PROOF OF LOSS IN CARGO CLAIMS CAMEROON AIRLINES AND ABDULKAREEM IN VIEW.

Recently, the Honourable Justice Archibong of the Federal High Court, Lagos delivered two concise Judgments relating to international air cargo claims.

The said Judgments demonstrate the determination of the Nigerian Courts to comply, consistently, with the terms of the Warsaw Regime, particularly Article 22 as it relates to proof of loss.

More importantly the Courts of first instance appear to have consistently relied on the Court of Appeal decision in the case of **Cameroon Airlines v. Abdul Kareem (2003) 11 NWLR Part 830 CA 1,** as a guide to establishing the quantum and proof of loss in, particularly pre-montreal (1999), cargo claims.

The first suit was filed by one Mathias Von Oelhafen against South African Airways. The Plaintiff sought compensation for the alleged loss of personal items shipped from Nigeria to Namibia and by way of Writ of Summons and Statement of Claim dated 16th September 2005, respectively, he sought against the Defendant, as follows:

a) The sum of US$ 97,102.65 or in the alternative =N=15,000,000.00 (Fifteen Million Naira) being the aggregate value of the plaintiff's goods damaged or lost by the defendant.

b) Interest at the rate of 21% per annum from July 2004 until judgment and thereafter at the rate of 5% per annum on the judgement debt until payment.

c) Further and other reliefs.'

The issues to be determined in the suit were as follows:

a) Whether the contract in this case is governed exclusively by the provisions of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 as amended by the Hague Protocol of 1958 adopted by and applied to Nigeria, prior to 14th November 2006, by the Carriage by Air (Colonies Protectorates and Trust Territories) Order in Counsel 1953 Laws of Nigeria (hereinafter called the Warsaw Convention); and if so

b) Whether upon reviewing the facts and evidence in this case, the Plaintiff is entitled to the Claims sought.

In the second suit a Religious Organisation, the Registered Trustees of Deeper Life of Nigeria, sought by Writ of Summons and Statement of Claim dated 5th July 2006, as follows:

a) General damages of N 8,000,000.00 for breach of contract as follows:

i) =N= 6,870,100.00 being the cost of equipment.

ii) =N= 14,143.00 being money paid by the Plaintiff to the defendant as a carrier for reward, without consideration

iii) =N= 1, 215,757.00 for the inconveniences and embarrassment suffered by the Plaintiff.

Iv) 10% interest or other percentage on the sum the Court may award from the date of Judgment until judgment debt is paid in full.

In this instance it was the Plaintiffs case that the Airline contracted to transport, by cargo, its audio equipment from Lagos, Nigeria to South Africa and that same was never delivered.

In his Judgment the Honourable Justice Archibong relied solely on the provisions of Article 22 of the Warsaw Convention 1929 and held that in view of the fact that the Plaintiff's failed to make a **special declaration and pay a supplementary sum upon delivery of the equipment to the Defendant**, they were unable to obtain Judgment for sums beyond the limitation set out in Article 22(2) of the Convention.

In particular with regards the claims in the earlier case of Von Oelhafen, the Court resolved that not only had the Plaintiffs failed to make a special declaration and pay a supplementary sum upon delivery of the goods to the Defendant, in addition the Plaintiff had failed to establish the weight of the cargo and accordingly the Plaintiffs claims were dismissed in its entirety.

The decision of the Court follows the Court of Appeals decision in Cameroon Airlines and Abdul kareem wherein the burden of proof with regards alleged loss or damage to baggage or cargo, under the Warsaw Convention, was placed exclusively on the Passenger/Consignee (in this case the

In the Abdul Kareem case the Plaintiff boarded her return leg flight from Jedda, Saudi Arabia to Lagos, Nigeria. Though she paid excess luggage for three baggages she did not make a special declaration in respect thereof. The three baggages were misplaced upon arrival in Nigeria.

The Plaintiff sued the Defendant for =N= 4,000,000.00 (Four Million Naira) plus interest.

In its Judgment the lower Court awarded the Plaintiff the sum of =N= 3,000,000.00 (Three Million Naira) as damages.

On appeal the following issues were raised for determination:

1. Whether the Court below was right in holding that the case between the Plaintiff and the Defendant was not governed exclusively by the provisions of the Warsaw Convention 1929
2. Whether the Court below was right in awarding damages at larges in excess and far beyond the

limit of the carriers liability for loss of registered luggage when the Defendant/Appellant had not lost its right to rely on the limits to its liability under the Warsaw Convention, as provided under Article 25 of the Warsaw Convention

3. Whether the Plaintiff had satisfactorily discharged her responsibility in her claim for loss of her registered luggage as provided for under Article 22(2) of the Warsaw Convention.

On the first issue Justice Chukwuma-Eneh of the Court of Appeal in delivering the lead Judgment raised the question as to whether the respondent (Plaintiff in the lower Court) is at liberty to choose between the Warsaw Convention and Common law for remedies against the appellant in respect of damages. The simple answer to this was no. He relied on the Supreme Court decision of **Patkun Industries Limited v. Niger Shoes Manufacturing Company Limited (1988) 5 NWLR Part 93 SC 138 at p. 152** (though not an aviation matter) where Justice Karibi-Whyte who delivered the lead judgment said:

'It has been well settled that where a common law right has been enacted into statutory provision, it is to the statutory provision so made that resort must be had for such rights and not in the common law.'

Accordingly Justice Chukwuma-Eneh refused to apply common law and determined the applicable law in computing the compensation due and payable to the respondent as the Warsaw Convention.

The Judge went on state that the respondent's remedies lie exclusively within the conditions and limited of the Warsaw Convention— no more no less.

On the second issue the Court of Appeal analysed the provisions of Articles 25 and 22 respectively. In particular the Court opined that the onus of proving willing misconduct, as defined in ***Goldman –v– Thai Airways International Limited*** rests squarely on the respondent (Plaintiff in the lower Court). By implication the Court wanted to see pleadings in the Statement of Claim, before the Lower Court, that showed that the Defendant was not only reckless but that its actions were done "with knowledge that damage would probably result".

It was deemed that the even where the respondent proved some form of loss the limitation under Article 22(2) would apply where the respondent was unable to establish wilful misconduct or exposition of a special declaration, as to the value of the goods.

Lastly the Court of Appeal resolved that in order to establish any form of loss of her registered baggage ***vis-a-vis the provisions of Article 22(2)(a) and (b) of the Warsaw convention 1929 as amended by the Hague Protocol of 1955,*** the onus of adducing evidence of the weight of the luggage is on the Plaintiff in the lower Court. The Court felt, rightly so, that damages in respect of actions under Article 18 and 19 are computed based on the weight of the passenger's luggage. Justice Chukwuma—Enek said ***"i do not subscribe to the respondents argument that the onus of proof on this point is on the appellant as it would make nonsense of the principle that he who asserts has to prove. Special damages must be pleaded and strictly proved. It has been noted that under Article 22(2) the plaintiff is required in order to activate the provision to show as follows:***

That there was a special declaration of the value of the registered luggage made at the time when the luggage's were handed over to the appellant.

That evidence of a special declaration of the value of the luggage was presented in the court below by way of evidence, and

That the supplementary sum as required under Article 22(2)(a) was paid ....."

Therefore to compute the compensation the weight of the luggage must be ascertained and the Plaintiff at the trial Court is required to establish the weight of the baggage aforesaid.

In failing to reveal the weight of the alleged lost baggage the Plaintiff would be left without a remedy. More interestingly the Courts would be unable to award damages even within the limited sums stipulated under Article 22(2).

At this stage it is important to note that under the Montreal amendments there is no requirement to establish the weight of the cargo for compensation under the limitation clause. Once loss is proven the Plaintiff is entitled to a fixed sum of USD $ 1000 United Stated Dollars.