as the law will not presume to be the consequence of the defendant's act but**

**which depends in part, on the special circumstances of the case. Special damages must be specifically pleaded and strictly proved.** (p. 3445 A)

*DAMAGES - Award - Interference*

**5. An award of damages is within the discretionary powers of the Court. An appellate court would not usually interfere with a previous award unless satisfied:**

- (a) **that the trial court acted under a mistake of law; or**
- (b) **where the trial court acted in disregard of some principle of law; or**
- (c) **where it acted under a misapprehension of facts; or**
- (d) **where it has taken into account irrelevant matters or failed to take into account relevant matters; or**
- (e) **where injustice would result if the appellate court does not interfere; or**
- (f) **where the amount awarded is either ridiculously low or ridiculously high that it must have been a wholly erroneous estimate of the damage.** (p. 3446 B)

*DAMAGES - Award - Double compensation*

**6. While it is the law that general damages need not be proved but are presumed to be the natural consequence of the act complained of, I am however unable to agree with the view that in the circumstances of this case the respondent was entitled to an award of £100,000.00 general damages in addition to the award of special damages. It is conceded that the learned senior counsel is a respected citizen of this country and a Senior Advocate of Nigeria. With due respect to the learned silk, I am of the humble view that he has been fully compensated under sub-paragraphs (a) - (f) for the wilful misconduct of the appellant. The law is that a person who has been fully compensated under one head of damages for a particular injury cannot be awarded damages in respect of the same injury under another head. The award of an additional £100,000.00 for 'stress and inconvenience in travelling' is, in my respectful view, not only manifestly too high but clearly amounts to double compensation. In the circumstances, I hold that sufficient reasons have been shown to warrant interference with the concurrent findings of the two lower courts in respect of this head of claim in order to prevent an injustice.**

(p. 3447 C)

## NOTABLE POINT OF INTEREST

### **PETER-ODILI JSC**

#### ***1. Negligence – Ingredients – Proof***

The reason for that doctrinal application is that the essential elements B  
to establish an action in negligence being thus:

(i) the existence of a duty to take care owed to the complainant  
by the appellant.

(ii) Failure to attain that standard of care prescribed by the  
law; and

(iii) Damage suffered by the complainant, which must be C  
connected with the breach of duty to take care. (p. 3458 E)

### **REPRESENTATION**

S. A. Akorede Lawal, Esq., for the Appellant

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Femi Atoyebi, S.A.N., for the Respondent

### **CASES REFERRED TO**

Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt. 498) 124

Sidhu v. British Airways (1997) 1 All ER 193

Harka Air Services (Nig.) Ltd. v. Keazor (2011) 13 NWLR (pt. 1 264) E  
320

Horabin v. British Overseas Airways Corporation (1952) 2 All ER  
1016

Odinaka v. Moghalu (1992) 4 NWLR (pt. 23 3) 1

Makwe v. Nwukor (2001) FWLR (pt. 62) 1

F

Rusten Platinum Mines Ltd. v. South African Airways (1977) Lloyd's  
Rep. 564

U.A.C. (Nig.) Plc v. Irole (2001) 5 NWLR (pt. 707) 583

Odiba v. Azege (1998) 9 NWLR (pt. 566) 370

Unipetrol (Nig.) Plc v. Adireje (W.A.) Ltd. (2005) 14 NWLR (pt. 946) G  
563

Watts v. Morrow (1991) 1 WLR 1421

Enang v. Adu (1981) N.S.C.C. 453

Oyedele v. L.U.T.H. (1990) 6 NWLR (pt. 155) 194

George v. Dominion Flour Mills Ltd. (1963) 1 ANCR 70

H

Cameroon Airlines v. Otutuizu (2011) 4 NWLR (pt. 1238) 512

### **STATUTES REFERRED TO**

Warsaw Convention 1929,

Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953, art. 19, 22(2), 24, 25

**LEAD JUDGMENT BY KEKEKE-EKUN JSC**

This is an appeal against the judgment of the Court of Appeal Lagos Division delivered on 22/6/2010 affirming the judgment of the Federal High Court Lagos delivered on 2/4/2008.

The brief facts that gave rise to this appeal are as follows:

The respondent, a Senior Advocate of Nigeria, was a first class passenger on the appellant's flight from London Heathrow Airport on Sunday 7th May 2000, arriving in Lagos in the early hours of Monday 8th May 2000. At the boarding gate in London, on 7th May 2000, the respondent was informed by a staff member of the appellant that one of the pieces of hand baggage he intended to take onto the flight was too bulky and in excess of the weight allowed for hand baggage. He relinquished the bag to the appellant's staff to be checked into the aircraft's hold. It was duly tagged and the respondent was given the appropriate baggage tag. Upon his arrival in Lagos in the morning of 8th May, his bag did not arrive with the flight. He returned to the airport twice a day between 8th and 10th May but his bag did not arrive, even though he had been informed that the bag had been traced at the airport in London and would be sent to Lagos without delay. Notwithstanding the fact that he gave written authority to his personal assistant in London to collect the bag, the appellant refused to release the bag to him and insisted that it would be brought to Lagos. It failed to do so. Having declined to state the contents of the bag because it contained valuables and cash, when it failed to arrive, he was advised to travel back to London to collect it, personally. On 10th May, 2000 the respondent traveled back to London with a business class ticket to collect his bag. He was met on arrival by a member of staff of the plaintiff who took him to a large room containing many unshipped bags belonging to Nigerians. He found his bag intact.

As a result of the actions of the appellant, the respondent wrote a letter to it dated 11/5/2000, seeking compensation for the manner in which he was treated and the resultant losses incurred by him. The appellant eventually responded by a letter dated 25/8/2000 wherein it offered the respondent the sum of £508.48. Being utterly

dissatisfied with the offer, he instituted an action against the appellant before the Federal High Court Lagos (the trial court) by a writ of summons filed on 6/5/2000. By paragraph 22 of his further amended statement of claim dated 3/7/2005 at page 127 of the record, he claimed as follows:

*“By reason of the defendant’s incompetence; deliberate act and/or act of negligence the plaintiff has been put to a lot of financial losses; travel stresses; loss of professional times, etc.*

**PARTICULARS OF LOSSES**

a. *Cost of One Way First Class Ticket to Lagos 7 May 2000* C  
-US\$ 1,500

b. *2 return club class ticket to London of 10 May 2000* -  
US\$3,950

c. *One night stay in London hotel, etc* - £225

d. *Taxi costs (Airport, London, etc) for plaintiff/assistants* D  
*Phones, Faxes to & fro U.K. - Lagos, etc.*

e. *Loss of professional time for travelling*  
*to the U.K. @ £150/hr* - £6,600

f. *Damages for stress and inconvenience*  
*of travelling* - £100,000 E

Total (a) = US\$ 5,450

(b) = £107,013

*Whereof the plaintiff claims these sums together with interests at the rate of 25% per annum from 8 May, 2000 until judgment and costs”.* F

At the trial the respondent testified on his own behalf and did not call any other witness. The appellant called one witness. It denied liability and contended that the respondent’s claims are not cognizable under the provisions of the Warsaw Convention. G

At the conclusion of trial, judgment was entered in favour of the respondent. An appeal to the Court of Appeal, Lagos Division (the lower court) was unsuccessful. Still dissatisfied the appellant has appealed to this court vide its amended notice of appeal filed on 31/12/2010 pursuant to an order of this court granted the same day. H The amended notice of appeal contains 2 grounds of appeal. The two grounds shorn of their particulars are:

A. The learned Justices of the Court of Appeal erred in law when they agreed with and thus upheld the decision of the trial court

on assessment of damages and thereby, dismissed the appeal of the appellant.

B. The learned Justices of the Court of Appeal erred in law when they failed to pronounce on the exclusivity of the Warsaw Convention 1929 when they upheld the judgment of the trial court appealed against.

The parties duly filed and exchanged their respective briefs of argument. At the hearing of the appeal on 17/3/2014, S. A. Akorede Lawal Esq. adopted and relied on the appellant's brief settled by Otunba Yomi Oshikoya, dated and filed on 24/5/2012. He also adopted and relied on the appellant's reply brief filed on 9/11/2012. In adumbration of the arguments canvassed in his brief, he submitted that the appellant's main contention is that the respondent's case was brought under the Common Law instead of under the Warsaw Convention of 1929, which has been domesticated in Nigeria under The Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (hereinafter referred to as the CAO). He submitted that under the CAO there are three possible causes of action available to a passenger. He submitted that the relevant article for this case is Article 19, while the remedy is provided for in Article 22(2). He also referred to Article 24 and 25 of the Order in support of the submission that no matter how the action is framed, it must comply with the provisions of the Warsaw Convention. He urged the court to allow the appeal.

Femi Atoyebi, SAN, the respondent in this appeal, appeared in person. He adopted and relied on his respondent's brief filed on 4/17/2013. In further expatiation of his brief he pointed out that contrary to the appellant's contention that the action was founded on Common Law, both lower courts found that the action was based on the Warsaw Convention. He submitted that there was abundant evidence of wilful misconduct by the appellant, which defeats their right to a defence under Article 19 of the CAO. He urged the court to uphold the concurrent judgments of the two lower courts and dismiss the appeal. He informed the court that he was prepared to waive the claim for interest on the judgment debt.

In reply on points of law, Mr. Akorede-Lawal submitted that the appellant's contention is that the concurrent findings of the two lower courts amount to a nullity, as there is no cause of action. He



submitted that where there is no cause of action, the issue of wilful misconduct could not arise.

The appellant distilled a single issue for the determination of the appeal, which was adopted by the respondent. It reads:

Whether or not the learned Justices of the Court of Appeal were right in affirming the judgment of the lower court in respect of assessment of damages and exclusivity of the Warsaw Convention 1929. B

In support of the sole issue for determination, learned counsel for the appellant submitted that the relationship between the parties is that of carrier and passenger. He submitted that the contract between the parties is a special contract of international carriage by air of passenger, baggage and/or goods. He submitted that the applicable law is the Warsaw Convention 1929 which has been domesticated in Nigeria vide Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (CAO) contained in Vol. 11 1958 Laws of the Federation. He submitted that this position has been confirmed by the Supreme Court in *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt.498) 124. Learned counsel contended that the Warsaw Convention 1929 and the CAO provide the passenger's exclusive cause of action and sole remedy against an air carrier in respect of injury, loss, damage or delay in the carriage of passengers or delivery of baggage and goods in the course of or arising out of international carriage. He referred to: *Sidhu v. British Airways* (1997) 1 All ER 193 or 1 AC 430. He also referred to Article I of the Order. He submitted that Articles 17, 18 and 19 of the CAO provide causes of action in respect of (i) injuries to passenger or death; (ii) damage to checked baggage or goods and (iii) damage occasioned by delay in the transportation by air of passengers, baggage or goods respectively. He submitted that the respondent's claim as endorsed on his further amended statement of claim is a claim that could only be considered at Common Law not having been formulated with the provisions of the CAO in mind. He did however concede that the claim could be considered within the purview of Article 19. C D E F G

He submitted that the gravamen of the respondent's claim is that his baggage, which ought to have been delivered to him in Lagos when he arrived on 8<sup>th</sup> May 2000, was delivered to him on 10<sup>th</sup> May 2000. He contended that the delivery was within the number of days allowed airlines to deliver passengers' baggage. He further contended that as at the date when the respondent decided to collect his bag in London the appellant was not in breach of the general conditions of carriage. He argued that since the respondent travelled of his own H

volition to collect his bag, even though he had been informed that it would be delivered on the 10th of May, the appellant was not liable for the delay.

Alternatively, he submitted that if the respondent's claim is merely for the delay in delivering his checked baggage, the remedy available to him is as provided for in Article 19 of the CAO. He submitted that Article 19 must be read in conjunction with Article 24, which provides:

*"In cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limit set out in this convention".*

He reiterated his contention that the respondent's case was founded on breach of contract under the Common Law and not as required under the convention. He submitted that notwithstanding the way the respondent's claim is couched, if the head of claim does not fall within the contemplation of the Convention, the action is bound to be dismissed. He relied on the authority of: *Oparaji v. Virgin Atlantic Airlines Ltd.* (2008) WL 2708034 (E.D.N.Y.) September 19, 2006 wherein the plaintiff's claims were based on delay. He noted that although the claims were within the scope of Article 19, they were dismissed because of his decision to secure substitute travel and not because of any action on the part of the carrier in delaying him. He submitted that the claim for damages as asserted by the respondent is wrong and misleading as there is no legal authority that moral damages should apply to any baggage claim. He submitted that mental anguish is only recoverable where there is bodily injury. He referred to: *Morris v. KLM Royal Dutch Airlines*; *King v. Bristow Helicopters Ltd.* (2002) ALL ER (D) 394 (Feb.) (2002) UKHL 7. He maintained that the claim for £100,000.00 and the entire heads of claim are founded on inconvenience and are therefore not sustainable or recoverable in law.

He submitted further that the respondent could only establish a cause of action under Article 19 and that the damages recoverable are strictly as provided in Article 22 (2). He submitted that although the lower court rightly identified the applicable law, it came to a wrong conclusion by affirming the remedies granted to the respondent under the Common Law governing breach of Contract and tort of negligence. He referred to *Sidhu v. British Airways* (supra) @ 454.

He submitted that all the claims asserted in paragraph 22 of the further amended statement of claim under particulars of losses do not contain any claim in respect of delay but rather that it Contains heads of claim which the courts, in applying Article 19 of the Convention,

have universally held not to be recoverable in a claim based squarely on delay.

He submitted that this court in the case of: *Harka Air Services (Nig.) Ltd. v. Emeka Keazor* (2011) 13 NWLR (Pt. 1 264) 320, upheld the exclusivity of the Warsaw Convention to matters between an airline and its passengers.

He submitted that the application of Common Law to this case by the lower court led to a wrong assessment of the damages recoverable by the respondent and thus the court erroneously affirmed the decision of the trial court. He submitted that the finding of the lower Court that the award of general damages in the sum of N3 million was neither too high nor too low is at variance with the provisions of Article 22 (2). Relying on the decision of this court in *Harka Air Services (Nig.) Ltd. v. Emeka Keazor* (supra) and the case of: *Horabin v. British Overseas Airways Corporation* (1952) 2 All ER 1016 @ 1020 B-D per Barry, J., he submitted that a party alleging wilful misconduct must prove it with probative facts and evidence. He maintained that the respondent failed to plead or prove wilful misconduct on the part of the appellant or any of its agents, which would entitle him to make a claim for a higher amount than that provided for under Article 22 (2). He submitted that it is only if and when a passenger or consignor, at the time of handing over his baggage to the carrier, has made a special declaration of the value or it is proved that the carrier is guilty of wilful misconduct that the carrier will not be able to take advantage of the limited liability provided for under the Convention. He referred to Articles 22 (2) and 25.

In reference to the finding of the lower court to the effect that the award of general damages is within the discretion of the court, learned counsel submitted that the finding cannot be supported having regard to the provisions of Articles 19, 22 (2), 23, 24 and 25 of the Convention. He maintained that the award of damages in matters governed by the CAO is not subject to the discretion of the trial Judge, unless the respondent is able to break the ceiling of the limit of liability of the appellant by pleading and proving by probative evidence that the appellant is guilty of wilful misconduct.

In reply to the above submissions, the respondent P.O. Atoyebi, SAN agreed that the claim is governed by the CAO. He submitted that both lower courts considered and applied the provisions of the Order to determine the rights and liabilities of the parties. He submitted that what the lower court decided was that having regard to the provisions of Article 25, the appellant could not avail itself of the provisions of the Order to limit its liability because it is not entitled

to any defence thereunder. He referred to relevant portions of the judgments of the two lower courts in support of this submission.

He contended that the evidence showed that the appellant was clearly negligent and/or guilty of wilful misconduct towards the respondent in the performance of its duties to him under the contract of carriage. For what constitutes negligence he relied on: *Odinaka v. Moghalu* (1992) 4 NWLR (Pt.233) 1, 15 E; *Makwe v. Nwukor* (2001) FWLR (Pt.62) 1 @ 16 C-G; (2001) 14 NWLR (Pt. 733) 356. He submitted that all efforts by the respondent to retrieve his bag and the resultant cost and inconvenience are the direct consequences of the appellant's negligence. He referred to paragraphs 21 & 22 of the further amended statement of claim where negligence was specifically pleaded. He argued that the refusal of the appellant to put the respondent's bag on the next available flight despite having located it in London was a deliberate act by the appellant and/or its staff, which borders on reckless indifference towards the respondent. He referred to: *Harka Air Services (Nig) Ltd. v. Emeka Keazor* (supra) @ 364 C per Rhodes-Vivour, JSC for what constitutes wilful misconduct. He submitted that not only did the respondent plead wilful/intentional or deliberate misconduct; there was ample evidence on record in support thereof. He urged the court to discountenance the submissions of learned counsel for the appellant in this regard. He submitted that the foreign authorities of: *Horabin v. British Overseas Airways Corp.* (supra) and *Rusten Platinum Mines Ltd. v. South African Airways* (1977) Lloyd's Rep. 564 @ 569 relied upon by the appellant in fact support the respondent's case. He contended further that in any event, by virtue of Article 25, what would amount to wilful misconduct is to be determined in accordance with the law of the Court seised of the matter, which in the instant case is Nigerian law.

Learned senior counsel submitted that from all the actions of the appellant and/or its agents in London, the only conclusion a reasonable man could draw is that the appellant is guilty of gross wilful misconduct in the handling of the respondent's hand baggage. He submitted that the appellant's right to exclude or limit its liability is taken away if the damage is caused by its wilful misconduct or by such default on its part as, in accordance with the law of the court seised of the case, is considered to be the equivalent of wilful misconduct. He submitted that where, as in this case, both the trial court and the lower court made findings of wilful misconduct against the appellant, damages are left at large. He referred to: *Harka Air Services (Nig.) Ltd. v. Emeka Keazor Esq.* (supra) at 350 G - H. He referred to Article 25 and submitted that appellant's case is for damage occasioned by delay

in the carriage of his luggage by air and therefore cognisable under Article 19. He submitted that all the cases cited by the appellant are distinguishable from the facts of this case and therefore irrelevant, as they relate to either injury to passengers carried by air or loss of their luggage.

He contended that having sufficiently demonstrated that the appellant was not entitled to exclude or limit its liability under the order, the lower court was at liberty and was right to award such special and general damages as the Common Law recognises, in favour of the respondent. He referred to items (a) - (f) under paragraph 22 of the further amended statement of claim, for special damages totalling US\$5,450 and £7.013 and submitted that the claims were specifically pleaded and proved by the respondent. He submitted that the claim for £100,000.00 is a claim in damages for stress and inconvenience. He Contended that the respondent had testified at the trial that a similar award was made by the appellant in favour of one Victoria Beckham, a white British lady and wife of the famous football star, David Beckham who, as a first class passenger lost her luggage while flying from the United States to London. He noted that she was paid compensation of £100,000.00 and given a number of complimentary first class tickets to any destination of her choice worldwide. He noted further that certified true copies of British newspaper reports of this fact were tendered and admitted as exhibits 14 and 15 without objection from the appellant.

On the factors to be considered by the court in the award of general damages, learned senior counsel referred to the case of: U.A.C. (Nig.) Plc v. Irole (2001) 5 NWLR (Pt.707) 583 @ 599 B - E; Odiba v. Azege (1998) 9 NWLR (Pt.566) 370 @ 382 D - E & 388 C - E. He maintained that the award of general damages in addition to the special damages is justified in the circumstances of this case. He submitted that general damages are, by their nature, what the law would presume to be the direct, natural and probable consequence of the act complained of. He submitted that unlike special damages, general damages need not be strictly proved. He referred to: Unipetrol (Nig.) Plc v. Adireje (W.A.) Ltd. (2005) 14 NWLR (Pt.946) 563 @ 632 - 633; Watts v. Morrow (1991) 1 WLR 1421. He submitted that having regard to the evidence of the alleged compensation to Mrs. Victoria Beckham in the sum of £100,000.00 in addition to a number of first class complimentary tickets, which evidence was neither challenged nor controverted, it was reasonable to presume that the respondent, a respected citizen of Nigeria and a learned Senior Advocate of Nigeria, should receive the same treatment. He urged the

court to follow the standard adopted by the appellant itself in dealing with its British first class passenger and uphold the award of general damages.

In his reply brief, learned counsel for the appellant submitted that the respondent made out a case of negligence and not wilful misconduct in his pleadings. He submitted that the respondent is bound by his pleading and reliance on any evidence led in respect of wilful misconduct would be wrong in law and should be expunged from the record. He cited the case of: *Enang & Ors. v. Adu & Ors.* (1981) N.S.C.C. 453 @ 459 per Nnamani, JSC. He contended that the arguments in respondent's brief deal mainly with negligence. He submitted further that the respondent had a duty to plead particulars of the wilful misconduct, which he failed to do. He relied on: *Oyedele v. L.U.TH.* (1990) 6 NWLR (Pt. 155) 194 @ 199; *George & Or. v. Dominion Flour Mills Ltd.* (1963) 1 ANCR 70@76; (1963) 1 SCNLR 117.

In conclusion, learned counsel submitted that the concurrent findings of the two lower courts are based on wrong principles of law and cannot stand. He urged this court to interfere and correct the anomaly. He referred to *Harka Air Services (Nig.) Ltd. v. Emeka Keazor Esq.* (supra) at 350 G-H, and urged the court to allow the appeal.

It is the contention of the appellant herein that the two lower courts failed to pronounce on the exclusivity of the provisions of the Warsaw Convention to the relationship between the parties and that both courts erroneously considered the case from the perspective of Common Law principles. It was settled as far back as 1997 in the case of *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt.498) 124 that the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (the CAO), which domesticated the Warsaw Convention of 1929 in Nigeria, not having been repealed or declared invalid, is an existing law within the meaning of section 274(1) of the 1979 Constitution (now section 315 (1) of the 1999 Constitution as amended). On the duty of Nigerian courts to continue to apply rules of international law, Wali, JSC at page 150 A-B (supra) stated thus:

*“Nigeria; like any other commonwealth country, inherited the English Common Law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic*

*stability; cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.”*

Article 1 (1) of the CAO provides:

Article 1:

*“(1) This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.”*

There is no doubt therefore that the relationship between the parties being that of international carrier and passenger is governed by the CAO.

It is also correct, as submitted by learned counsel for the appellant that Articles 17, 18 (1) and 19 of the Order provide exclusive causes of action for a passenger to the exclusion of any other law. The Articles provide as follows:

*“Article 17:*

*The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by 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.*

*Article 18(1):*

*The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.*

*Article 19:*

*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.”*

Learned Counsel for the appellant has argued that the respondent’s action before the trial court was not brought in contemplation of the provisions of the CAO but under Common Law principles. He however concedes that the suit could be considered under Article 19. In paragraph 22 of his further amended statement of claim, the respondent sought special and general damages on the following ground:

*“By reason of the defendant’s incompetence, deliberate act and/or act of negligence, the plaintiff has been put to a lot of financial losses, travel stresses, loss of professional time, etc.”* (Italics mine)

The claim is clearly premised on loss and inconvenience suffered by him occasioned by the delay in the carriage of his luggage

by the appellant. The claim is therefore cognisable under Article 19 as conceded by the appellant. The issue in contention is: what is the respondent's remedy in the circumstances? Articles 22, 24 and 25 of the CAO are instructive in this regard. For ease of reference, the relevant provisions are reproduced hereunder:

B *"Article 22*

*(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 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.*

C *(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over 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 consignor at delivery.*

E *(3) ....*

*(4) The sums referred to above shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.*

F *Article 24:*

*(1) In cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.*

*2...*

G *Article 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 wilful 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 wilful misconduct.*

H *(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."* (Italics mine for emphasis)

While it is the contention of the appellant that the respondent



is only entitled to the remedy provided in Article 22 (2) and that Article 24 circumscribes the respondent's right to make any claim for damages outside the limitations set by the CAO, it is the respondent's contention that by virtue of Article 25, the appellant is not entitled to avail itself of the provisions of Article 22 (2) because the default complained of was caused by its wilful misconduct.

I must observe at this stage that it would not be correct to say, as contended on behalf of the appellant that the two lower courts failed to pronounce on the exclusivity of the CAO to the contract between the parties. At page 341 lines 37 & 38 - page 342 lines 1-3 of the record, the learned trial Judge in the course of his judgment held thus:

*"Since both parties agree that the Warsaw Convention is the applicable law; this court will only rely inter alia on the Warsaw Convention to the extent of determining what right if any the parties have vis-à-vis this action. I therefore hold that the applicable law governing this action is the Warsaw Convention."*

The court continued at page 344 lines 25 - 33 of the record:

*"I have read the provisions of the Warsaw Convention and fully appreciated them. I had earlier said that there is a presumption of negligence on the part of the defendant. I had also said that the defendants were reckless in carrying out their contractual responsibilities towards the plaintiff and therefore defendant cannot avail themselves of the provisions of the Convention. They are not entitled to any defence. Moreso Art. 19 of the CAO has provided that the carrier is liable for damage occasioned by delay in the carriage by air of passengers; luggage or goods and I so hold."*

The Court of Appeal at page 522 lines 7 - 11 of the record reported in (2010) 4 NWLR (Pt. 1214) 561 @ 600 paras. E-F held:

*"In the instant case, its rather indisputable that the 1953 Order (supra) domesticating the Warsaw Convention; 1929; as part of the existing law of Nigeria subsists: especially in view of the fact that it has neither been repealed (by any law) nor declared invalid by any court of competent jurisdiction. And I so hold. See Ibidapo v. Lufthansa (supra) at 149 paras. A-B per Wali, JSC."*

The applicability and exclusivity of the CAO is therefore not in doubt. The issue in contention is whether, having regard to the circumstances of this case, the appellant was entitled to limit its liability to the amount provided for in Article 22 (2) thereof. The appellant argues very forcefully that the respondent did not plead or prove wilful misconduct but rather made out a case of negligence. The respondent on the other hand argues that the appellant's refusal to put his bag on the next available flight despite having located it was a deliberate act

by the appellant and/or its staff and therefore amounts to wilful misconduct.

In the case of *Horabiu v. British Airways Corp.* (1952) 2 All ER 1016 @ 1020 B - D, the term 'wilful misconduct' was explained thus:

B *"In order to establish wilful misconduct; the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong, and yet did it, notwithstanding; or alternatively, that he did it quite recklessly; not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible .... The element of wilfulness is essential in the present case if the plaintiff is to recover more than the £3,000 to which he is admittedly entitled,"* (Italics supplied)

C It is evident from the above that wilful misconduct comprises the act itself and the mental element. Although the claim was in respect of personal injuries and damage to goods sustained by the plaintiff as a result of a plane crash, the principle enunciated in *Horabin's case* (supra) with regard to how to determine wilful misconduct is applicable to any claim for damages arising under the provisions of the CAO. The case was cited with approval by this court in the recent case of: *Harka Air Services (Nig.) Ltd. v. K Keazor* (2011) 13 NWLR (Pt.1264) 320 D @ 342 A; 360 H. His Lordship, Rhodes-Vivour, JSC stated at page 364 C- D:

F *"Wilful misconduct is a deliberate wrong act by a pilot, airline staff, or its agent which gives rise to a claim for damages by passengers. When staff of an airline (ICT with reckless indifference, such unacceptable behaviour especially by a professional person amounts to wilful misconduct."* (Italics mine)

G I had noted earlier in this judgment that the appellant conceded that the respondent's case was cognisable under Article 19 of the CAO. I have carefully examined the respondent's further amended statement of claim at pages 127 - 130 of the record and find paragraphs 10, 11, 12, 13 and 21 particularly relevant to the issue at hand. They are reproduced hereunder for ease of reference:

H *"10. On the 8 May 2000 when the defendant confirmed having located the baggage; the plaintiff sent two of his assistants in London to the defendants offices at Heathrow Airport with authority to collect the baggage; and although they again admitted having found the same, they refused to hand it over to them, insisting that they would ship it on their next flight to Lagos.*

*11. When on Wednesday, 10 May 2000 the baggage did not arrive, and in view of the importance of its contents which for safety/*

*security reasons he could not disclose at the material time, the plaintiff purchased another business class return ticket to London from the defendant just to go and pick the said baggage, after he had told the defendant's manager aforesaid the previous day that that would be his next line of action if the baggage did not arrive by the Wednesday morning flight. The plaintiff will rely on the copy of his said ticket at the trial of this action.* B

12. Obviously the said manager had reported the matter to the cabin crew on that flight and the plaintiff was approached by the senior cabin attendant; who in clear acknowledgment of their negligence and deliberate act of incompetence and/or nonchalance; voluntarily upgraded the plaintiff to the First Class cabin and got the pilot to radio the ground staff at London Heathrow to meet the plaintiff on arrival later that evening. C

13. An official of the defendant duly met the plaintiff at London Heathrow airport and confirmed that the baggage was awaiting his collection. The official later took the plaintiff to their Lost Baggage Room at the airport where he was handed his baggage. Curiously, the baggage was intact and the plaintiff surrendered the original baggage tag in exchange for the baggage. The said official profusely apologised to the plaintiff stating that they had wronged him and advised the plaintiff to put in his claim, which he promised would be dealt with speedily. D E

21. The plaintiff shall contend at the trial that the defendant's act of not transporting his baggage to Lagos after the same was located was a deliberate act and/or an act of negligence and/or incompetence of the defendants (sic), its staff and/or agents. F

*Particulars of negligence:*

(a) Fact of collection of the plaintiff's baggage at the boarding gate;

(b) Fact of non-arrival of the baggage with the flight or at all;

(c) Refusal of the defendant to hand over the baggage to plaintiffs agents in London in spite of plaintiff's authorisation; G

(d) Refusal to talk to the plaintiff on phone with a view to finding an amicable solution to the matter; and

(e) Fact that the plaintiff had to travel back to the U.K. to pick the baggage when the same was not lost but merely kept by the plaintiff in their lost baggage store." (Italics supplied) H

**I am of the view that the averments in the paragraphs reproduced above clearly disclose an allegation of wilful misconduct on the part of the appellant. Though described as particulars of negligence, the facts set out in sub-paragraphs**

(a) to (e) of paragraph 21 are facts tending to illustrate the acts of wilful misconduct allegedly committed by the appellant. The respondent gave copious oral and documentary evidence in support of the above pleadings. The two lower courts, relying on these facts rightly concluded in my view, that having regard to the circumstances of the case, the appellant was not entitled to avail itself of the provisions of the CAO to limit or exclude its liability towards the respondent. I agree with the findings of the two lower courts that the acts of the appellant in this case were reckless and deliberate. It not only failed to deliver the respondent's checked baggage upon his arrival in Lagos, after several fruitless trips by him to the airport in Lagos over a period of three days on the appellant's promise that the baggage would arrive, it deliberately refused to deliver the said baggage to his duly authorised agents in London when it was located at their office at Heathrow Airport, and continued to withhold it until the respondent had to travel back to the U.K. to retrieve it at great personal expense. It was clear from the evidence led at the trial that the appellant had no intention of delivering the respondent's baggage to him in Lagos, having abandoned it at its lost baggage store in London. It was on this basis that both courts considered the respondent's claim for damages. I agree with both courts that in view of the appellant's acts of wilful misconduct, it was not entitled to restrict or limit its liability to the amount provided for in Article 22 (2) of the CAO. By virtue of Article 25, once wilful misconduct was established, the respondent was entitled to damages.

*In the instant case the respondent claimed both special and general damages. The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm.* See: *Eliochin (Nig.) Ltd. v. Mbadiwe* (1986) 1 NWLR (Pt.14) 47 @ 65 per Obaseki, JSC; *Odiba v. Azege* (1998) 9 NWLR (Pt.566) 370 @ 382 D - E. *The rationale behind the compensatory theory for the award of damages is found in the maxim restitution in integrum. In other words, to restore the injured party to the position he or she was in prior to the injury.* See: *Shell Petroleum Dev. Co. (Nig.) Ltd. v. High Chief Tiebo VII & Ors* (1996) 4 NWLR (Pt.445) 657 @ 680 D - E; *Okongwu v. N.N.P.C.* (1989) 4 NWLR (Pt. 15) 296; *Cameroon Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512. *It is the law that general damages such as the law will presume to be the natural or*

**probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law and need not therefore be proved by evidence and may be averred generally. On the other hand, special damage is such loss as the law will not presume to be the consequence of the defendant's act but which depends in part, on the special circumstances of the case. Special damages must be specifically pleaded and strictly proved.** See: Incar (Nig.) Ltd. v. Benson Transport Ltd. (1975) 3 SC (Reprint) 81; F.B.N. Plc v. Associated Motors Co. (Nig.) Ltd. (1998) 10 NWLR (Pt.570) 441 @ 465 466 G-C.

The claims listed in paragraph 22 (a) - (f) of the respondent's further amended statement of claim are as follows:

- a. Cost of one way First Class Ticket to Lagos 7 May 2000 - US\$1,500
- b. 2 return club class ticket to London of 10 May 2000 - US\$ 3,950
- c. One night stay in London hotel, etc - £225
- Taxi costs (Airport, London, etc) for plaintiff/assistants - £73
- d. Phones; faxes to & fro U.K. - Lagos; etc - £73
- f. Loss of professional time for travelling to the U.K. @ £150/hr - £6,600

These claims are in the nature of special damages. It was held in F.B.N. v. Associated Motors Co. Ltd. (supra) at page 466 A - B, that the obligation to particularise a claim for special damages arises, not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible. It seems to me that the claims in sub-paragraphs (a) - (f) constitute the losses directly incurred by the respondent and flowing from the appellant's wilful misconduct. In this regard, the lower court held at pages 533-534 of the record:

*"Regarding the special damages, it is rather evident that the respondent had not only clearly and unequivocally pleaded, but also proved vide credible viva voce evidence the special damages in question. Items A - F of the reliefs for special damages were not only clearly pleaded, but also proved by the respondent at the trial with credible viva voce evidence. The amounts so claimed in reliefs A - F in question were neither challenged nor controverted by the appellant. Thus, it behoves upon this court to deem the said reliefs A - F for special damages as having been admitted by the appellant, and accordingly proved by the respondent."*

This finding to my mind is fully supported by the record. It is unassailable and ought not to be disturbed by this court.

This brings me to the award of £100,000.00 being damages for stress and inconvenience of travelling. This is an award of general damages made in addition to the award of special damages. The learned senior counsel (respondent) reiterated the legal position that general damages are by their nature what the law would presume to be the direct, natural and probable consequence of the act complained of and need not be strictly proved.

***An award of damages is within the discretionary powers of the Court. An appellate court would not usually interfere with a previous award unless satisfied:***

***(a) that the trial court acted under a mistake of law; or  
(b) where the trial court acted in disregard of some principle of law; or***

***(c) where it acted under a misapprehension of facts; or  
(d) where it has taken into account irrelevant matters or failed to take into account relevant matters; or***

***(e) where injustice would result if the appellate court does not interfere; or***

***(f) where the amount awarded is either ridiculously low or ridiculously high that it must have been a wholly erroneous estimate of the damage.*** See: *Shell Petroleum Devt. Co. Nig. v.*

*Tiebo VII (supra); Shodipo & Co. LTd. v. Daily Times of Nig. Ltd. (1972) 1 All NLR (Pt.2) 406; Acme Builders Ltd. v. Kaduna State Water Board (1999) 2 NWLR (Pt.590) 288; Mutual Aids Society v. Akerele (1965) 4 NSCC 268 @ 272.*

The basis upon which the respondent claimed £100,000.00 was that in a case similar to his, the appellant paid the sum of £100,000.00 in addition to a number of complimentary First Class tickets to one Mrs. Victoria Beckham, a white First Class passenger of the airline and wife of a famous international football star, for loss of her baggage on a journey from the United States of America to London. British Newspaper reports of the award were tendered and admitted in evidence. It is also the respondent's contention that as a Senior Advocate of Nigeria and a respected citizen of this country he is entitled to receive nothing less.

In reviewing this aspect of the respondent's claim, the lower court at page 534 of the record held:

*"Unhesitatingly, I agree in toto with the contention of the respondent (sic) (appellant); to the effect that there is no basis at all for comparing Mrs. Beckham with the respondent. Indisputably, no evidence was adduced regarding the status of Mrs. Beckham, save the reference thereto as a wife of a popular international football star.*

*Contrariwise, however, the respondent is not only a member of the foremost honourable profession on the planet earth; the legal profession; but also a senior silk, a Senior Advocate of Nigeria (SAN); which is paripassu with a Queens Counsel (Q.C.) of the United Kingdom."*

I agree entirely with the lower court that there was no evidence adduced regarding the status of Mrs. Beckham. There was also no evidence of the peculiar circumstances of her claim to make it at par with the respondent's case. The evidence tendered by the respondent showed that her baggage was lost entirely while the respondent's baggage was eventually recovered intact. Furthermore the court could not speculate on whether the said Mrs. Beckham had made any prior declaration of the value of her baggage at the time of delivering it to the appellant as provided for in Article 22 (2). **While it is the law that general damages need not be proved but are presumed to be the natural consequence of the act complained of, I am however unable to agree with the view that in the circumstances of this case the respondent was entitled to an award of £100,000.00 general damages in addition to the award of special damages. It is conceded that the learned senior counsel is a respected citizen of this country and a Senior Advocate of Nigeria. With due respect to the learned silk, I am of the humble view that he has been fully compensated under sub-paragraphs (a) - (f) for the wilful misconduct of the appellant. The law is that a person who has been fully compensated under one head of damages for a particular injury cannot be awarded damages in respect of the same injury under another head.** See: Tsokwa Motors (Nig) Ltd. v. U.B.A. Plc (2008) 2 NWLR (Pt.1071) 347; Artra Industries (Nig.) Ltd. v. N.B.C.I. (1998) 4 NWLR (Pt.546) 357; Arisons Trading & Eng. Co. Ltd. v. Military Governor, Ogun State & Ors. (2009) 15 NWLR (Pt. 1163) 26. **The award of an additional £100,000.00 for 'stress and inconvenience in travelling' is, in my respectful view, not only manifestly too high but clearly amounts to double compensation. In the circumstances, I hold that sufficient reasons have been shown to warrant interference with the concurrent findings of the two lower courts in respect of this head of claim in order to prevent an injustice.**

In conclusion, the appeal succeeds in part. The judgment of the lower court affirming the judgment of the trial court in terms of paragraph 22 (a) - (f) of the further amended statement of claim in the sum of US\$5,450 and £7,013 pounds sterling respectively is hereby affirmed. The award of £100,000.00 as general damages is hereby set aside. It is hereby reiterated that at the hearing of the appeal on 17/

3/2014 the respondent agreed to waive the claim for interest on the judgment sum. Costs follow the event. As the appeal succeeds in part, the parties shall bear their respective costs.

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**MOHAMMED JSC**

B The judgment of my learned brother Kekere-Ekun JSC, which has just been delivered was read by me before today, I completely agree with the reasoning and the ultimate conclusion arrived at that this appeal ought to be allowed in part. The entire appeal was predicated on the quantum of damages recoverable by the respondent from the appellant for breach of a contract of international carriage by air resulting in the late delivery of the respondent's checked in luggage from London Heathrow to Murtala Mohammed International Airport Lagos that occurred on 8th May, 2000.

C  
D The facts giving rise to the respondent's action in the trial court against the appellant in which he claimed the sums of USD5,450.00 and £107,013.00 as damages, have been fully stated in the lead judgment. At the end of the hearing of the case at the trial court, the learned trial Judge granted all the reliefs claimed by the plaintiff, now respondent in the judgment which was affirmed on appeal by the E Lagos Division of the Court of Appeal. The appellant is still not happy with the judgment of the Court of Appeal against it and has therefore appealed to this court on a single issue raised in the appellant's brief of argument and adopted in the respondent brief.

The issue is –

F *“Whether or not the learned Justices of the Court of Appeal were right in affirming the judgment of the lower court, in respect of assessment of damages and exclusively of the Warsaw Convention 1929.”*

G Although it was strongly argued for the appellant that the courts below ought not to have considered and granted the claims of the respondent for damages based on negligence under the Common Law, rather than under the applicable statute of Warsaw Convention of 1919 which is applicable in Nigeria and which governed the contractual relationship between the parties in this case, the record of this appeal and the judgments of the two courts below have both H revealed quite plainly that the dispute between the parties was indeed heard and resolved under the relevant Rules of the Warsaw Convention 1929. In fact, even the appellant in its appellant's brief of argument at page 8 paragraph 4.13 seemed to have conceded that claims of the respondent as framed in the statement of claim could



have been rightly considered within the purview of Article 19 of the Warsaw Convention 1929, domesticated in Nigeria by Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953, Article 19 of the Warsaw convention 1929 under which the respondent's claims were brought reads –

*“19. The carrier shall be liable for damages occasioned by delay in the transportation by air of passengers, baggage or goods.”* B

The appellant having failed to deliver the respondent's checked in baggage on 8th May, 2000 on arrival at the respondents destination at Lagos and still failed to deliver the same baggage after several promises by its staff to do so between 8th -10th May, 2000, until the appellant found it necessary to fly back to London in search of his baggage on 10th May, 2000, the appellant's liability for the claim against it under Article 19 of the Warsaw Convention 1929, is not at all in doubt as the Convention is applicable in Nigeria. See Joseph Ibadapo v. Lufthansa Airlines (1997) 4 NWLR (Pt. 498) 124. C

Although the appellant in its arguments relied on Article 24(1) D of the Convention which states –

*“24(1) In cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.”*

To take advantage of Article 22(2) of the Convention which E limited its liability to the respondent's claims to the sum of 250 Francs per kilogram of the luggage, the subject of the claim, the evidence on record in the instant case by virtue of Article 25 of the Convention, had excluded the appellant from taking advantage of Article 22(2) and 24(1) of the Convention to limit its liability to the claims of the F respondent. The relevant provisions of Article 25(1) of the Convention states -

*“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 wilful 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 wilful misconduct.”* G

The evidence of the only witness for the appellant at the trial court stating that there was no need for the respondent to have undertaken the journey to London for the collection of his luggage since the respondent had been informed that the luggage had been recovered and that it would have been flown back to Lagos by the appellant, had been shown to be not correct as the alleged recovered luggage was traced to the appellant's large hall where unshipped luggage belonging to Nigerians were stored. The place for the delivery H

of the respondent's checked in luggage was Lagos in Nigeria, The appellant clearly failed to deliver the luggage to Lagos Nigeria and the fact that the respondent had to travel to London in search of his luggage which ought to have been delivered to him in Lagos Nigeria was caused by the wilful misconduct of the appellant. This evidence  
B clearly confirm that the damage suffered by the respondent was caused by the wilful misconduct or default on the part of the appellant which deliberately refused to deliver the respondent's luggage to Lagos on 10th May, 2000 as earlier promised. That is to say that the evidence on record having clearly established that the appellant was  
C guilty of wilful misconduct as a carrier, it would not be able to take advantage of the limited liability defence provided under the Convention Articles 22(2) and 24 thereof. In other words, the appellant was guilty of wilful misconduct in the performance of its contractual duties as a carrier between itself and the respondent. This  
D therefore entitled the trial court and the court below to use their discretion in assessing the damages claimed by the respondent. This situation had resulted in concurrent findings by the two courts below on the fact that the wilful misconduct of the appellant in the discharge of its contractual responsibilities as a carrier in the handling of the respondent's checked in hand luggage gave rise to the respondent's  
E claims against the appellant, thereby leaving the assessment of damages open to the discretion of the trial court. See *Harka Air Services (Nigeria) Limited v. Emeka Keazor* (2011) 13 NWLR (Pt. 1264) 320.

Finally, the claims of the respondent against the appellant rooted in the contract of International Carriage of Luggage by air  
F between the parties, certainly the item of claim by the respondent for £100,000.00 damages for stress and inconvenience, cannot in my view be regarded as having been based on restitution in integrum, aimed at restoring the plaintiff/respondent to the position as if the contract has been performed. See *U.B.A. Plc v. B.T.L. Industries Ltd.*  
G (2006) 19 NWLR. (Pt. 1013) 61. I therefore agree that that relief should have been refused by the trial court and the refusal affirmed by the court below. Both courts having failed to do so, the appeal must be allowed on this item of relief for damages alone which is hereby set aside. The appeal is however dismissed in respect of the remaining  
H reliefs granted by the trial court and affirmed by the court below.

I am also not making any order on cost.

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**FABIYI JSC**

I have had a preview of the judgment just delivered by my

learned brother, Kekere-Ekun, JSC, I agree with the reasons therein advanced to arrive at the conclusion that the appeal should be allowed in part.

The respondent flew first class in the appellant's flight B.A. 295 from London Heathrow Airport to Lagos on 8<sup>th</sup> May, 2000. His checked in hand baggage was left behind as same was not delivered to him in Lagos. He went to Lagos Airport several times between 8<sup>th</sup> May, 2000 and 10<sup>th</sup> May, 2000 to no avail. He instructed his associate in London to collect same but the appellant refused to hand it over as instructed. On advice by appellant's official, the respondent had cause to travel to London to collect his baggage intact.

The respondent filed his suit wherein he claimed special and general damages for crass negligence and wilful misconduct. The trial court found in favour of the respondent. The appellant appealed to the Court of Appeal. Thereat, the judgment of the trial court was affirmed.

This is a further appeal to this court.

In this court, the single issue raised by the appellant for determination reads as follows:-

*"Whether or not the learned Justices of the Court of Appeal were right in affirming the judgment of the lower court in respect of assessment of damages and exclusivity of the Warsaw Convention, 1929"*

As found by the trial court and affirmed by the Court of Appeal, the appellant failed to hand over the respondent's hand baggage to him in Lagos as same was left behind at London Heathrow Airport. The respondent instructed his associate in London to collect the baggage on his behalf. The appellant refused to act as directed. The respondent had to travel back to London to retrieve his baggage intact. The appellant's action equates with wilful misconduct. If the appellant had acted positively to hand over the baggage to the respondent's associate in London, the impasse would not have taken place. The two lower courts found the action of the appellant as equating to wilful misconduct. They were right. By virtue of Article 25 of the Warsaw Convention, the appellant cannot take umbrage under Article 22(2) and 24(1) of the Convention to limit its liability to the claims of the respondent.

Article 25(1) of the Convention states as follows:-

*"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 wilful 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 wilful misconduct.”*

The respondent’s claims were brought under Article 19 of the applicable Warsaw Convention, 1929. The appellant’s counsel was at one with same. The said Article 19 reads as follows:-

“19. *The carrier shall be liable for damages occasioned by delay in transportation by air of passengers, baggage or goods.”*

The measure of damages in an action like this one is founded on the principle of restitutio in integrum. The respondent should receive compensation in money in the same position as if the loss had not been inflicted on him subject to the rules of law as to remoteness of damages. See *Lagos City Council Caretaker Committee v. Benjamin O. Unachukwu* (1978) 3 SC 199 at 202; *Liesbosch Dredger v. SS Edison* (1933) AC 449 at 459.

The heads of claim touching on special damages resulting from the wilful misconduct of the appellant were established by the respondent as found by the trial court and affirmed by the Court of Appeal. The concurrent findings of the courts below have been depicted as being perverse. I shall not interfere with same. See: *Kale v. Coker* (1982) 12 SC 252.

The next point of note relates to the award of general damages in the sum of £100,000. In my considered view, an award of general damages after the award for special damages invariably equates with double compensation; in the main. The law frowns at same. The respondent recovered his hand baggage within three days, intact unlike Mrs. Beckham whose luggage got lost. It is not proper to encourage gold digging; as it were, in the matter. See: *Soetan v. Ogunwo* (1975) 6 SC 67 at 72; *Kerewi v. Odugbesan* (1967) NMLR 89 at 91.

I also feel that the head of claim relating to general damages should be set aside.

G

### **PETER-ODILI JSC**

I agree completely with the judgment just delivered by my learned brother, Kekere-Ekun, JSC. In support of the very well articulated reasoning I shall make some comments.

The respondent, who was the plaintiff before the Federal High Court, Lagos by a writ of summons and statement of claim both dated 6<sup>th</sup> May, 2002 filed this action on the same date against the defendant which is the appellant herein. Both the appellant and the respondent amended their respective pleadings and the matter went to trial. The plaintiff had further amended his statement of claim which had the

particulars of losses as follows:

#### PARTICULARS OF LOSSES

(a) Cost of One Way First Class Ticket to Lagos 7 <sup>th</sup> May, 2000 -		
US\$ 1,500		
(b) Return Club Class Ticket to London of 10 <sup>th</sup> May, 2000 -	US\$	
3,950		B
(c) One night stay in London Hotel, etc -	£225.00	
(d) Taxi costs (Airport, London, etc) for plaintiff/assistants -	£	
115.00		
(e) Phones, Faxes to & fro U.K., Lagos etc	£73.00	
(f) Loss of professional time for travelling		
to the U.K. @ £150/hr for 37hrs	- £6,600.00	C
(g) Damages for stress and inconvenience of travelling	- £100,000	
TOTAL	(a) = US\$	
5,450		

b) = 107,013.00 D

#### Background Facts

The respondent was a passenger on board the appellant's flight from London Heathrow Airport on Sunday 7<sup>th</sup> May, 2000 and he arrived Lagos safely in the early morning of Monday 8<sup>th</sup> May, 2000.

On the said 7<sup>th</sup> May, 2000, the respondent was carrying two (2) pieces of hand baggage, but on being informed by a staff of the appellant that one of the hand baggage is bulky and in excess of the weight allowance for hand baggage, the respondent voluntarily released one of the huge bags for the appellant's staff to be checked into the hold of the aircraft, the baggage having been tagged and appropriate baggage tag issued and delivered to the respondent. F

On arrival at Lagos in the early morning of Monday the 8<sup>th</sup> May, 2000, the hand baggage of the respondent collected from him did not arrive with the aircraft.

When the said hand baggage did not arrive on the appellant's subsequent flights on 8<sup>th</sup> and 9<sup>th</sup> May, 2000 (two (2) days waiting period for delivery of the hand baggage), the respondent decided to go back to London allegedly to collect the baggage having been advised by the appellant that the baggage had been located in London and will arrive Lagos on 10<sup>th</sup> May, 2000. Instead of the respondent to wait and collect the baggage in Lagos, he decided to go to London contrary to the information given to him by the appellant. H

The respondent instituted this action to claim for the expenses he allegedly incurred in going back to collect his baggage in London and for losses he allegedly sustained.

On the 17<sup>th</sup> day of March 2014 date of hearing, learned

counsel for the appellant Mr. Akorede-Lawal adopted the appellant's brief of argument settled by Yomi Oshikoya and filed on 24/5/12 and also a reply brief filed on 9/11/12. He distilled a single issue for determination which is as follows:

Whether or not the learned Justices of the Court of Appeal were right in affirming the judgment of the lower court, in respect of assessment of damages and exclusivity of the Warsaw Convention, 1929.

The respondent, Oluwafemi Atoyebi SAN who appeared in person adopted the brief he settled and filed on 4/7/12. He also accepted the use of the single issue as drafted by the appellant.

Learned counsel for the appellant, Mr. Akorede-Lawal submitted that the Court of Appeal or lower court was wrong to have affirmed the judgment of the trial judge contrary to the clear provisions of the Warsaw Convention 1929 which is the applicable law to the contract and international carriage by air between the appellant and the respondent. That the law applicable to the contract is International Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12th October, 1929 also called the Warsaw Convention 1929 being a foreign convention was domesticated to be made applicable to Nigeria by the Carriage by Air (Colonies, Protectorate and Trust Territories) Order 1953 hereinafter called 1953 Order in Vol. 11 of the 1958 Laws of the Federation. That both the Warsaw Convention 1929 and the 1953 Order have been held to be the applicable law to contract of International Carriage by air in Nigeria. He cited, Joseph Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (Pt. 498) 124.

For the appellant was further submitted that both the Warsaw Convention 1929 and the 1953 Order provide the passenger's exclusive cause of action and the passenger's sole remedy against an air carrier in respect of injury, loss, damages or delay in carriage of passenger or delivery of baggage and goods in the course of or arising out of international carriage. He cited Sidhu v. British Airways (1997) 1 All ER 193.

Learned counsel stated on that the gravamen of the claim of the respondent is that his baggage which ought to be delivered to him in Lagos when he arrived on 8th May, 2000 was delivered to him on 10th May, 2000 which is still within the number of days allowed the airlines to deliver passengers baggage. That the appellant had not breached the general conditions of carriage as at the date the respondent decided to collect the baggage in London. He said the respondent travelled back to London on his own volition and the

respondent has nothing to do with the trip as he had been informed that the baggage would be delivered on the same day. That indeed the respondent has remedy under Articles 22 (2) and 23 of the Warsaw Convention 1929/1953 Order which limits liability of the appellant and so the remedy under Common Law from which respondent framed his claim is not available here. Therefore neither the Common B Law remedy of breach of contract and the tort of negligence which respondent had in mind would apply and the two courts below should have realised same. He cited *Sidhu v. British Airways* (supra) 454,

Mr. Akorede-Lawal of counsel said the exclusivity of the Warsaw Convention in situations such as the present was applied in *Harka Air Services (Nig.) Ltd. v. Emeka Keazor* (2011) 13 NWLR (Pt. C 1264) 320.

He went on to contend that the mental anguish claim can only be recoverable if there is bodily injury and so the claim for £100,000 and the entire heads of claim couched on inconvenience is not sustainable. D

Mr. Akorede-Lawal stated on that the party alleging wilful misconduct must prove it with probative facts and evidence and the standard of proof of wilful misconduct has been defined within the following cases; *Horabin v. British Overseas Corp.* (1952) 2 All ER 1016 at 2010; *Harka Air Services (Nig.) Ltd. v. Emeka Keazor* (2006) E 1 NWLR (Pt. 960) 160 at 168 (CA).

He submitted further that the provision on Article 25 of Hague Protocol 1995 commonly referred to as Warsaw Convention 1929 as amended by Hague Protocol, applied by the two courts below was done erroneously. He referred to *Goldman v. Thai Airways* 3 All ER F 693.

The respondent contended that the claim is governed by the Warsaw Convention, 1929 which Nigeria has domesticated in her 1958 Laws of the Federation of Nigeria “*The Carriage by Air (Colonies, Protectorates and Trust Territories)*” Order 1953, that although the said law was omitted in both the 1990 and 2004 laws of the Federation, it continues to be applicable in Nigeria. He cited, *Joseph Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt 498) 124. G

Mr. Atoyebi, SAN said that appellant was clearly negligent and for guilty of wilful misconduct towards the respondent in the performance of its duties to him under the contract of carriage and so the defences under the convention are not available to the appellant. He cited *Makwe v. Nwukor* (2001) FWLR (Pt.62) 1 at 16, (2001) 14 NWLR (Pt, 733) 356; *Odinaka v. Moghalu* (1992) 4 NWLR (Pt. 233) 1. H

He said the concurrent findings of the two courts should be upheld as there was nothing standing in the way. He cited Iroegbu v. Okwordu (1990) 6 NWLR (Pt. 159) 643; Okonkwo v. Okonkwo (1998) 10 NWLR (Pt 571) 554.

The position of the appellant in summary is that the Court of Appeal or the court below wrongly affirmed the decision of the trial court which was premised on Common Law or in respect of which it was misled by placing reliance on the provisions of Hague Protocol which is not applicable to this claim. That the test in Warsaw Convention is wilful misconduct which is different from the test in Hague Protocol 1955 that “*negligence, recklessness must be associated with knowledge and intentional conduct.*” Appellant said the Hague Protocol is irrelevant in this claim and the respondent failed to demonstrate any facts or probative evidence that he has satisfied the required test of knowledge, negligence or recklessness with intentional misconduct. Also that the court below erred in awarding general damages and special damages against the appellant contrary to the Warsaw Convention 1929/1953 Order.

The respondent standpoint is that he proved his case by credible oral and documentary evidence which were neither challenged nor controverted while the appellant offered none. Also that the action was such that any reasonable person would reach the conclusion that it was one of gross wilful misconduct, by reason of which they had lost any available defences as provided under the relevant law, that of CAO.

On this matter as to the applicability of the Warsaw Convention 1929 which Nigeria domesticated in her 1958 Laws of the Federation “The Carriage by Air (Colonies, Protectorates and Trust Territories)” Order, 1953 otherwise referred to in short as CAO, a look; 1 (Article 3 rule 2 of that CAO would help and that is thus:

“*The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall nonetheless be subject to the rules of this Convention...*”

Article stipulates as follows:

“*Any provision tending to relieve the carrier of liability or to fix a lower limit mean that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.*”

It is common ground between the parties that the suit is governed by the Warsaw Convention. The area of departure is that while the respondent is of the view that their claims and as upheld by



the two courts below were within the ambit of that convention, the appellant thinks otherwise in that they posit that by the award of the two courts, those courts had gone outside the Warsaw Convention and rather applied the provisions of the Common Law.

The trial court had in its judgment held thus:

*“Since both parties agree that the Warsaw Convention is the applicable law, the court will only rely inter-alia on the Warsaw Convention to the extent of determining what right, if any, parties have vis-à-vis this action. I therefore hold that the applicable law governing this action is the Warsaw Convention ...I had earlier said that there is a presumption of negligence on the part of the defendant. I had also said that the defendants were reckless in carrying out their contractual responsibilities towards the plaintiff and therefore defendant cannot avail themselves of the provision of the convention. They are not entitled to any defence. Moreso Article 19 of the CAO has provided that the carrier is liable for damage occasioned by delay in the carriage by air of passengers luggage or goods and I so hold.”*

The court below held thus at 592 para. C: 597 paras. A-B:

*“According to the appellant’s learned counsel, the respondent’s claim as endorsed on the further amended statement of claim thereof, falls squarely under the provisions of Articles 19 & 22 of the Warsaw Convention 1929 and 1953 Order dealing with carriers’ liability for delay in the delivery of passenger’s baggage... By virtue of Article 19 of the Warsaw Convention (supra), the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, without the need to prove negligence. The carrier’s liability however is said to be to the passenger and not to any third party who suffers damage, as a result of the delay.”*

Going on further, the Court of Appeal stated at 597, paras. C-G; 604 paras. B-D:

*“In the instant case, it’s not in doubt that the respondent had recovered his hand baggage intact. He however had to take the trouble and pain of travelling back to London on 10/5/2000 to retrieve it. It was in evidence that the appellant went to Murtala Mohammed International Airport (MMA) Lagos twice on the 8th, 9th and 10th days of May, 2000 with a view to collecting in his hand baggage surreptitiously left in London by the appellant, but to no avail. On 10/5/2000, upon the advice of a staff of the appellant, the respondent bought a business class ticket (exhibit 11), boarded a flight and flew back to London. On arrival at the Heathrow Airport, London, he was met by a staff of the appellant who apologised thereto and took him to the baggage store, where he found his bag intact. The*

respondent stayed an extra day in London at his expenses in order to lay a complaint to the appellant. Not unsurprisingly, the appellant offered to compensate the respondent with a ridiculous and rather contemptuous sum of US\$508.48 for all the losses he claimed to have suffered (exhibit 8). Not unnaturally, the respondent flatly rejected the offer, on the ground that he was not fairly treated by the appellant.”

“On the other hand, the respondent’s submission on issue No. 2 is largely contained at pages 11 - 16 of the brief thereof. The provision of Articles 25 of the 1953 Order, was cited and relied upon, to the effect that the right of a carrier to avail himself of the provisions of the law, to exclude or limit his liability, is taken away where the damage is caused by wilful misconduct thereof. It was submitted that, in the instant case, the respondent has amply demonstrated various acts of the appellant which could safely be described as wilful misconduct or gross wilful misconduct. Thus, the appellant cannot seek to exclude or limit its liability under the law.”

In this regard, what transpired may be captured briefly as the fact of both parties agreeing that the appellant collected the respondent’s baggage in London on the 7th day of May, 2007 for delivery to him in Lagos on Monday morning 8th day of May, 2007 but this delivery did not take place and since the appellant failed to explain that failure, the doctrine of *res ipsa loquitur* applied to place the negligence on the burner. I relied on the case of *Odinaka v. Moghalu* (1992) 4 NWLR (Pt. 233) 1.

The reason for that doctrinal application is that the essential elements to establish an action in negligence being thus:

(i) the existence of a duty to take care owed to the complainant by the appellant.

(ii) Failure to attain that standard of care prescribed by the law; and

(iii) Damage suffered by the complainant, which must be connected with the breach of duty to take care. See *Makwe v. Nwukor* (2001) FWLR (Pt. 62) 1 at 16 (SC), (2001) 14 NWLR (Pt. 733) 356.

That these ingredients above stated are evident in this case is without dispute hence the application of *res ipsa loquitur* to establish negligence.

On the complaint by the respondent that the appellant was guilty of gross wilful misconduct, the reaction of the appellant is that the issue of gross wilful misconduct cannot apply when the applicable law is the Warsaw Convention. That such allegation of misconduct was rather in the domain of Common Law which is inapplicable in a carriage by air arrangement.

For a definition of wilful misconduct, this court in *Harka Air Services (Nig.) Ltd. v. Emeka Keazor Esq.* (2011) 13 NWLR (Pt. 1264) 320 at 364 paras. C-D per Rhodes-Vivour JSC stated it to be:

*“Wilful misconduct is a deliberate wrong act by a pilot, airline staff, or its agent which gives raise to a claim for damages by passengers. When a staff of an airline acts with reckless indifference, such unacceptable behaviour especially by a professional person amounts to wilful misconduct”.* B

In view of the definition above on wilful misconduct, the question that arises would be if the handing by appellant of the hand luggage of the respondent qualified as such misconduct. In this instance, DW1 said appellant could not identify the respondent's hand baggage only for them to locate the same luggage on the arrival of respondent back to London to pick it up, four days after it would have been delivered to him. All what one can see is a nonchalant attitude on the matter as concerning the respondent and comes within the ambit of wilful misconduct. D

It needs be said that with Article 25 of CAO, a 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 wilful 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 wilful misconduct. Also 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. Clearly the appellant is in error to push forward the idea that in a carriage by air once wilful misconduct is established, the matter is taken out of the Convention and into the realm of Common Law which is inapplicable. E F

Article 19 of CAO also provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers' luggage or goods. Therefore the two courts below were on good ground in finding the appellant liable as stipulated by the CAO. These concurrent findings are indeed not such as could be disturbed by this court since there is not around the findings, any perversity or a violation of some principle of law or procedure nor is there a miscarriage of justice, I refer to *Harka Air Services (Nig.) Ltd. v. Emeka Keazor* (supra) per Adekeye, JSC at 350; *Iroegbu v. Okwordu* (1990) 6 NWLR (Pt. 159) 643; *Okonkwo v. Okonkwo* (1998) 10 NWLR (Pt. 571) 554. G H

The appeal allowed in part since the respondent had been fully compensated under the grants in sub-paragraphs 22 (a) – (f) in

the statement of claim for the wilful misconduct of the appellant. These special damages properly pleaded and proved by the respondent upon which the judgment of the trial court ensured the grant, he is therefore not entitled to the general damages claim of £100,000 (One hundred thousand pounds) for stress and inconvenience. This  
B is because of the general principle of law which has no room for double compensation. I rely on *Airsons Trading & Eng. Co. Ltd. v. Military Governor, Ogun State & Ors* (2009) 15 NWLR (Pt. 1163) 26; *Tsokwa Motors (Nig.) Ltd. v. U.B.A. Plc* (2008) 2 NWLR (Pt. 1071) 347.  
C

I agree completely with the conclusion of my learned brother, Kekere-Ekun JSC upholding the judgment of the lower court which affirmed what the trial court did in terms of the award based on paragraph 22(a) – (f) of the further amended statement of claim in  
D the sum of \$5,450 (Five Thousand, Four Hundred and Fifty Dollars) while £100,000 general damages consequently set aside.

I also abide by the consequential orders made.

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**MUHAMMAD JSC**

E I had a preview of the comprehensive lead judgment of my learned brother, Kekere-Ekun, JSC just delivered. I adopt the judgment as mine in allowing the appeal in part by affirming the judgment of the trial court in terms of paragraph 22(a) – (f) of the further  
F amended statement of claim in the sum of US\$5,450 and £7,013 pounds sterling respectively. The £100,000 general damages awarded in favour of the respondent is however hereby set aside. Parties are to bear their respective costs.

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