

SUPREME COURT OF NIGERIA
19TH MAY, 2006. SC. 89/2002
CORAM:- S.M.A. BELGORE, A.I. KATSINA-ALU, U. A.
KALGO, N. TOBI, G. A. OGUNTADE, JJSC

ZAKHEM CON. (NIG.) LTD. APPELLANT
AND
EMMANUEL NNEJI
(Carrying on business under RESPONDENT
the Name & Style of EMACO
GROUPOF COMPANIES)

DOCUMENTS - Contractual document - Must contain an offer and an acceptance of that offer - To be properly so called - Only Exhibit 29 here qualifies as such (H1)

CONTRACTS - Formation of - Through correspondence - It must be apparent that parties have come to an agreement - When the correspondence are read together (H2)

CONTRACTS - Documents - Exhibit 29 - Interpretation of - Shows no contract of hire between the parties (H3)

CONTRACTS - Documents of - Rights of parties should be determined - In accordance with the terms of their contract - Which in this case - Is according to Exhibit 29 (H4)

FACTS

The Plaintiff/Appellant sued the Defendant/Respondent at the Kaduna High Court, claiming damages for breach of contract arising from the sale and hire of gas cylinders to the Respondent. It is common ground that the terms of the original contract were evidenced in writing as per Exhibit 29. However, Appellant in addition to Exhibit 29 tendered and relied on other documents viz letters, receipts and notes, which it

claimed were addenda and modifications to Exhibit 29. The learned trial judge accepted this story of the Appellant and in his judgment, relying heavily on these other documents awarded substantial damages against the Respondent in favour of the Appellant.

Respondent appealed against that decision to the Court of Appeal, which, in a majority judgment, allowed the appeal, dismissing Appellant's claims as awarded by the trial court, except an Order for the return of 63 empty gas cylinders by the Respondent to the Appellant. It was the position of the Court of Appeal that only Exhibit 29 constituted a binding contract between the parties and that their rights fell to be determined thereunder. Aggrieved, the Appellant has brought this appeal to the Supreme Court. The Respondent has also cross-appealed contending that the Court of Appeal erred when it upheld the order made by the trial court that Respondent should return 63 gas cylinders to the Appellant.

ISSUES FOR DETERMINATION

“3.1. Whether the Justices of the Court of Appeal, Kaduna especially their Lordships, Omage and Muhammed JJCA., correctly evaluated the evidence before the trial court when they held that the initial temporary agreement between the parties tendered and admitted as Exhibit 2, was the only evidence of the transaction between the parties in the contract for supply of gas cylinders, therefore any relief not contained in the said Exhibit 29, cannot be sustained?”

3.2. Whether the appellant has suffered any damage known to law entitling him to an award of damages as granted by the trial court especially in view of the fact that the respondent withheld and seized the appellant's 63 gas cylinders for over six years.

HELD (Unanimously dismissing the appeal and allowing the cross appeal per **OGUNTADE JSC**)

DOCUMENTS - Contractual document

1. There was no evidence that the parties entered into another contract apart from Exhibit 29. The documents which the trial court treated as contracts additional to Exhibit 29 were only invoices, letters and receipts exchanged between the parties.

Surprisingly, I must say the trial court even regarded a letter, Exhibit 24, written by plaintiff's counsel to the defendant as a contract between parties.

It is trite law that an offer must be accepted in order to crystallise into a contract. (p. 2022 F)

CONTRACTS - Formation of

2. It is possible for a contract to emerge from series of correspondence between two persons. But it must be apparent, when the correspondence exchanged are read together that parties have come to an agreement. In *Shell B. P. v. Jammal Engineering* (1974) 4 S.C. (Reprint) 24; (1974) 4 S.C. 33 at 72, this court, per Coker, JSC., observed:

"The final exercise of judgment must of necessity involve a consideration of all the correspondence that is properly put in evidence by both sides - all the correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a contract. It is only after such detailed consideration that a tribunal can fairly come to the conclusion as to whether or not the parties actually arrived at an agreement. See Thomas Hussey v. Horne-Payne (1879) 4 App. 311. The task of analysing the several letters and attempts to reconcile the one with the other is undoubtedly a very difficult one calling for the most serious examination of each and every one of several documents until the tribunal is able to say whether a contract is indeed established."

(p. 2024 F)

CONTRACTS - Documents - Exhibit 29

3. In this case, parties had not been engaged in an exchange of correspondence directed toward the emergence of an agreement between them. Rather, they had been guided in their transactions by the only agreement which both acknowledged as Exhibit 29. When Exhibit 29 is read, it becomes apparent that there was no contract of hire between the parties. The defendant had deposited N210,000.00 for 60 gas cylinders. The plaintiff testified that the defendant subsequently received 3 more gas cylinders. (p. 2025 B)

CONTRACTS - Documents of - Rights of parties

4. The defendant also filed a cross-appeal against the judgment of the court below. The grouse of the defendant is that the court below was in error to have upheld the order made by the trial court that the defendant should return 63 gas cylinders in dispute to the plaintiff. I think that there is merit in the complaint of the defendant. The defendant made the case that he did not have plaintiff's 63 gas cylinders as these had been returned to the plaintiff. The plaintiff however led evidence that the defendant still had his 63 cylinders. The evidence which the trial court accepted was that the defendant failed and or neglected to surrender plaintiff's 63 gas cylinders. The simple approach to resolve the dispute was to treat the 63 gas cylinders as lost and to make the defendant pay for them at the agreed N5,000.00 per cylinder. Since the plaintiff had previously deposited N210,000.00 for 60 gas cylinders, the right approach was to deduct the N210,000.00 deposited from N5,000.00 multiplied by 63 and to make the defendant pay the balance. The equation then comes to this (N5,000.00 x 63 - N210,000.00). This gives a net sum of N105,000.00 due to the plaintiff.

The court below rightly in my view held that Exhibit 29 was the only contract between the parties and that their rights fell to be determined in accordance with the terms of the said Exhibit 29. It however failed to go a step further to determine how much was due to the plaintiff on the basis of Exhibit 29. It upheld the judgment of the trial court that 63 gas cylinders be returned to the plaintiff when the indications were that these were lost.

In the final conclusion, this appeal fails. It is dismissed. The cross-appeal succeeds. It is allowed. (p. 2025 E)

NOTABLE POINT OF INTEREST

TOBI JSC

1. Liability clauses in contracts are to be strictly interpreted by court

Where the intention of the parties to a contract are clearly expressed in a document, the court cannot go outside the document in search of other

documents not forming part of the intention of the parties. In this case, Exhibit 29 clearly provided for the terms of the contract between the parties and the two courts below were right in not going outside the exhibit.

Where a contract specifically provides for liability in case of breach, the court will not go outside the contract in search of more palatable terms for one of the parties to the detriment of the other party. The court is bound to interpret the liability clause or clauses strictly as provided in the contract. (p. 2032 G)

C

REPRESENTATION

Chief Chris Uche, SAN., with B. C. Nwogu, Esq., Dr. I. T. Ofoegbu and Uchenna Awa (Miss) for the Appellant.

Akin Adewale, Esq., for the Respondent.

D

CASES REFERRED TO

Alexander Brogden & Ors. v. The Directors & Co. of the Metropolitan Railways Company (1877) a App. Cas 666 at 691

E

College of Medicine v. Adegbite (1973) 5 S.C. (Reprint) 106; (1973) 5 S.C. 149 at 163

Shell B. P. v. Jammal Engineering (1974) 4 S.C. (Reprint) 24; (1974) 4 S.C. 33 at 72

F

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the plaintiff at the Kaduna High Court, where he claimed against the defendant, damages for breach of contract, arising from the sale and hire of gas cylinders to the defendant. The parties filed and exchanged pleadings after which the suit was heard by Umaru Adamu, J. In his judgment on 9-2-2000, the trial Judge made his final awards in favour of the plaintiff in these terms:

G

“1. Defendant shall pay the plaintiff cost of hiring 63 gas cylinders from 1st Dec. 1993 to 28th February, 1993 - the sum of N283,500.00 (Two Hundred and Eighty Three Thousand, Five Hundred Naira).

2. Transportation on 8 occasions to Suleja at N4,000.00 (Four

Thousand Naira Only) per trip N32,000.00 Thirty Two Thousand Naira Only).

3. Defendant shall pay cost of hiring at N50.00 (Fifty Naira) per cylinder per day from 28th February, 1994 to 31st July, 1995.

B *4. Defendant shall pay cost of hiring at N50.00 (Fifty Naira) per cylinder per day from 1st August, 1995, to 23/12/99.*

5. Defendant shall pay general damages to the plaintiff in the sum of N125,000.00 (One Hundred and Twenty Five Thousand Naira Only).

C *Judgment entered in favour of the plaintiff as above. I wish to further state that the defendant shall be entitled to counter-claim in the sum of N210,000.00 (Two Hundred and Ten Thousand Naira Only) in his favour and against the plaintiff, being refundable deposit paid to the*
D *plaintiff by defendant in respect of the 60 (Sixty) Cylinders.*

The sum of N210,000.00 (Two Hundred and Ten Thousand Naira) shall be paid without interest.

Judgment accordingly entered as above.

E *The 63 gas cylinders shall forthwith be returned to the plaintiff by defendant.”*

The defendant was dissatisfied with the judgment. It brought an appeal against it before the Court of Appeal, Kaduna Division (hereinafter referred to as ‘the court below’). On 10-01-2002, the court below, in the majority judgment, per Omage and Mohammed JJCA.) allowed the
F appeal. Plaintiff’s claims were dismissed except that the order that the defendant return the 63 gas cylinders was upheld. The minority judgment by Umoren, JCA., dismissed the appeal and upheld the judgment of
G the trial court except the first head of claim for the return of the 63 gas cylinders.

The plaintiff was dissatisfied with the majority judgment of the court below and has brought a final appeal before this court. In the
H appellant’s brief filed for the plaintiff, the issues for determination in the appeal were identified as these:

“3.1. Whether the Justices of the Court of Appeal, Kaduna especially their Lordships, Omage and Muhammed JJCA., correctly evalu-

ated the evidence before the trial court when they held that the initial temporary agreement between the parties tendered and admitted as Exhibit 2, was the only evidence of the transaction between the parties in the contract for supply of gas cylinders, therefore any relief not contained in the said Exhibit 29, cannot be sustained? B

3.2. Whether the appellant has suffered any damage known to law entitling him to an award of damages as granted by the trial court especially in view of the fact that the respondent withheld and seized the appellant's 63 gas cylinders for over six years." C

The defendant's counsel in his respondent's brief formulated the issues for determination differently thus:

"1. Whether from the contract between the parties, the evidence before the court and the finding of the trial court on hire of gas cylinders, the lower court was right in setting aside the award of N6,943.000.00 being rent of 63 gas cylinders at N50.00 N50.00 cylinder per day from 1st December, 1993, to 23rd December, 1997." D

2. Whether from the contract between the parties and the evidence, the lower court was right in setting aside the award of N125,000.00 general damages for breach of contract and N32,000.00 cost of transport awarded in favour of the appellant." E

On a first look, one gets the impression that the two sets of issues formulated in the parties' briefs are different. On a further analysis however, and viewed against the judgment of the court below, it becomes apparent that the parties merely projected into the formulation of their issues, their respective standpoints on the case. I shall be guided by the appellant's issues, he being the aggrieved, on the judgment of the court below. The two issues will be considered together. G

As a starting point, it is desirable to have a fair understanding of the nature of the dispute out of which this appeal arose. The plaintiff, as he pleaded in his Amended Statement of Claim, carried on the business of the supply of gas in gas cylinders. On 17/9/93, the plaintiff and the defendant entered into a written agreement. The plaintiff was to sell gas to the defendant in cylinders on a continuing basis. The defendant, which was based in Suleja, Niger State, was to pay for the cost of transporta- H

tion of the gas cylinders from Kaduna, the base of the plaintiff to Suleja. The plaintiff supplied an initial 60 cylinders to the defendant against which the defendant deposited N210,000.00 at N3,500.00 per cylinder. Further supplies were made to the defendant. At the time the suit was brought, B plaintiff had a total of 63 gas cylinders with the defendant. It was pleaded that at the lime the defendant stopped buying gas from the plaintiff, it did not return the 63 empty gas cylinders. Rather, the defendant used the empty cylinders to buy gas from other gas dealers. The plaintiff further C pleaded that between 1/12/93 and 28/2/94, it cost N50.00 per cylinder per day to hire a gas cylinder and this rose to N200.00 and later to N300.00 by 1/8/95. The plaintiff therefore claimed against the defendant as follows:

	“(a) Use of the 63 gas cylinders for 3 months at N1,500.00 per	
D	cylinder per month 8th November, ’93 - 8th Feb., ’94	= N283,500.00
	(b) Transport on 8 occasions to Suleja at N4,000.00 per trip	
		= N32,000.00
	GENERAL DAMAGES	= <u>N184,000.00</u>
E	TOTAL	= <u>N500,000.00</u>

The plaintiff claims an order of the Honourable Court compelling the defendant company to deliver the 63 gas cylinders to the plaintiff. The plaintiff further claims the sum of N200.00 per cylinder per day F from the defendant as from the 8th day of February, 1994, till the defendant delivers the 63 cylinders to the plaintiff.

The plaintiff claims interest at the rate of 45% p.a. compounded as from the 1st November, 1994 till the determination of this suit and further 10% i.e. total of 55% per month until total liquidation of the judgment sum plus interest. G

Whereof the plaintiff claims the said interest and order against the defendant for the matter aforesaid.”

The defendant in paragraphs 4-10 of its Amended Statement of H Defence and counter-claim pleaded thus:

“4. The defendant in answer to paragraph 5 of the claim avers that the plaintiff had always been transporting the cylinders to Suleja and would charge transport cost to his bill.

5. *In further answer to paragraph 6 of the claim, the defendant avers that the said clause in the agreement does not denote that the defendant could not buy gas from other suppliers only that the plaintiff's cylinders would not be used to buy gas from other suppliers.*

6. *In answer to paragraph 7 of the Claim the defendant avers that the plaintiff, after being paid a refundable deposit of N3,500.00 per cylinder (totalling N210,000 (Two Hundred and Ten Thousand Naira) as per the agreement dated 17-9-93, it received a supply of 60 cylinders from the plaintiff.*

7. *In further answer to paragraphs 8 & 9 of the claim, defendant avers that they too have empty cylinders and that plaintiff had been selling to them by depositing already filled cylinders while taking the same number of empty cylinders in replacement. The defendant does not with hold any empty cylinder in replacement. The defendant does not with hold any empty cylinders belonging to the plaintiff.*

Defendant further avers in answer to paragraph 8a of the claim that it followed the contract agreement strictly to the letter and did not at any time get excess of 3 gas cylinders from the plaintiff and did not at any time give agreement notes to the plaintiff. If any agreement notes were given to the plaintiff (not conceded) they might have been forged by the plaintiff in collaboration with some of the defendant's former employees.

8. *The defendant in answer to paragraph 10 of the claim avers that they have not used the plaintiff's cylinder to purchase gas from other dealers. Rather, sometime in 1993, one Mr. Pius Tima, a former employee of the defendant (hereinafter called the said employee) who was in charge of receiving supplies was found to have forged the defendant's store keeper's signature allegedly receiving iron flat sheet plates needed for the latter's project.*

9. *After these findings, the buyers on receiving the stolen goods were arrested together with the said defendant's employee. The defendant's employee and the receivers are presently being prosecuted at Chief Magistrate Court, Suleja.*

10. *As a result of the discovery in foregoing paragraph 8, the*

defendant with the assistance of policemen at its depot embarked on thorough investigation of the activities of the said employee and discovered that he had been involved in forging signatures of his boss, allegedly receiving goods that were never supplied. It was also discovered that the plaintiff was one of the suppliers in favour of which forgery had been committed by the said employee. The defendant has asked the plaintiff to produce copies of the LPOs on which he is putting his claims to enable police investigate on the genuineness of the signature but plaintiff has so far refused to assist the police.”

The plaintiff, at the hearing, called evidence in support of his claim. He tendered as Exhibit 29, the agreement, which the parties subscribed to at the commencement of their relationship. The plaintiff also tendered several other documents, which he relied upon as constituting elements of the agreement he had with the defendant. The trial court in its judgment at pp. 176-177 of record of proceedings observed:

“This document Exhibit 11, tends to show that the plaintiff has excess cylinders in possession of the defendant. To buttress plaintiff’s claim on excess cylinders in the custody of the defendant, the plaintiff tendered Exhibit 13 which is referred to (sic) excess cylinders to Zakhem. Exhibit 13 contained various figures of excess Oxygen and Acetylene cylinders 28 and 25 respectively, giving the total to 86 on 20/12/93 stated -

Empties will be removed without refurbishment until outstanding balance is returned - 86

They had various receipts of both Oxygen and Acetylene, 02-61 and Accetylene- 34. Therefore, the excess balance will be 3 cylinders. It appears that out of 86 cylinders, 83 were returned, the balance excess will be 3 cylinders.

Indeed, Exhibit 8 dated 30/10/93, Exhibit II dated 8/11/93 and Exhibit 13 dated 20/12/93 pleaded in paragraphs 8 and 8a of the plaintiff’s Amended Statement of Claim dated 10/11/93. Looking at the documents Exhibit 3 and Exhibit 8, dated 30/10/93, Exhibit 11 dated 8/11/93 and Exhibit 13 dated 20/12/93, we find written agreement transacted in respect of the supply of the commodities, empties were not collected till

after certain time the empties were released to the plaintiff.

These written documents are additional agreement which follo
Exhibit 29.

Upon the foregoing, it is without doubt that Exhibit 29 and the
subsequent documents are binding on the parties to the contract agree- B
ment in dispute. Therefore, the defendant cannot deny the binding effect
of these documents on him.

Having established the binding effect of the contract on the plain-
tiff and the defendant, I have noted the breach of which gave rise to the C
claim before me. However, this breach of that contract is highlighted in
Exhibit 12 dated 10/11/93. The breach noted in paragraph 2 of Exhibit 12
that defendant is using gas cylinders of the plaintiff to purchase gas from
another company. It is further noted that such practice is prohibited and
violated the contractual agreement of both parties signed in Exhibit 29. D

Further Exhibit 24 is evidence of the breach; Exhibit 24, letter
written by the plaintiff's Solicitor demanding the defendant to fulfil his
obligation in respect of the contract binding on both plaintiff and defend-
ant." E

The court below in its majority judgment was of the view that the
trial court was in error to have treated the other documents tendered by
the plaintiff apart from Exhibit 29, as the agreement between the parties.
Exhibit 29, which both parties acknowledged as the agreement between F
them reads:

*"Temporary agreement for supply of sixty (60) cylinders of acety-
lene and oxygen to Zakhem Construction Company Abuja."*

Emaco Group of Companies do hereby agree to supply 40 cylin- G
ders of oxygen, 20 cylinders of acetylene to Zakhem Construction Com-
pany Abuja on the following conditions:

(1) Sales Deposit: there shall be a sales deposit of Three Thou-
sand, Five Hundred Naira per cylinder prior to supplies and which shall
be refundable after expiration of the contract. H

(2) Content price shall be as follows: Oxygen N700.00/cylinder
Acetylene N1,350.00/cylinder.

(3) Service charge: N80.00 service charge shall be made per cyl-

inder on every supply.

(4) Valve Damage: In case of damage to valve, a charge of N900 shall be made for replacement of one.

(5) Loss of cylinder: A charge of N5,000.00 shall be made for
B replacement of one lost cylinder.

(6) Payment for supplies: shall be made through cheques (certified) at the end of every month in the above name only.

(7) Method of supplies: supplies shall be made on the receipt of
C LPO, and transportation by self but where Emaco undertakes transportation, surcharge shall be made.

NOTE: under no circumstances shall you use our cylinders to purchase gas from any other dealer other than from our Company Emaco.”

D A comparison of the terms of Exhibit 29 above with the heads of claim raised by the plaintiff (earlier reproduced in this judgment) shows that the parties had at the commencement of their relationship vide Exhibit 29 made provisions in respect of the gas cylinders given to the
E defendant by the plaintiff. The defendant was made to deposit the sum of N3,500.00. per cylinder and the amount so deposited was made refundable after the expiration of the contract. The defendant deposited N210,000.00 for the 60 gas cylinders which were given to it at the beginning. It was also agreed that if any cylinder got lost, the plaintiff would
F charge against the defendant the sum of N5,000.00. **There was no evidence that the parties entered into another contract apart from Exhibit 29. The documents which the trial court treated as contracts additional to Exhibit 29 were only invoices, letters and receipts exchanged between the parties.**
G

Surprisingly, I must say the trial court even regarded a letter, Exhibit 24, written by plaintiff’s counsel to the defendant as a contract between parties. Exhibit 24 reads:

H “27-1-1994

*The Managing Director
ZAKHEM Construction
Nig. Ltd., Suleja.*

Sir,

RE: YOUR CONTRACT WITH
EMACO GROUP OF COMPANIES

We write as solicitors to Emaco Group of Companies, on whose firm instructions we now write you. B

Our client has informed us and shown to us the agreement between you by which our client supplies industrial gas to your company. It is further our information that you are retaining 63 gas cylinders of our client on the agreement that you will not use the cylinder to purchase gas from any other company or individual but only from our client. C

You may recall you were in breach of this contract sometimes in November, 1993, and this resulted in our letter ENC/EC/N/78/93 of 10/11/93 to you which you ignored.

It is our sad information now that not only did you courageously ignore our said letter but you have continued in breach of the terms of the contract between you. This you have done by refusing to buy from our client since our earlier letter and have continued to use 63 cylinders of our clients to purchase gas from other companies. This is sequel to the fact that you have continued in business for the period aforementioned. D E

It is further our sad information that within this period of November, 1993, our client has come to you bringing along filled gas cylinders eight times which you neither accepted nor gave our client his empty cylinders. F

It is our instruction to demand as follows:

1. That you pay to us for the transport of our client of the 8 times that our client came to you and you refused to accept gas, at the rate of N4,000.00 per trip, and that is a total of N32,000.00. G

2. For using our client's cylinders to purchase elsewhere contrary to the contract terms, the 63 cylinders are now on hire to you at the rate of N1,500.00 per cylinder per month. So for the period of two months you are in breach, you are to pay to us a total of N189,000.00. This brings our total claim which you are to pay to us now to Two Hundred and Twenty One Thousand Naira (N221,000.00). H

3. You are to hand over to us our client's 63 cylinders on or before

3/1/94, your failure to handover the 63 gas cylinders to us as demanded will continue to attract hire-rent as herein calculated.

4. If however you resume normal business/purchases with our client's cylinders from February, 1994, we charge you hire-rent for only December and January. Please note that we shall not allow you to continue to retain our client's gas cylinders to be purchasing with them from another company and we shall embark on all available legal processes to enforce our claim in the unfortunate event of your non-compliance with this letter. We give you up to 31/1/94 to comply with this letter or face legal battle with us.

Thanks.

Yours faithfully,

(Sgd)

Basil C. Nwosu &
Co.

(Legal Practitioners)

CC. EMACO GROUP OF COMPANIES,

NO. 3 Dan-musa Road,
Kaduna."

It is trite law that an offer must be accepted in order to crystallise into a contract. See *Alexander Brogden & Ors. v. The Directors & Co. of the Metropolitan Railways Company* (1877) a App. Cas 666 at 691 as applied in *College of Medicine v. Adegbite* (1973) 5 S.C. (Reprint) 106; (1973) 5 S.C. 149 at 163.

It is possible for a contract to emerge from series of correspondence between two persons. But it must be apparent, when the correspondence exchanged are read together that parties have come to an agreement. In *Shell B. P. v. Jammal Engineering* (1974) 4 S.C. (Reprint) 24; (1974) 4 S.C. 33 at 72, this court, per Coker, JSC., observed:

"The final exercise of judgment must of necessity involve a consideration of all the correspondence that is properly put in evidence by both sides - all the correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a con-

tract. It is only after such detailed consideration that a tribunal can fairly come to the conclusion as to whether or not the parties actually arrived at an agreement. See Thomas Hussey v. Horne-Payne (1879) 4 App. 311. The task of analysing the several letters and attempts to reconcile the one with the other is undoubtedly a very difficult one calling for the most serious examination of each and every one of several documents until the tribunal is able to say whether a contract is indeed established."

In this case, parties had not been engaged in an exchange of correspondence directed toward the emergence of an agreement between them. Rather, they had been guided in their transactions by the only agreement which both acknowledged as Exhibit 29. When Exhibit 29 is read, it becomes apparent that there was no contract of hire between the parties. The defendant had deposited N210,000.00 for 60 gas cylinders. The plaintiff testified that the defendant subsequently received 3 more gas cylinders. It was agreed in Exhibit 29 that if any of the gas cylinders got lost, the defendant would pay N5,000.00 for it.

The defendant also filed a cross-appeal against the judgment of the court below. The grouse of the defendant is that the court below was in error to have upheld the order made by the trial court that the defendant should return 63 gas cylinders in dispute to the plaintiff. I think that there is merit in the complaint of the defendant. The defendant made the case that he did not have plaintiff's 63 gas cylinders as these had been returned to the plaintiff. The plaintiff however led evidence that the defendant still had his 63 cylinders. The evidence which the trial court accepted was that the defendant failed and or neglected to surrender plaintiff's 63 gas cylinders. The simple approach to resolve the dispute was to treat the 63 gas cylinders as lost and to make the defendant pay for them at the agreed N5,000.00 per cylinder. Since the plaintiff had previously deposited N210,000.00 for 60 gas cylinders, the right approach was to deduct the N210,000.00 deposited from N5,000.00 multiplied by 63 and to make the defendant pay the balance. The equation

then comes to this (N5,000.00 x 63 -N210,000,00). This gives a net sum of N105,000.00 due to the plaintiff.

The court below rightly in my view held that Exhibit 29 was the only contract between the parties and that their rights fell to be determined in accordance with the terms of the said Exhibit 29. It however failed to go a step further to determine how much was due to the plaintiff on the basis of Exhibit 29. It upheld the judgment of the trial court that 63 gas cylinders be returned to the plaintiff when the indications were that these were lost.

In the final conclusion, this appeal fails. It is dismissed. The cross-appeal succeeds. It is allowed. I set aside the order that the defendant return 63 gas cylinders to the plaintiff. In lieu of that order,

I award One Hundred and Five Thousand Naira Only (N105,000.00) in plaintiff's favour against the defendant being the amount due from the defendant to the plaintiff arising from the defendant's failure, neglect or refusal to return plaintiff's 63 gas cylinders. It is fair to conclude that parties bear their own costs. I therefore make no order as to costs.

E _____

BELGORE JSC

I had read in advance the judgment of my learned brother, Oguntade, JSC., partially allowing this appeal. I entirely agree with him and make the same consequential orders as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Oguntade, JSC. I agree with it.

This transaction was a very simple one. It was governed by Exhibit 29. Exhibit 29 provides that for every cylinder not returned, the respondent would pay a replacement cost of N5,000.00. It is pertinent to point out that the defendant had deposited the sum of N210,000.00 with the appellant. P.W.2, in his evidence for the appellant, testified that according to the agreement "if cylinders were not returned, the deposit will

go for it.” P.W.2 had also testified that:

“The defendant deposited N3,500.00 on each cylinder total N210,000.00. We are still with the money as per agreement.”

From the foregoing, it will be seen clearly that the responsibility of the respondent under Exhibit 29 was only to pay the balance of B N105,000.00 to the appellant as replacement cost of 63 cylinders.

It is for this reason that I agree entirely with the lead judgment of my learned brother, Oguntade JSC. The appeal succeeds in part. I award in favour of the plaintiff against the defendant the sum of N105,000.00. C I also make no order as to costs.

KALGO JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Oguntade, JSC., in this appeal. I entirely adopt as mine his reasoning and conclusions reached therein and agree that the main appeal is without merit and it must fail. But there is merit in the cross-appeal which succeeds. I therefore dismiss the main appeal E and allow the cross-appeal but I make no order as to costs.

TOBI JSC

This is a case of a contract between the parties. The contract has F to do with the supply of 60 cylinders of gas, split into 40 oxygen and 20 acetylene. Expectedly, the parties give different versions of their contractual relationship.

Let me first take the version of the appellant who was the plaintiff G in the High Court. On 17th September, 1993, the parties entered into an initial temporary agreement, Exhibit 29, for the appellant to supply the respondent 60 cylinders of gas of 40 oxygen and 20 acetylene. Because of the exigencies of the business, arising from the urgent need of the H respondent for more supply, there was an immediate need to modify Exhibit 29. This was made possible by Exhibit 3, an agreement which stipulated the days for supplying gas and removing empty gas cylinders.

Somewhere along the line, the respondent breached the contract (hopefully Exhibit 3) by withholding the gas cylinders of the appellant, refused to buy gas from the appellant. The respondent used the gas cylinders of the appellant to purchase gas from other companies. The solicitors of the appellant wrote Exhibit 12, warning the respondent of the breach. The respondent unilaterally determined the contract but refused to release 63 gas cylinders to the appellant. After another letter from the solicitors, Exhibit 24, an action was filed against the respondent.

The respondent tells quite a different story. Yes, both parties entered into an agreement, Exhibit 29, on 17th September, 1993 for supply of the 60 cylinders of oxygen and acetylene gas. It is the case of the respondent that Exhibit 29 was the only binding agreement between the parties and that any liability must be within the provisions of Exhibit 29. Counsel for the respondent took time to reproduce Exhibit 29 at pages 3 and 4 of the respondent's brief.

The appellant in his suit claimed special and general damages arising from the use of 63 gas cylinders. The learned trial Judge in his judgment held that the respondent withheld 63 cylinders belonging to the appellant and awarded N7.1 million as damages. He ordered the respondent to return the 63 empty gas cylinders to the appellant. He also ordered that the appellant should refund the sum of N210,000.00 refundable deposit paid by the respondent to it.

Dissatisfied, the respondent appealed to the Court of Appeal. That court, by a majority judgment of two to one, allowed the appeal and set aside all, but one of the claims granted by the learned trial Judge in favour of the plaintiff.

The appellant has appealed to this court. There is also a cross-appeal. Briefs were duly filed and exchanged. The crux of the argument of appellant is that the Court of Appeal was wrong in holding that Exhibit 29 was the only evidence of the transaction between the parties in the contract of supply of the gas cylinders. It is also the case of the appellant that on the principle of *ubi jus ubi remedium* the appellant having suffered damages as a result of the withholding of his 63 gas cylinders for over nine years was entitled to the grant of damages as granted by the trial

Judge. The appellant urged this court to allow the appeal.

The respondent has defended the judgment of the Court of Appeal by referring to Exhibit 29. It was argued that the contractual relationship was Exhibit 29 and no other document and that the Court of Appeal rightly set aside the damages awarded by the learned trial Judge. B

It is the argument of the cross-appellant that from the evidence before the trial court, the cross-respondent was not entitled to the order that 63 cylinders be returned to him. Instead of ordering the return of the cylinders, an order of payment of cost of replacement should have been made, the cross-appellant argued. It is also the argument that from the evidence before the trial court, the cross-respondent failed to prove that the cross-appellant did not return all the empty cylinders to him. The cross-appellant urged the court to allow the cross-appeal and dismiss the cross-respondent's case in its entirety. C D

It is the argument of the cross-appellant that he proved his case at the trial court. It is submitted that the averments in cross-appellant's Amended Statement of Defence and Counter-Claim are a general denial as it failed to plead all the 86 excess cylinders in Exhibit 13 and the 60 E agreement cylinders in Exhibits 1 and 2. The cross-respondent urged the court to affirm the order of the Court of Appeal which had earlier affirmed the order of the trial court that the 63 withheld cylinders of the cross-respondent be returned to him by the cross-appellant. The court is F also urged to dismiss the cross-appeal.

Exhibit 29 is in the following terms:

*“EMACO GROUP OF COMPANIES,
No.3 Danmusa Road,
Kaduna.
17th September, 1993.*

TEMPORARY AGREEMENT FOR SUPPLIES OF
SIXTY (60) CYLINDERS OF ACETYLENE AND
OXYGEN TO ZAKHEM CONSTRUCTION COY.
ABUJA

*EMACO GROUP OF COMPANIES do hereby agree to supply 40
cylinders of Oxygen, 20 cylinders of Acetylene to ZAKHEM CONSTRUC-*

TION COY. ABUJA on the following conditions:

1. *SALES DEPOSIT* - There shall be a sales deposit of Three Thousand, Five Hundred Naira (N3,500.00) per cylinder prior to supplies and which shall be refundable after expiration of the contract.

B 2. *CONTENT PRICE* - shall be as follows: Oxygen N700.00/cylinder Acetylene N1,350.00/cylinder.

3. *SERVICE CHARGE* - N800.00 service charge shall be made/cylinder on every supply.

C 4. *VALVE DAMAGE* - In case of damage to valve, a charge of N900 shall be made to effect replacement of one.

5. *LOSS OF CYLINDER* - A charge of N5,000.00 shall be made for replacement of one lost cylinder.

D 6. *PAYMENT FOR SUPPLIES* - shall be made through cheques (certified) at the end of every month in the above name only.

7. *METHOD OF SUPPLIES* - supplies shall be made on the receipt of LPO and transportation by self but where Emaco undertakes transportation, a surcharge shall be made.

E *NOTE*: under no circumstances shall you use our cylinders to purchase gas from any other dealer other than from our Company Emaco.

SGN:.....

EMACO GROUP REPRESENTATIVE

F SGN:.....

ZAKHEM REPRESENTATIVE".

The appellant, P.W.2, in his evidence said:

G "We have the condition by writing the agreement. The agreement was on 17/9/93. After writing the agreement, we read it and Mr. Albert signed on behalf of the defendant company. The agreement is Exhibit 29."

The appellant gave evidence on the extent of liability in the event of breach in respect of non- return of the cylinders. He said:

H "In paragraph 5 of Exhibit 29 states N5,000 if cylinders are not returned the defendant shall pay N5,000 as at that time."

P.W.1, Alfred Eneh, also gave evidence on Exhibit 29. He said:

"Our type of business entails that anybody buying from us gave us

empty for exchange. The defendant said that they did not have empties. On this, they entered into agreement with them that they shall have to pay security deposit of N3,500 per cylinder for the whole 60 cylinders. This agreement was written by parties and signed by my Director, Mr. Emmanuel Nneji for our company, also signed by Mr. Albert for the defendant.” B

In his evidence, D.W.1, Lucky Olomewo also testified on Exhibit 29:

“There was contract between plaintiff, we entered an agreement with the plaintiff to supply us with gas. The agreement was written agreement. I can identify the agreement. This is the agreement.” D.W.1 identified Exhibit 29. C

Witness also identified Exhibit 13, the written memo.

It is clear from the above evidence that Exhibit 29 was the centre pin. I can describe it as the alpha and the omega of the entire transaction. D
It was the main reference point.

The appellant relied on Exhibits 3, 8, 11 and 13 which he said provided for excess cylinder. Let me have a close look at the exhibits. Exhibit 3 reads: E

“This is the preliminary agreement for filling Oxygen/Acetylene Bolt. Every Friday, they will send filled bottles and replace the empty ones. On Tuesday, they will collect cheque on 28/9/93 for the initial amount, all other supplies shall be paid on monthly basis.” F

I do not think it is correct to refer to Exhibit 3 as an agreement. It is not because it has not the character and content of an agreement. At best Exhibit 3 is a note in respect of when to supply the oxygen/acetylene and when payment will be made.

I take Exhibit 8. It is dated 30/11/93 and it reads: G

*“Emaco Group supplied Twenty Cyles Acetylene, ten Cyles of 02 to Zakhem Construction, Suleija. No empties were collected by Emaco as usual. Zakhem promises to get them ready for collection next week. Emp- H
ties owed.*

02 -	-	10}
		}30.”
Acetylene	-	20}

Again, Exhibit 8 is not an agreement. It is a document showing what Emaco Group supplied the respondent and that Emaco did not collect any empties in return.

Exhibit 11 dated 8/11/93 reads:

B *“Emaco Group Kaduna has supplied Zakhem Construction Suleja, excess cylinders as today -*

Oxygen - 39}
}58

Acetylene - 10}
C *Zakhem promises to supply same to Emaco soonest.”*

Again, Exhibit 11 is not an agreement and cannot be so regarded by this court.

D And finally, Exhibit 13. This exhibit headed “Excess Cyls. to Zakhem” contains a breakdown of oxygen and acetylene on three days, that is, 8/3/93,16/11/93 and 27/11/93. It did not indicate whether the cylinders were supplied to Zakhem. Even if there is such indication, the exhibit, like others, does not qualify as an agreement.

E I see in Exhibits 3. 8.11 and 13, a flowing documentation of the business transaction between the parties, in apparent implementation of Exhibit 29. They are not binding on the parties as they lack offer, acceptance and intention to create legal relationship. I am not even sure that
F there is consideration. All that I am sure of is they have the legal capacity to contract.

G While parties have the right to pick and choose from the lot of exhibits tendered, which lean in favour of their case, they can only succeed at the end of the day if the court comes to the conclusion that the exhibits so picked and chosen are the pivot on which the case can be proved and has in law and in fact been proved.

H Where the intention of the parties to a contract are clearly expressed in a document, the court cannot go outside the document in search of other documents not forming part of the intention of the parties. In this case, Exhibit 29 clearly provided for the terms of the contract between the parties and the two courts below were right in not going outside the exhibit.

Where a contract specifically provides for liability in case of breach, the court will not go outside the contract in search of more palatable terms for one of the parties to the detriment of the other party. The court is bound to interpret the liability clause or clauses strictly as provided in the contract.

B

Exhibit. 29, in paragraph 5 thereof clearly provided that a charge of N5,000.00 shall be made for replacement of one lost cylinder. How did the appellant come by the sum of N20,000.00? The argument of learned counsel on the N20,000.00 charge, with the greatest respect, does not impress me, as it is clearly outside the purview of Exhibit 29. I entirely agree with the arithmetic of my learned brother by the equation of multiplication formula which gives a net sum of N105,000.00 due to the appellant.

C

It is for the above reasons and the fuller reasons given by my learned brother, Oguntade, JSC., in his judgment that I too come to the conclusion that the appeal fails. I make the same award in the judgment of my learned brother. I accept as mine the conclusion reached by my learned brother on the cross-appeal.

D

E

F

G

H