

SUPREME COURT OF NIGERIA
13TH MAY, 2005. SC. 103/2000
CORAM:- S. M. A. BELGORE, S. U. ONU, U. A. KALGO, D. O.
EDOZIE, S. A. AKTNTAN, JJSC

INTERNATIONAL MESSENGERS (NIG) LTD. APPELLANT

AND

PEGOFOR INDUSTRIES LIMITED RESPONDENT

CONTRACTS - Nature - Agreement - Where in a written document - Oral evidence may not be allowed to contradict it (H1)

CONTRACTS - Breach - Exemption clause - Effect of - Fundamental breach - Where a party is guilty of fundamental breach - Exemption clause cannot be relied upon - To escape liability (H2)

CONTRACTS - Liability - Limitation clause - That ridiculously limits amount of liability - Is as good as a clause exempting from liability (H3)

PLEADINGS - Defence - Statutes - Need to plead facts that will bring a transaction - Within the ambit of a statute relied upon (H4)

APPEALS - Pleadings - Case put forward before trial court - Cannot be changed on appeal - Contrary to a party's pleadings or evidence (H5)

DAMAGES - Evidence - Award of damages by trial court - Interference by appellate court - Is not allowed - Where the award is based on credible evidence - And on right principles (H6)

FACTS

Before the Onitsha High Court, the plaintiff/respondent a company engaged in the manufacture of industrial gas instituted an action against the defendant/appellant an air courier company. The respondent through its Managing Director handed over a package of a faulty chemical plant component to the applicant for delivery in Italy where it will be repaired. The package got lost and the appellant notified the respondent by a letter. The respondent filed a claim against the appellant for a total sum of N1,500,000.00.

The appellant admitted responsibility for the loss but relied on the Airway bill which contained an exemption clause that limited its liability to N500 in case of a breach of contract. The trial court held that the appellant was liable to indemnify the respondent for full value of the lost component and therefore awarded a sum total of N419,610, and N2,000 cost to the respondent. The appellant not satisfied with the decision of the trial court appealed to the Court of Appeal but was not successful. It has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the lower courts determined the only issue for determination presented to it (sic) by the parties in Exhibit "A", settlement of issues?

(ii) Whether on a proper determination of the issue for determination in Exhibit "A", the defendant is liable to indemnify the plaintiff to the full extent of its loss having regard to the terms of the contract between the parties?

(iii) Whether the plaintiff proved the value of the lost package?"

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

CONTRACTS - Nature

1. It is, therefore, a misconception by learned counsel for the defendant to contend, as he did, that the only issue presented to the court for determination was not resolved. Equally baseless is the contention that inadmissible evidence was admitted in the interpretation of Exhibit "C". It is a well established principle of law that where parties have reduced their

agreement into a written document, subject to some exceptions, oral evidence will not be allowed to contradict or alter the contents of the document: Colonial Development Board v. Kamson (1955) 21 NLR 75. In the instant appeal, no evidence was led to contradict Exhibit “C” (p. 1381 A)

Exemption clause - Effect of

2. The present position of the Common Law would appear to be that the consequence or effect of an exemption clause on a fundamental breach of contract or breach of a fundamental term is not a rule of law but, in each case, the question is one of interpretation of the contract to determine whether the exemption clause was intended to give exemption from the consequences of a fundamental breach. This rule of common law has been modified by Section 190 of the Contract Law, Cap. 32, Revised Laws of Anambra State, 1991 which enacts:

“Nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of a contract, or a breach of a fundamental term to rely upon an exemption clause so as to escape liability.”

The expression “*fundamental breach*” is used to denote a performance totally different from that which the contract contemplated or a breach of contract more serious than one which would entitle the other party merely to damages and which at least would entitle him to refuse further performance of the contract: Suisse Atlantique case (1967) 1 AC 361 at 392, 399. Since in the instant case, the defendant did not only fail to freight the plaintiff’s package as contracted, but lost same, the defendant was guilty of a fundamental breach of contract and therefore not entitled to be protected by the exemption clause in Exhibit “C” (p. 1382 A)

CONTRACTS - Liability - Limitation clause

3. Learned counsel for the defendant filed a Reply brief in which he tried to distinguish an exemption clause from a limitation clause, the former exempting a party from liability whilst the latter merely limits the damages payable in the event of liability. He, therefore, submitted that Exhibit “C”

did not come within the purview of Section 190 of the Anambra State Contract Law. As attractive as this argument may be, it is by no means sound. A limitation clause which limits liability to a ridiculous amount is as good as a clause exempting from liability. In my view a limitation clause is a specie of which an exemption clause is a genus. A reference to exemption clause in Section 190 of the Anambra State Contract Law includes limitation clause. (p. 1382 F)

PLEADINGS - Defence - Statutes

4. It is pertinent to observe that the question about the applicability of the 1953 Order supra was not raised at all in the two lower courts nor was it properly raised in this court through a ground of appeal. A party who relies on the provisions of a statute as a defence should plead in his statement of defence facts relied upon for bringing a particular transaction within the ambit of that statute: Katsina Local Authority v. Alhaji Bermo Makudawa (1971) NMLR 100. In the case in hand, the defendant pleaded and relied for its defence on Exhibit C and no reference whatsoever was made to the 1953 Order. (p. 1383 C)

Pleadings - Case put forward before trial court

5. A party is not permitted on appeal to change the case he had made at the trial court since an appeal is simply the continuation of the case put forward in the court of first instance. It is not also permissible for a party to make a case contrary to his pleadings or evidence. (p. 1384 E)

Evidence - Award of damages by trial court

6. From the evidence on record, it is inferable that the piston rod and its assembly cannot be procured locally. It is amazing that the defendant company having negligently lost the component and thereby made it impossible for an expert to put a value on it should turn round to challenge the plaintiff's evidence on the value of the faulty piston. I am, however, of the view that there is credible evidence on record to sustain the finding of the trial court to the effect that the value of the faulty component was US\$25,000 equivalent to N417,500.00 at the relevant time. The plaintiff's

witness testified that he bought the new replacement of the lost component for \$28,000.00 and that the defective accessory was bought along with the installed plant in 1990, that is, about four years before 1994 when the plaintiff's witness testified. Making allowance for reasonable wear and tear and the defective condition of the accessory, I am of the view that the sum of US\$25,000.00 is a reasonable estimate of the value of the lost piston. B

There is a concurrent finding of the two lower courts in that respect and there is nothing to show that the findings are perverse. It is not the practice of this court to interfere with the award of damages by the trial court unless such award is shown to be manifestly too high or too low or made on wrong principle. (p.1384 A) C

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Need for courier companies to live up to expectation

Whenever a decision is made to send a parcel or letter through a courier company rather than the usual official postal service, the sender intends to rely on special efficiency and speed of delivery by the courier company. It is in this light that such a courier company must live up to its expectations to fulfill its fundamental obligations under contract of delivery. Should the company rely on a third party e.g., an airline carrier to carry the parcel; the failure of the carrier is a contractual matter between such a carrier and the carrier company. The sender, like the respondent herein, can under no imagination be roped into failure of the third party carrier to deliver a parcel or its loss by any exemption clause. At any rate the exemption clause was never pleaded at the trial court. (p. 1385 A) D F G

KALGO JSC

2. When to draw attention to limitation of liability

The attention of the respondent was not drawn to this limitation of liability at the time of issue, until after the loss of the package. This cannot in my view, bind the respondent at the stage it was brought to its attention; and what is more, the complete loss of the package, is a fundamental breach H

of the contract of transportation of the package by the appellant. And in this particular case, Section 190 of the Contract Law (Cap.32) Laws of Anambra State 1991, applied to prevent the application of the exemption clause in Exhibit “C”. Therefore the limitation of N500.00 liability in Exhibit “C” does not apply to bind the respondent and the appellant must therefore indemnify the respondent to the full extent of its loss. (p. 1389 E)

AKINTANJSC

3. Why Companies cannot rely on ridiculous limitation clause

It is extremely ridiculous for the appellant to believe that the exclusion clause, whereby its liability could be limited to only N500 in a situation of this nature, is applicable to this case. This is a case where the appellant received a parcel for delivery to a consignee in Italy for a fee of N2,110. It failed to deliver the package to the consignee. In fact, no satisfactory information was given as to the whereabouts of the package. A case of fundamental breach of the contract has in my view, been proved against the appellant. To allow the appellant to successfully rely on the exclusion clause would be too scandalous as such could open a floodgate for situations where courier service companies could defraud their customers by receiving valuable items from customers which they would fraudulently convert and then offer N500 as compensation to their victims for the loss, a sum far less than what was collected as the freight charges. Such a situation should be prevented at all cost. To that end, I hold that the exclusion clause is totally inapplicable. (p. 1391 B)

REPRESENTATIONS

Mr. F. R. A. Williams, Jnr., (with him, Mohammed Salau), for the Appellant.

Mr. C. J. Asiegbu, for the Respondent.

CASES REFERRED TO

Colonial Development Board v. Kamson (1955) 21 NLR 75

Cardoso v. Executors of the Estate of Doherty (1938) 4 WACA 78

George v. Dominion Flour Mills Ltd. (1963) 1 SCN LR 117

Orizu v. Anyaegbunam (1978) 5 S.C. 21

Oredoyin v. Arowolo (1989) 7 S.C. (Pt.II) 1 (1989) 4 NWLR (Pt.114) 172

Edebiri v. Edebiri (1997) 4 NWLR (Pt.498) 165 at 174

Okoya v. Santilli (1994) 4 NWLR (Pt.338) 256

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Kade v. Coker (1982) 12 S.C 252

Onaga & Ors. v. Micho & 2 Ors. (1961) 12 SC NLR 101

Elf (Nig.) Ltd. v. Silla (1994) 6 NWLR (Pt.350) 258 at 274

C

STATUTES REFERRED TO

Evidence Act, Laws of the Federation of Nigeria 1990, ss. 132, 135(1)(2)

Contract Law (Cap. 32) Revised Laws of Anambra State, 1991 s. 190

Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953

LFN 1958

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LEAD JUDGMENT BY EDOZIE JSC

The respondent and appellant were respectively plaintiff and defendant before the Onitsha High Court in Suit No. 0/31/92. The plaintiff, a company engaged in the manufacture of industrial gas had a chemical plant in Onitsha which was installed by an Italian Company (Siad Machine Impianti Company of Bergano, Italy). A vital component of the machinery consisting of piston and rod assembly was faulty and needed to be transmitted urgently by air to the said Italian company in Italy for necessary repairs.

On 8th November, 1991, the plaintiff, through its Managing Director handed over a package of the faulty component to the defendant, an air courier company, at its office in Onitsha for transmission to the Italian company for repairs and return by 15th November, 1991, so that the machinery could resume production the next day. In consideration of the transportation, the plaintiff paid the sum of N2,110.00 to the defendant and was issued with a receipt thereof and an Airway bill by the defendant's employee who received the package. The Airway bill which was signed by the plaintiff contained an exemption or limitation clause which limited the liability of the defendant to the sum of N500 in the event of loss or

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damage of the good. The package eventually got lost and the defendant by its letter of 5th December, 1991, notified the plaintiff to that effect. To minimise its loss, the plaintiff, by telex, placed an order for a complete new component which was delivered on 21/12/91 at a cost of US 28,000.00 dollars. Thereupon, it commenced an action against the defendant for breach of contract of bailment claiming a total sum of N1,500,000.00 (One Million, Five Hundred Thousand Naira) particularised in paragraph 16 of its statement of claim as follows:-

C	<i>“(i) Value of the complete piston and rod assembly at current</i>	
	<i>rate of exchange -</i>	<i>\$25,000.00 or N417,500.00</i>
	<i>(ii) Charge paid for carriage-</i>	<i>N2,110.00</i>
	<i>(iii) Loss of earning from</i>	
D	<i>16/11/91 to 20/12/91 (35 days)</i>	
	<i>at N15,000 per day-</i>	<i>N525,000.00</i>
	<i>Total special damage</i>	<i>N944,610.00</i>
	<i>General Damages</i>	<i><u>N555,390.00</u></i>
E	<i>Total</i>	<i><u>N1,500,000.00</u></i>

The defendant admitted responsibility for the loss of the package but relying on the exemption clause contained in the Airway bill contended that as the Airway bill formed the contractual relationship between the parties, its liability to the plaintiff was limited to N500.

After the exchange of pleadings but before trial, counsel for both parties jointly filed in court, a document titled “Settlement of Issues” admitted in evidence as Exhibit “A” wherein they set out facts agreed upon as relevant to the case and also relevant documents admitted by consent including the receipt for N2110.00 and the Airway bill subsequently admitted in evidence as Exhibits B and C respectively. In the said “Settlement of Issues” Exhibit “A”, the parties stated that the only issue the court should determine was whether, having regard to the Airway bill, Exhibit “C”, the Defendant’s liability was limited to N500, and they further agreed that if the court determined the issue negatively, the plaintiff should proceed to prove its loss.

At the trial, each party called one witness and after taking the

addresses of counsel, the learned trial Judge, Ononiba, J., held that the defendant was liable to indemnify the plaintiff to the full extent of its loss. Adverting to the quantum of damages upon which evidence had been led, the learned trial Judge referred to Section 190(a) of the Anambra State Contract Law, Cap. 30, Laws of Anambra State, and held that the plaintiff was entitled to the full value of the lost component which he assessed at N417,500.00. He also adjudged the plaintiff entitled to the refund of the sum of N2,110.00 paid as freight. In all, he awarded the plaintiff a total sum of N419,610 with N2,000 costs. The claims for consequential damages and general damages were disallowed.

The defendant's appeal against that judgment to the Court of Appeal, Enugu Division, was unsuccessful hence the further appeal to this court. In the briefs filed, exchanged and adopted by the parties at the hearing of the appeal, the defendant identified three issues as arising for determination. These issues which were also adopted by the plaintiff are:

(i) Whether the lower courts determined the only issue for determination presented to it (sic) by the parties in Exhibit "A", settlement of issues?

(ii) Whether on a proper determination of the issue for determination in Exhibit "A", the defendant is liable to indemnify the plaintiff to the full extent of its loss having regard to the terms of the contract between the parties?

(iii) Whether the plaintiff proved the value of the lost package?"

Issues (i) and (ii) are closely related and are conveniently treated together. They deal with the construction of the exemption clause in the Airway bill, Exhibit "C". The contention of the defendant's counsel in his brief is that the courts below did not decide the issue presented by the parties for determination as reflected in the "Settlement of Issue", Exhibit "A", in that, instead of confining themselves to the interpretation of the terms in the Airway bill, Exhibit "C", they took into consideration evidence extraneous to Exhibit "C" by referring to the evidence of the plaintiff's Managing Director on how he impressed upon the defendant's employee the urgency of the repairs of the defective component. Learned counsel cited the case of *Maxima Insurance Company Ltd. v. Owoniyi* (1994) 3

NWLR (Pt.369) 178, 194 to submit that when parties settle issues for determination, the pleadings before the settlement is no longer material and no longer defines the issues. Referring to Section 132 of the Evidence Act, Cap. 112, Laws of Nigeria 1990, which deals with the exclusion of oral by documentary evidence, it was submitted that since both parties agreed that all the terms of the contract are embodied in the Airway bill Exhibit “C”, it was wrong for the courts below to admit oral evidence of witnesses in the interpretation of Exhibit “C” the terms of which are very clear and unambiguous and ought to have been given their ordinary meaning in line with the decision of this court in Union Bank v. Ozigi (1994) 4 NWLR (Pt.333) 385.

As noted earlier on, parties by their counsel filed a document titled “Settlement of Issues” admitted in evidence as Exhibit “A” in which they prayed the trial court to determine the following issue, to wit:

“Whether, having regard to the terms of the Airways bill No. 220031 signed by the plaintiff, the defendant’s liability is restricted to only N500 or is it liable to indemnify the plaintiff to the full extent of its loss.”

The learned trial Judge, after reviewing relevant case law on exemption clauses decided the issue in his judgment at p.32 of the record where he said:

“My answer, therefore, to the issue for determination is that having regard to the terms of the Airway bill No. 220031 signed by the plaintiff, the defendant is liable to indemnify the plaintiff to the full extent of its loss.”

In affirming that decision, the court below per the lead judgment of Olagunju, JCA., at p.96 of the record stated:

“On the combined authority of the decisions in Akinsanya v. UBA Ltd. and Narumal and Sons Nig. Ltd. v. Niger Benue Transport Co. Ltd., (Supra) and the test of reasonableness posited in DHL International Nigeria Ltd. v. Chidi, (Supra)..... it cannot reasonably be maintained that it was the intention of the parties that in the circumstances in which the fundamental term of the contract between the parties was breached by the appellant, the exclusion clause in the Airway bill, Exhibit “C” that limits the liability under the contract to

N500 can still be operative.”

It is, therefore, a misconception by learned counsel for the defendant to contend, as he did, that the only issue presented to the court for determination was not resolved. Equally baseless is the contention that inadmissible evidence was admitted in the interpretation of Exhibit “C”. It is a well established principle of law that where parties have reduced their agreement into a written document, subject to some exceptions, oral evidence will not be allowed to contradict or alter the contents of the document: Colonial Development Board v. Kamson (1955) 21 NLR 75. In the instant appeal, no evidence was led to contradict Exhibit “C”. In my view, I think that what is crucial for determination is whether Exhibit “C” was correctly interpreted. The relevant clause in Exhibit “C” reads thus:

“IMNL Air courier’s liability for loss or damage is limited to N500 D per delivery subject to the condition of carriage on the reverse side. IMNL are not liable for any consequential loss.”

The interpretation of the above clause involves the consideration of the effect of an exemption clause in the event of a fundamental breach of contract. Discussing this topic in the case of Narumal & Sons Ltd. v N.B.T.C. Ltd. (1988) 2 NWLR (Pt. 106) 730, this court per Nnamani, JSC., at 750 said:

“The law as regards these implied and express warranties, the effect of fundamental breach of them and exclusion clauses has grown from the earlier cases in the 19th century.”

After reviewing several authorities on the subject, he held at p.783 thus:

“The result of the authorities appears to me to be that while in the earlier cases a fundamental breach of an express or implied warranty would have led to an exclusion of an exception clause, the latter cases appear to hold that such an intention must be deduced from the construction of the terms of the contract between the parties. In other words, having regard to the terms, circumstances of the contract, was it the intention of the parties that even if a fundamental term of the contract (in this case an express or implied warranty) had been breached, the exclusion or exemp-

tion clause would nevertheless apply?"

From the above, **the present position of the Common Law** would appear to be that the consequence or effect of an exemption clause on a fundamental breach of contract or breach of a fundamental term is not a rule of law but, in each case, the question is one of interpretation of the contract to determine whether the exemption clause was intended to give exemption from the consequences of a fundamental breach. This rule of common law has been modified by Section 190 of the Contract Law, Cap. 32, Revised Laws of Anambra State, 1991 which enacts:

"Nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of a contract, or a breach of a fundamental term to rely upon an exemption clause so as to escape liability."

The expression "*fundamental breach*" is used to denote a performance totally different from that which the contract contemplated or a breach of contract more serious than one which would entitle the other party merely to damages and which at least would entitle him to refuse further performance of the contract: *Suisse Atlantique case (1967) 1 AC 361 at 392, 399*. Since in the instant case, the defendant did not only fail to freight the plaintiff's package as contracted, but lost same, the defendant was guilty of a fundamental breach of contract and therefore not entitled to be protected by the exemption clause in Exhibit "C".

Learned counsel for the defendant filed a Reply brief in which he tried to distinguish an exemption clause from a limitation clause, the former exempting a party from liability whilst the latter merely limits the damages payable in the event of liability. He, therefore, submitted that Exhibit "C" did not come within the purview of Section 190 of the Anambra State Contract Law. As attractive as this argument may be, it is by no means sound. A limitation clause which limits liability to a ridiculous amount is as good as a clause exempting from liability. In my view a limitation clause is a specie of which an exemption clause is a genus. A reference to exemption clause in Section 190 of the Anambra State Contract Law includes limitation

clause.

Reference was also made to Carriage by Air (Colonies Protectorates and Trust Territories) Order, 1953, Volume XI Laws of the Federal Republic of Nigeria, 1958 (1953 Order for short) which learned counsel submitted governs the carriage of goods by air. It was pointed out that a chapter thereof deals with the liability of the carrier for, among other things, destruction or loss or damage to goods. Citing the case of Mohammed v. Commissioner of Police (1987) 4 NWLR (Pt.65) 430 learned counsel argued that a state law cannot override a subsisting Federal Legislation.

It is pertinent to observe that the question about the applicability of the 1953 Order supra was not raised at all in the two lower courts nor was it properly raised in this court through a ground of appeal. A party who relies on the provisions of a statute as a defence should plead in his statement of defence facts relied upon for bringing a particular transaction within the ambit of that statute: Katsina Local Authority v. Alhaji Bermo Makudawa (1971) NMLR 100. In the case in hand, the defendant pleaded and relied for its defence on Exhibit C and no reference whatsoever was made to the 1953 Order. A party is not permitted on appeal to change the case he had made at the trial court since an appeal is simply the continuation of the case put forward in the court of first instance: Oredoyin v. Arowolo (1989) 7 S.C. (Pt.II) 1; (1989) 4 NWLR (Pt.114) 172; Edebiri v. Edebiri (1997) 4 NWLR (Pt.498) 165 at 174. It is not also permissible for a party to make a case contrary to his pleadings or evidence; Cardoso v. Executors of the Estate of Doherty (1938) 4 WACA 78; George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117; Orizu v. Anyaegbunam (1978) 5 S.C. 21. In any case, it does not appear to me that the 1953 Order is applicable in this case. It governs the relationship between the Airline Carriers and those with whom they entered into a contract of carriage of goods by air. The plaintiff did not make any contract with any Airline and, therefore, is not bound by the 1953 Order. I therefore, resolve the issues under consideration against the defendant.

With respect to the last issue for determination relating to proof of

the value of the defective component, it is contended by learned counsel for the defendant, that no credible evidence was led to that effect as the evidence adduced by the plaintiff in that regard was hearsay evidence which is inadmissible in evidence. **From the evidence on record, it is inferable that the piston rod and its assembly cannot be procured locally. It is amazing that the defendant company having negligently lost the component and thereby made it impossible for an expert to put a value on it should turn round to challenge the plaintiff's evidence on the value of the faulty piston. I am, however, of the view that there is credible evidence on record to sustain the finding of the trial court to the effect that the value of the faulty component was US\$25,000 equivalent to N417,500.00 at the relevant time. The plaintiff's witness testified that he bought the new replacement of the lost component for \$28,000.00 and that the defective accessory was bought along with the installed plant in 1990, that is, about four years before 1994 when the plaintiff's witness testified. Making allowance for reasonable wear and tear and the defective condition of the accessory, I am of the view that the sum of US\$25,000.00 is a reasonable estimate of the value of the lost piston.**

There is a concurrent finding of the two lower courts in that respect and there is nothing to show that the findings are perverse: see Okoya v. Santilli (1994) 4 NWLR (Pt.338) 256; Kade v. Coker (1982) 12 S.C 252. **It is not the practice of this court to interfere with the award of damages by the trial court unless such award is shown to be manifestly too high or too low or made on wrong principle:** see Onaga & Ors. v. Micho & 2 Ors. (1961) 12 SC NLR 101; Elf (Nig.) Ltd. v. Silla (1994) 6 NWLR (Pt.350) 258 at 274.

The award of the trial court is in order. Consequently, I resolve this issue in favour of the plaintiff.

In sum, the appeal is devoid of any merit and is accordingly dismissed with N10,000.00 costs to the plaintiff.

BELGORE JSC

Whenever a decision is made to send a parcel or letter through a courier company rather than the usual official postal service, the sender intends to rely on special efficiency and speed of delivery by the courier company. It is in this light that such a courier company must live up to its expectations to fulfill its fundamental obligations under contract of delivery. Should the company rely on a third party e.g., an airline carrier to carry the parcel; the failure of the carrier is a contractual matter between such a carrier and the carrier company. The sender, like the respondent herein, can under no imagination be roped into failure of the third party carrier to deliver a parcel or its loss by any exemption clause. At any rate the exemption clause was never pleaded at the trial court.

I therefore find no merit in this appeal and for the further reasons in the judgment of my learned brother, Edozie, JSC., which I fully adopt as mine, I dismiss this appeal with N10,000.00 costs to the respondent.

ONU JSC

I have had the advantage to read before now the judgment of my learned brother, Edozie, JSC., and with it I am in entire agreement that the appeal is devoid of merit and must perforce fail.

The facts of the case are not complicated and I do not intend to set them out herein, (my learned brother having ably performed that task) except to delve straight into the issues proffered for determination seriatim thus:

The three issues formulated by the appellant in this appeal and which the respondent adopted are as follows:

(i) Whether the lower courts did not determine the only issue for determination presented to it by the parties in Exhibit “A”, Settlement of Issues?

(ii) Whether on a proper determination of the issue for determination in Exhibit “A”, the defendant is not liable to indemnify the plaintiff to the full extent of its loss having regard to the terms of the contract between

the parties?

(iii) Whether the plaintiff did not prove the value of the lost package?

However, I consider the argument of issue No.1 which indeed overlaps issues (ii) and (iii) herein, would suffice to adequately dispose of
B the entire appeal as follows:-

TREATMENT OF ISSUE NO. 1

The parties hereto through their counsel settled the issues for determination and filed the same - SETTLEMENT OF ISSUES - duly
C admitted and marked Exhibit A in the trial High Court while paragraph 5 thereof reads:

*“The parties further agree that should the court adjudge the defendant liable to indemnify the plaintiff to the full extent of his loss the plaintiff shall thereafter prove its loss as the defendant does not admit to
D any such loss.”*

Subject to the above, both counsel further agreed as follows:

*“ 1. The only issue for determination is whether having regard to the terms of the Airways bill No.220031 signed by the plaintiff the
E defendant’s liability is restricted to only N500 or is it liable to indemnify the plaintiff to the full extent of its loss.”*

From the foregoing, I agree with the respondent’s contention that it was not precluded from leading evidence in proof of its case as to the
F value of the lost item and the liability of the appellant therein. The lower court in my view, was therefore right in admitting the evidence of what transpired in the appellant’s office on 8th November, 1991, in determining the liability or otherwise of the appellant as the evidence was not
extraneous.

G In answer to the appellant’s contention therefore that in taking into consideration facts extraneous to Exhibit “C”, the court below did not decide an issue different from what the parties presented to it for determination, the answer is to be found at pages 24 and 25 of the records
H particularly paragraph 5(b) of the Settlement of Issues (ibid), SECOND SCHEDULE on page 25 of the Record as follows:

“By reason of facts agreed set out in the first schedule, the plaintiff contends that:

(a) The defendant is liable to indemnify it to the full extent of its loss whilst the defendant contends

(b) That its liability is limited to N500 as per the airway bill signed by the plaintiff company.

In the SECOND SCHEDULE of the SETTLEMENT OF ISSUES, B the respondent's contention is that appellant was liable to indemnify it to the full extent of the loss.

The respondent in proof of the averment called P.W.1 who testified as to what transpired in the appellant's office, the day Exhibits B and C were made. It is for these reasons that I agree with the respondent that the appellant was liable to indemnify it to the full extent of its loss while the appellant on its liability was limited to N500 as per the air way bill. It is to be noted that in arriving at its judgment, the lower court did not rely on the trial court's finding that the contract was concluded as soon as Exhibit B D was signed. Therefore, the only issue for determination cannot stand on a different pedestal but on the SECOND SCHEDULE as agreed between the parties and I so hold.

Although the lower court referred to the case of Maximum E Insurance Co. Ltd. v. Owoniyi (1994) 3 NWLR (Pt.331) 178 at page 195, the ratio in that case cannot be applied to the facts of this case having regard to the issues settled. It is the respondent's contention that the court below was not right when it relied on the case by holding that Exhibit "A" F (Settlement of Issues) has superceded the pleadings of the parties as regards the issues of fact or law. With respect, the statement of law in that regard depends on the issues settled by the parties. In Owoniyi's case (supra) both counsel agreed that the only issue in dispute is mainly law and on that basis counsel for the parties addressed the court and led no G evidence. In the instant case, the respondent did not admit that the liability of the appellant was only N500 and that was why evidence had to be led to prove those facts that would enable the court to determine whether the appellant's liability was limited to N500 or whether the appellant was liable H to indemnify the respondent to the full extent of its loss. Rather, as indeed transpired, Exhibit "A" narrowed the issues of fact or law to be canvassed by the parties. Facts agreed as relevant by the parties included MNL official

receipt of payment of the sum of N2,110.00 - Exhibit B. This document occupied an important place in the contract for it is the meat of the contract between the appellant and the respondent. Thus, as the court below held in the Maximum Insurance Co. Ltd. v. Owoniyi (supra) at ratio 4 of page

B 192 paras A-C of the report:

“The burden of proof is squarely on the appellant who made a positive claim or assertion. In this connection I have this to say in the case of Ejiniyi v. Adio (1993) 7 NWLR Pt.305 page 320 at 330.....

C *“The maxim ‘he who asserts must prove’ operates in this manner. A man cannot be expected to prove a negative assertion. The latin saying sums up the matter as follows: ‘Ei incumbit probation qui dicit, non quinegat, cum per rerum naturam factum negantis probation nulla sit.’ Meaning - the proof”. See Ojomo v. Ijeh (1987) 4 NWLR (Pt.64) 216, 230.*

D *The latin expression set out above appears to have been taken into consideration in the making of Section 135 of the Evidence Act which provides-“135(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of*
 E *facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Having regard to Section 135(1) and (2) of the Evidence Act, Cap. 112 (ibid), I am of the view that the burden is on the respondent to prove
 F that the appellant was liable to indemnify him (respondent) to the full extent of its loss. This the respondent did in accordance with the provisions of Section 135(1) and (2) of the Evidence Act Cap. 112, Laws of the Federation 1990 and that the lower courts determined the only issue
 G presented to them in Exhibit “A” “*SETTLEMENT OF ISSUES.*” The decisions of Eboade v. Atomesin (1997) 5 NWLR (Pt.506) 490; Union Bank v. Ozigi (1994) 4 NWLR (Pt.333) 385 and Chukumah v. SPPC (1993) 4 NWLR (Pt.289) 512, among others relied on by the appellant in
 H this appeal are, in my firm view, of no avail to them. See Okongwu v. NNPC (1989) 4 NWLR (Pt. 115) 296 at p. 309, para F-G.

For the reasons proffered by me and the more detailed ones contained in the judgment of my learned brother, Edozie, JSC., I dismiss

the appeal and make similar consequential orders inclusive of costs as contained therein.

KALGOJSC

I have before now had the opportunity of reading in draft the judgment of my learned brother, Edozie, JSC., in this appeal. I entirely agree with his reasoning and the conclusions reached therein. The appeal has no merit and should be dismissed.

It is very clear to me that although the parties have filed an agreed document called “Settlement of Issues” which was admitted in evidence as Exhibit “A”, it did not cover the liability in respect of the lost package and Exhibit “A” is very clear on this. The respondent had admitted the loss of package which was placed under its care by the appellant for transportation to Italy for repairs. The fees of N2,110.00 was paid to the respondent for this purpose and Exhibit B was the receipt for same. Exhibit “C” was Airways Bill limiting the liability of the respondent to only N500.00, which was later issued to the respondent.

The attention of the respondent was not drawn to this limitation of liability at the time of issue, until after the loss of the package. This cannot in my view, bind the respondent at the stage it was brought to its attention; and what is more, the complete loss of the package, is a fundamental breach of the contract of transportation of the package by the appellant. And in this particular case, Section 190 of the Contract Law (Cap.32) Laws of Anambra State 1991, applied to prevent the application of the exemption clause in Exhibit “C”. Therefore the limitation of N500.00 liability in Exhibit “C” does not apply to bind the respondent and the appellant must therefore indemnify the respondent to the full extent of its loss. This is the central issue in dispute between the parties and I resolve it in favour of the respondent.

For the above and fuller reasons given in the leading judgment of my learned brother, Edozie, JSC., on all the issues raised in the appeal, which I adopt as mine, I also find no merit in the appeal. I dismiss it and affirm the decision of the Court of Appeal confirming that of the trial court. I award N10,000.00 costs to the respondent against the appellant.

AKINTANJSC

The facts of this case are not in dispute by the parties. Briefly, they are that the respondent, a manufacturing company based in Onitsha, delivered a faulty spare-part of one of its manufacturing equipments to the appellant, a courier company, for delivery to a company in Italy for repairs and return same to the respondent in Onitsha after the necessary repairs had been carried out. The agreed fee of N2,110 charged by the appellant was paid by the respondent and a receipt for the payment was issued. Also given to the respondent is another document for the air freight behind which is printed an exclusion clause limiting the appellant's liability for loss etc., to only N500.

The package was not delivered at the destination as required and no reason for the failure was given by the appellant. The respondent instituted this action at Onitsha High Court claiming the value of replacing the lost spare parts, and refund of the freight charges paid to the appellant among others. Judgment was entered in respondent's favour for those two items. The appellant's appeal to the Court of Appeal against that judgment was dismissed, hence the present appeal to this court.

The main contention of the appellant in this court is that the lower court was in error for not limiting the appellant's liability to the N500 stated in the exclusion clause at the back of the air freight document issued by the appellant to the respondent.

It is pertinent to note that the appellant did not give details of how the parcel it received from the respondent for delivery to an addressee in Italy got lost. The information about the loss was only disclosed to the respondent after the said respondent had contacted the appellant after receiving information from the consignee that the package was not received. The appellant then informed the respondent of the loss through a letter written to the respondent. No details of how the loss occurred were disclosed. This is definitely a clear case where gross negligence can be inferred.

Section 190 of the Contract Law, Cap.32, Revised Laws of Anambra

State, provides as follows:

“Nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of a contract, or a breach of a fundamental term to rely upon an exemption clause so as to escape liability.”

This is the applicable law since the appellant is a courier company B and not an airline company. The provisions of International Carrier by Air etc., Order 1963 relied on by the appellant are therefore inapplicable to this case.

It is extremely ridiculous for the appellant to believe that the C exclusion clause, whereby its liability could be limited to only N500 in a situation of this nature, is applicable to this case. This is a case where the appellant received a parcel for delivery to a consignee in Italy for a fee of N2,110. It failed to deliver the package to the consignee. In fact, no D satisfactory information was given as to the whereabouts of the package. A case of fundamental breach of the contract has in my view, been proved against the appellant. To allow the appellant to successfully rely on the E exclusion clause would be too scandalous as such could open a floodgate for situations where courier service companies could defraud their E customers by receiving valuable items from customers which they would fraudulently convert and then offer N500 as compensation to their victims for the loss, a sum far less than what was collected as the freight charges. Such a situation should be prevented at all cost. To that end, I hold that the F exclusion clause is totally inapplicable.

For the above and the fuller reasons given in the leading judgment written by my learned brother, Edozie, JSC., which I hereby adopt, I also hold that the appeal lacks merit. I therefore dismiss it with N10,000.00 G costs in favour of the respondent.