

SUPREME COURT OF NIGERIA
17TH SEPTEMBER, 1993 SC. 57/1988
CORAM:- A.G KARIBI-WHYTE, A.B. WALI, O.
OLATAWURA, M. E. OGUNDARE, S.U. ONU, JJSC.

CHIEF J.A. OJOMO PLAINTIFFS
AND
INCAR NIGERIA LTD. AND ANOR. DEFENDANTS

APPEALS - Plaintiff not appealing against trial court's finding on an issue - Court of Appeal's finding on the issue at variance with Plaintiff's pleading - proper consequence thereof.

CONTRACTS - Where Plaintiff is not a party to a contract certain clauses of the agreement referring to Plaintiff - whether Plaintiff can maintain action based on same

DAMAGES - Court unsure of the adequate length of determination of notice - same court awarding a years commission for breach - whether such award is proper.

EVIDENCE - Evidence of custom of trade not pleaded by the Plaintiff - whether such evidence should be admitted

PRACTICE AND PROCEDURE - Where an agreement fails to indicate duration of appointment - Plaintiff suggesting duration whether onus is on him to prove.

FACTS

The Plaintiff as a Pensions Consultant made proposals to the 1st defendant for the establishment of a pension scheme for the latter. The 1st defendant consequently appointed him as a Pensions consultant in respect of its retirement scheme and other pension matters. The 2nd defendant was appointed the insurance Company for the purpose of carrying out the scheme. Things latter fell apart between the Plaintiff and the 1st defendant as a result of which the 1st defendant appointed another firm of consultants in respect of the Pensions scheme. The Plaintiff claimed that he was not notified of the

termination of his consultancy. He contended that the abrupt termination of his consultancy amounted to a breach of contract as the consultancy was customarily supposed to last through the duration of the scheme although he did not plead that, custom of trade specifically. The trial court entered judgment for the plaintiff. The Defendants being dissatisfied went to the court of Appeal which allowed the appeal in part. The plaintiff has now appealed to the Supreme Court against the reduction in damages awarded to him whilst the 1st Defendant has cross-appealed on the question of liability and damages.

HELD (unanimously dismissing the appeal)

1. The Plaintiff is not a party to Exhibit A1 (the agreement between the 1st Defendant and its Staff Worker's Union) and so there is no way the agreement could be the basis of liability between the plaintiff and the 1st Defendant even though paragraphs 10 and 11 thereof made reference to the plaintiff. (P63 L14)

2. Plaintiffs testimony that according to his profession, his consultancy as regards the 1st Defendant's pension scheme is to last as long as the scheme is in operation is evidence of custom of trade. As no such custom was pleaded, this evidence ought not to have been admitted as it went to no issue and having been admitted it should have been expunged. (P. 63 L21)

3. The Plaintiff did not appeal against the low courts finding that his contract with the 1st Defendant was determinable with reasonable notice by either side. The finding of the court of Appeal being at variance with the plaintiff's case in his pleadings is tantamount to a rejection of plaintiff's case and the consequence should have been a dismissal of the plaintiff's case. (P67 L 18)

4. It is for the plaintiff to prove the case set up by him and the court cannot set up another for him where that case fails. Exhibit A, whereby the 1st Defendant appointed the plaintiff as consultant did not indicate the duration of the appointment. Therefore, it is for the plaintiff to prove, as suspected by him, that his consultancy is indeterminable

during the pendency of the scheme. (P.67 L25).

5. The trial court and the Court of Defendant liable in breach wrong in finding the 1st liable in breach of contract. (P. 69 L 31)

6. The Court o was unsure contract, the award must case are based on length of notice of determination of the contract, the award must be set aside moreso when damages in this class of case based on length of notice. (P.69 L22)

7. The 1st Defendant has succeeded in its cross appeal while plaintiff's appeal fails and the plaintiff's claims against the 1st Dependent are dismissed. (P. 73 L5)

REPRESENTATION

A. B. Kasumu, SAN, with S.W Baidi for the Appellant/Cross, Responent.

D. Akinkugbe for the 2nd Respondent.

CASES REFERRED TO

1. Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Pt. 144) 283
2. Chinweze v. Masi (1989) 1 NWLR (Pt. 97) 254
3. Egbe v. Alhaji (1990) 1 NWLR (Pt. 127) 546
4. L.R.P. (Nig) Ltd. v. Oviawe (1992) 5 NWLR (Pt. 243) 572
5. Magnusson v. Koiki (1991) 4 NWLR (Pt 183) 119
6. Nelson v. Akofiranmu (1962) All NLR 130
7. Oduola v. Coker (1981) 5 SC 197.
8. Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360
9. African Continental Seaways Ltd. v. Nigeria Dredging Roads and General Seaworks Ltd. (1977) 5 SC 235
10. Ibuluya v. Dikibo (1976) 6 S.C. 97
11. Ihewusi v. Ekeanya (1989) 1 NWLR (Pt 96) 239
12. Omosanya v. Anifowoshe (1959) 4 FSC 94
13. Ajadi v. Okenihun (1985) NWLR (Pt. 2) 484
14. Jones v. Chapman (1848) 2 Exch. 803
15. Convey Island Commissioner v. Preedy (1922) 1 ch. 179
16. Mogaji v. Odofin (1978) 4 SC. 91
17. Arornire v. Awoyemi (1972) 1 All NLR (Pt. 1) 101

56 Ojomo v. Incar Nig. Ltd. (1993) 11 KLR Ogundare JSC
18. Kuforiji v. V.R.B. Nigeria Ltd. (1981) 6-7SC 48
19. George Okafor v. Eze Idiogo III (1984) N.S.C.C. 360
20. Okpiri v. Jonah (1961) I All NLR (Pt.1) 107

LEAD BY JUDGMENT BY OGUNDARE JSC

5 By a writ of summons issued in May 1982, the plaintiff claimed from the defendants jointly and severally or in the alternative as follows:

10 *"1. Declaration that the Plaintiff's contract with the 1st Defendant as brokers in respect of their workers Benefit Scheme arranged with the 2nd Defendant is still subsisting.*

2. An order that the 2nd Defendant do pay to the plaintiff all commission due on the said Benefit Scheme from January. 1981, until the determination of this action."

15 The Defendants having put in appearance, pleadings were filed and exchanged. By paragraph 21 of his Statement of Claim, the plaintiff claimed as hereunder:

 "Wherefore the Plaintiff claims against the Defendants jointly and severally or in the alternative

20 (i) Declaration that the Plaintiff's contract with the 1st Defendant as Consultants in respect of the 1st Defendant's workers Pension Scheme arranged with the 2nd defendant is still subsisting.

 (ii) An Order that the 2nd Defendant do pay to the Plaintiff all commissions due on the said Pensions-Scheme from January 1981

25 until the determination of this action.
 (iii) Further or alternatively to claims (i) and (ii) or either of them, a sum of N2.5 million from 1st Defendant being damages for breach of contract.

30 **PARTICULARS OF DAMAGES:**

(a) Commission which the Plaintiff would have earned during the year of 1981	35,000.00
(b) Commission which the Plaintiff would have earned during the year of 1982	40,000.00
35 (c) Commission which the Plaintiff would have earned from 1983 to 1992 that is 10 years at N50,000.00 per annum	500,000.00
(d) General Damages	N1,925,000.00
TOTAL	N2,500,000.00

Needless to say the defendants denied liability. At the conclusion of the trial and addresses by learned counsel for the parties, the learned trial Judge in a considered judgment found as follows:

"Having regard to the views which I have held earlier on the notice of termination of the services of the plaintiff I shall not grant the declaration sought so also shall I not grant the second order sought; I shall however grant the 3rd claim, for damages for a breach of contract. It is however trite law and learned counsel seemed to have conceded that, that in an action for a breach of contract, there is dichotomy of damages into special and general damages. Damages in such an action are limited to such that flows naturally from the breach or such that may be considered to have been in the contemplation of parties that will flow from such a breach. In *P.Z & Co. v. Ogedengbe* (1972) 1 All NLR (Pt.1) 202, it was held among others:

'(2) Apart from damages naturally resulting from the breach of contract no other form of general damages can be contemplated; for this reason the award of a sum as general damages in addition to the sum awarded in lieu of notice cannot stand.'

Having regard to the above, the claim under (iii) and (b) (sic) cannot stand and is hereby struck out. Based on the evidence before me, I shall grant claims (iii) (e) (sic) & (b) in their entirety: as regards claim (iii) (c) I shall grant a sum of N250,000.00 being the commission which the plaintiff would have earned for 5 years from 1983-1987 at the rate of N50,000.00 per annum. Plaintiff therefore succeeds in his claim and there shall be judgment for the plaintiff against the defendants jointly and severally for the sum of N325,000.00".

He entered judgment for the plaintiff accordingly. Being dissatisfied with the said judgment, the defendants appealed to the Court of Appeal which court (Ademola J.C.A, Nnaemeka-Agu, J.C.A (as he then was) and Kolawole J.C.A by majority decision (Nnaemeka-Agu, J.C.A dissenting) dismissed the appeal of the 1st defendant but reduced the damages against it to N35,000.00. The court unanimously allowed the appeal of the 2nd defendant and dismissed plaintiffs claim against it. Being dissatisfied with the majority decision of the Court of Appeal as to the damages awarded in his favour, the plaintiff appealed to this court against the award. The 1st defendant also cross-appealed on the question of liability and damages. The 2nd defendant was made a party to this appeal by the 1st defendant.

I may here mention however, that the plaintiff-did not appeal in respect of the dismissal of his claims against the 2nd defendant.

This is perhaps a convenient stage to set out the facts, howbeit briefly. The plaintiff practised as a pensions consultant under either the name and style of Pensions Consultant Company of Nigeria or United Pensions Consultants Company Limited or United Pensions Consultants Company. Sometime in July 1970, he made proposals to the 1st defendant for the establishment of a Pension Scheme for the latter's staff. Consequent upon the submission of his proposals, the 1st defendant appointed him as Pensions Consultant in respect of its staff retirement scheme and other pension matters as might be approved by the 1st defendant and its Workers' Union. The plaintiff prepared a staff Retirement Benefit Scheme which was approved by the 1st defendant. On the recommendation of the plaintiff the 1st defendant appointed the 2nd defendant as its Insurance Company for the purpose of carrying out the Scheme. Under the arrangement between the parties, the plaintiff was not entitled to any remuneration from the 1st defendant but the 2nd defendant was obliged to pay him annual commission on all premiums paid by the 1st defendant to the 2nd defendant. The Scheme came into operation on 1st January, 1971 and continued until 1980 when it appeared that things fell apart between the plaintiff and the 1st defendant in consequence of which the 1st defendant notified the 2nd defendant of the appointment of another firm of Consultants in respect of the Staff Pension Scheme. The plaintiff claimed that he was not notified of the termination of his consultancy by the 1st defendant. The 1st defendant, on the other hand, claimed that the plaintiff was so notified. The plaintiff contended that even if he was notified, such notification would not "in fact and in law" terminate his agreement with the 1st defendant. Plaintiff instituted the action leading to this appeal contending that the abrupt discontinuance of 1st defendant to do business with him since January 1980 amounted to a breach of contract.

In plaintiff/respondent's Brief of Argument, two questions were set out as calling for determination in this appeal which expression also includes the cross appeal both of which shall hereinafter be referred to as "this. appeal". The 1st defendant for its part, raised three questions in its Brief of Argument. Having regard to the Grounds of Appeal as contained in the two Notices of Appeal and the judgment

of the court below appealed against, I am of the view that the questions that call for determination in this appeal are as stated in the plaintiff/respondent's Brief and these are:

"(1) Was the Court of Appeal right in confirming the decision of the trial court on the liability of the 1st Defendant for breach of contract; and

(2) Was the court right in its assessment of the damages due to the Plaintiff from the breach."

I shall now proceed to consider the questions raised but before doing so, I need say something on the position of 2nd defendant.

Mr. Kayode Sofola in his oral address before us made a point that the two appeals, that is, the main appeal and the cross-appeal do not concern the 2nd defendant as the plaintiffs claim against that defendant having been dismissed and there was no appeal against that dismissal, the 2nd defendant was no longer concerned with the matter. Learned counsel for all the parties conceded that there was no appeal against the 2nd defendant. Consequently we struck out both the appeal and the cross-appeal in so far as the 2nd defendant is concerned.

QUESTION 1:

In his oral argument before us Mr. Kayode Sofola observed that the plaintiff's case was built on paragraphs 7,8, 19 and 21(iii) of his Statement of Claim and that the sum total of this case was that his consultancy Agreement with the 1st defendant could not be terminated during the duration of the Insurance Scheme he prepared for the 1st defendant. He also observed that both the trial High Court and the Court of Appeal found that the Consultancy Agreement could be determined during the life of the Scheme. He further observed that there was no appeal by the plaintiff against this finding. Learned counsel also observed that the two courts below found that the consultancy Agreement could be determined by Exhibit 12, a letter dated 10th December, 1980 written by the 1st defendant to the plaintiff terminating his broker's appointment with effect from 31st December 1980 but that Exhibit 12 was never received by the plaintiff. Learned counsel submitted that it was plaintiff's duty to establish that his contract was still subsisting at the time of the alleged breach. He referred to paragraph 14 of the Statement of Claim and argued that

while plaintiff pleaded that he wrote renewal letter in January 1982 he was silent on the issue of renewal letter of January 1981. He urged the court to hold that on the pleadings and evidence the plaintiff did not prove that the Consultancy Agreement with the 1st defendant was still subsisting.

5 In his brief, Mr. Sofola, after referring to a passage in the lead judgment of Ademola J.C.A to the effect that the 1st defendant could not bring forward in the Court of Appeal a line of argument at variance with his case at the trial, submitted that paragraph 9 of the 1st
10 defendant's Statement of Defence was sufficient to base the argument that the plaintiff was not entitled to claim a right to express notice. Learned counsel further submitted that the absence of any term requiring express notice meant that there was not in law any need for Exhibit J2. Relying on Order 3 rule 23 of the Court of
15 Appeal Rules 1981, learned counsel submitted that the court below ought to have heard the 1st defendant's argument regarding the termination of the party's contract and further submitted that since paragraph 9 of the 1st defendant's Statement of Defence did challenge any insistence of a right of express notice by virtue of the absence of
20 any such term in the letter of Agreement that issue was one which the Justices of the Court of Appeal properly could have entertained. He submitted that there was sufficient evidence other than Exhibit J2 upon which the 1st defendant could base his contention that plaintiff had notice of the termination of his Consultancy contract and the
25 court below could have considered the argument put forward before it on the issue of notice and the, manifestation of awareness of notice by the plaintiff. He submitted that the plaintiff had at least knowledge of defacto termination. This could be inferred, he argued, from the
30 evidence adduced by witnesses for the 1st defendant at the trial to the effect that no fresh pension matters were given to the plaintiff after 1980 and also from the plaintiff's own showing that he had no direct knowledge of the 1st defendant's pension matters after 1980. Learned counsel also submitted that, on the evidence plaintiff could
35 not show that the 1st defendant renewed his appointment after 1980 as it was a pre-condition, as admitted by the plaintiff, that the confirmation of the renewal of his appointment had to be done every year.

Professor Kasumu SAN, learned leading counsel for the plaintiff, while conceding that the statement of claim was inelegantly drafted

submitted, however, that the defence of the 1st defendant at the trial was to the effect that the plaintiff had express notice of the termination of his consultancy agreement with the 1st defendant and that issue having been decided against it by the trial Judge, the 1st defendant could not, in the Court of Appeal, now raise the defence of implied knowledge. Learned Senior Advocate argued that reference by the plaintiff to "annual renewal" was not to plaintiff's appointment as a consultant but to the premium payable to 2nd defendant by the 1st defendant. He urged on us to uphold the findings of the 2 courts below as to the liability of the 1st defendant for breach of contract. 5

It is necessary to set out the relevant paragraphs of the parties' pleadings and the evidence in support in order to be able to arrive at a conclusion as to whether plaintiff succeeded in establishing 1st defendant's liability to him for breach of contract. I shall refer in this respect to paragraphs 4, 7, 8, 16, 18, 19 and 20 of the Statement of Claim and paragraphs 3, 8 and 9 of 1st defendant's Statement of Defence. 10 15

The penultimate paragraphs of the Statement of Claim read:

"4. In a letter dated 25th August, 1970 the 1st defendant appointed the plaintiff as Pensions Consultant in respect of its staff retirement scheme as well as all pension matters as may be approved by the said 1st defendant and its Workers' Union 20

7. Under the Scheme the plaintiff is not entitled to receive any fee from the 1st defendant but the 2nd defendant is obliged to pay an agreed annual commission to the plaintiff on all premiums paid to the 2nd defendant by the 1st defendant. 25

8. Once a firm is appointed as Consultant of a Scheme such firm continues as such so long as the Scheme is in operation except otherwise agreed. 30

16. In a letter from the 2nd defendant dated 2nd March, 1982 the plaintiff was informed that the 1st defendant had written them in December, 1980 purporting to terminate the plaintiff's appointment as their Consultants and appoint a new broker to handle the same as from the 1st of January, 1981. 35

18. The Plaintiff was never notified about the intention of the 1st Defendant to terminate his agreement.

19. Alternatively the plaintiff will contend that even if notified (which is not admitted) such notification does not in fact and in law

terminate the agreement.

20. The plaintiff will further contend that the abrupt discontinuance of the 1st defendant to do business with him since January, 1982 is a breach of contract."

5 Paragraphs 3, 8 and 9 of the 1st Defendant's Statement of Defence read:

"3. With reference to paragraph 8 of the Statement of Claim the 1st defendant will contend 'It the trial that the service of the plaintiff had been determined by the 1st defendant's letter of 10th December, 1980 which was posted to the plaintiff and a copy of the said letter was addressed to Minet James (Nigeria) Ltd.'s letter of 19th December, 1980 addressed to the 2nd defendant and a copy of which was addressed to the 1st defendant.

8. That the letter of 25th August, 1970 on which the plaintiff 15 claimed to have been appointed the 1st defendant's Pension Consultant was the basis of agreement between the plaintiff and the 1st defendant and the said agreement was clear as to the rights and obligations of the parties.

9. The 1st defendant will contend at the trial that the plaintiff 20 could not import any terms or conditions that are not contained in the said purported letter of 25th August, 1970, which has been averred by the plaintiff to be the basis of agreement between the plaintiff and the 1st defendant."

25 The letter of 25th August 1970 pleaded by both parties as the basis of the agreement between them is Exhibit A in these proceedings and it reads:

"EXHIBIT 'A'

INCAR (NIGERIA LIMITED)

30 Our Ref. ADM/SA/VO/2883/15 OFFICE & SHOWROOM
WORKSHOP & SPARE

Messrs

Pension Consultant Company

IJORA CAUSEWAY APAPA

P.O. BOX 2581, Lagos

of Nigeria

P.O.Box 3488

25th August, 1970

35

Dear Sirs,

We refer to your letter dated 5th July, 1970 and to the subsequent meeting held in our offices with your representative and wish

to confirm your appointment as Pension Consultant for the proposed Staff Retirement Scheme of Incar (Nigeria) Limited.

It is also confirmed that all pension matters when duly approved, by Incar Management and Incar African Union Workers Representatives will be placed with the Insurance Company through your services provided your suggestion will be acceptable by us. 5

We shall be grateful if you could supply us with a full report containing your views and suggestion, legal procedure to follow and estimated cost so as to enable.

Yours faithfully,

Sgd. INCAR (NIGERIA) LTD." 10

Professor Kasumu has argued that Exhibit A must not be taken in isolation but should be read along with Exhibit A1 to determine the terms of the agreement between the parties. I have read Exhibit A1 made on 16th September, 1970; it is an agreement between the 15 1st defendant and its staff Workers' Union. Plaintiff was not a party to Exhibit A1. With respect to learned Senior Advocate, therefore, I cannot see how that agreement could be the basis of liability between the plaintiff and the 1st defendant, notwithstanding that paragraphs 10 and 11 thereof made specific reference to the plaintiff. 20

Plaintiff testified, inter alia, as follows:

"I want the scheme to continue as long as 1st defendant is operating in Nigeria. That was the main objective of my appointment as Consultant." 25

Continuing he said:

"According to my profession, the consultancy is to last as long as the scheme is in operation. If the 1st defendant intends to change me, they have to consult with me and negotiate for the compensation which has to be paid; the confirmation (sic) should be the equivalent of remuneration say for at least 5 years sometimes 10 years." 30

This is evidence of custom of trade but no such custom was pleaded and this evidence ought not to have been admitted in his further evidence the plaintiff testified:

"In 1981 I was still acting as Consultant to 1st defendant, and we did correspondent (sic) with each other. I used to send them cheques; these are some of the correspondences between 1st defendant and me in 1981" 35

I have examined the 45 exhibits tendered in support of this

piece of evidence; they relate to refund of benefits of staff that had left the service of the 1st defendant in 1980 and had thereby withdrawn from the pension scheme. The exhibits in no way relate to renewal of the scheme.

Cross-examined, the plaintiff deposed:

5
"1st defendant are supposed to pay 2nd defendant through me but sometimes they paid them direct. I cannot remember any year they paid 2nd defendant direct and 2nd defendant paid me. I am a Consultant to 1st defendant and the Workers. Exhibits D and
 10 *D1 refer to my activities for the workers before 1981. Each year I write letters to 1st defendant to give me information about workers coming and those going out in addition I help to solve queries from other at any time, I also settle claims I also settle disputes between*
 15 *workers and management in respect of pensions. I cannot remember writing 1st defendant in 1981."*

To further questions, he answered:

20 *"I never received Exhibit J2 through 2nd defendant. I cannot remember asking for the list in 1981, I asked for the one in 1982."*

Cross-examined by Mr. Akinkugbe for the 2nd defendant, plaintiff testified thus:

25 *"My duty includes getting in the premiums. I cannot remember getting in the premium in 1981."*

The irresistible inference one can draw from the evidence of
 30 the plaintiff is that from 1981 onwards he was not used as a broker or adviser or consultant by the 1st defendant. Hence he was not paid any commission by the 2nd defendant as from that year.

Evidence led for the defence showed (1) that Exhibit J, the broker could administer a scheme already set up and (3) that plaintiff
 35 was not given any fresh job after 1980.

It is on the above pleadings and evidence that the two courts below found the 1st defendant liable for breach of its contract with the plaintiff. Are they right? I rather think not. The basis upon which the learned trial Judge found against the 1st defendant is to be found

in the following passage of his judgment:

"In the case before me, the 1st defendant said that a notice dated 10th December, 1980 was sent to the plaintiff: the receipt of that notice was denied: there was no evidence as required by section 25 of the Interpretation Act that a prepaid letter was put in the post. Failure to adduce that evidence is in my view fatal to the claim of the 1st defendant that plaintiff's service was duly terminated by that letter of 10th December, 1980. Dickinson v. Dodds (1876) 2 C.h .D. 463 was case that stated that notice to a third party from which the person entitled to the said notice has knowledge of the withdrawal of the offer to him was sufficient notice to the offerer. This authority notwithstanding I hold that the purported termination of plaintiff s services was wrongful; it was not sufficient to terminate plaintiffs services.

This view seems supported by the contents of the plaintiff's letter to the 1st defendant dated 30th March, 1982 (Exhibit J4), the 4th paragraph of which states 'We are still of the opinion that our consulting services with you subsists and if you want to terminate the same you should do so in the proper manner, inform us in writing and give the necessary notice having regard to the fact that we are paid commission on yearly basis.' There was no reply to this letter. What then is the necessary notice to be given? In paragraph 3607 of Chitty on Contracts 24th Edition Vol. 2, the learned author is of the opinion that:

"If a contract of employment makes no express of specifically implied provision for its duration or termination by notice, there is likely to be implied at common law a presumption that the contract is for an indefinite period and terminable by reasonable notice given by either party".

From the above, it seems to me that the appropriate notice, mentioned in Exhibit J above would be a reasonable notice stipulated in the opinion of the learned author of Chitty on Contracts. What is a reasonable notice? I think it depends on the circumstances of each case. In *Lowa v. Walter* (1892) 8 T.L.R. 358, the court had to deal with what constituted a reasonable notice in respect of a contract of service between a Newspaper Proprietor and a foreign correspondent and it was held that in the absence of custom or special

agreement the length of notice must be reasonable and in that case 6 months' notice was held to be a reasonable one. Whereas in Richardson v. Koefod (1962) 1 W.L.R. 1812, it was held that six weeks notice was reasonable in the case of the manageress of a cafe. In the case before me, there was no evidence of special agreement as to the termination of the contract of service between the parties; but in his evidence plaintiff said as follows: 'If the 1st defendant intends to change me, they have to - consult with me and negotiate for the compensation which has to be paid: the compensation should be the equivalent of remuneration for at least 5 years sometimes 10 years.' Counsel submitted that plaintiff being an expert in this field, he was giving an expert evidence on the custom obtaining in his profession. This piece of evidence was not challenged by the witnesses for the 2nd defendant nor in cross-examination of the plaintiff: it stands unchallenged.....since the evidence of plaintiff as to custom was that of an expert and not challenged, 5 years compensation is allowed by the custom of the trade."

He later concluded:

"I am bound to accept the evidence of the plaintiff as an expert evidence in the trade as to the custom of the trade and not to act on reasonable notice".
(Italics mine)

With profound respect to the learned trial Judge, the evidence on which he had acted was on a fact that was never pleaded. Not only that, the evidence was at variance with plaintiff's pleadings because the case put up by him was to the effect that his contract with the 1st defendant was not determinable during the pendency of the Scheme designed by him except otherwise agreed. It was his case also that there was no such agreement.

The Court of Appeal seems to have fallen into the same error. For Ademola J.C.A. in his lead judgment decided as follows:

"The question now is what is the reasonable notice in the circumstances of this case? Without hesitation, I go back to the terms of the contract (Exhibit A) which stipulated that renewal of the policy of insurance must be done every year for the first applicant by the

respondent. The evidence is that no such instruction was given to the respondent by the 1st appellant in 1981. The appellant contended that his notice of 10th December 1980 which is to take effect on the 31st of December was clear intention that in 1981 there would be no instruction to the respondent of a renewal of policy. The finding of the learned Judge was to the effect that the notice purported to be given by the 1st appellant was not proved to have been received by the respondent.

There is no appeal by the 1st appellant on this finding. If even for the sake of argument that it was received by the respondent, it would in my opinion not constitute a reasonable notice of the determination of what I can now regard as a yearly contract between the parties. That being the case, the notice that could reasonably terminate such a yearly contract could at the very least be a three months notice or six months notice. That being my view, I must hold that there have been a breach of contract between the parties."

There has been no appeal by the plaintiff against the lower court's finding that his contract with the 1st defendant was determinable by either side giving a reasonable notice to the other. But as I have stated earlier on in this judgment, that finding of the Court of Appeal was at variance with the case put forward by the plaintiff in his pleadings. The effect of the finding is a tacit rejection of plaintiff's case, the consequence of which should have been a dismissal of that case. It is for the plaintiff to prove the case set up by him. It is not for the court, where that case fails, to set up another case in order to find in favour of the plaintiff. I have examined Exhibit A the letter whereby the 1st defendant appointed the plaintiff as consultant. There is no indication in the letter of the duration of the appointment. But plaintiff pleads that it is indeterminable during the pendency of the Scheme he prepared for the 1st defendant. It is for him to prove this for there is nothing in Exhibit A to suggest such an interpretation being put on it. He testified about the custom of the trade in support of his assertion but he did not plead this custom to enable the other side to react to it. His evidence on custom, therefore, went to no issue. The position therefore, is that he has not proved the case he set up. That case was not that he was given inadequate notice but that the contract could not be determined at all during the pendency of the Scheme

he designed unless otherwise agreed between him and the 1st defendant. In conclusion, I must hold that the two courts below were wrong to find the 1st defendant liable in breach of contract. I accordingly answer Question 1 in the negative.

QUESTION 2:

5 Both parties appealed against the award by the court below of damages to plaintiff. Plaintiff's complaint is that the award of N35,000.00 damages to him was based partly on the mistaken view that the contract between the parties was a yearly contract and therefore determined by at least three or six months notice, partly on the
10 mistaken view that damages over and above this period would be remote and partly on the erroneous ground that there was no plea by the plaintiff of evidence of custom or evidence to support the award of damages for 5 years, 1st defendant on the other hand complains that there was no evidence to justify the award made.
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Mr. Sofola, in his oral argument, observed that plaintiff's claims (iii)(a) - (c) were in respect of commission and not damages. He also observed that plaintiff's counsel had conceded in the court below that the claim for general damages must fail. He then submitted that
20 there was no evidence to support the claims (iii)(a) (c). He cited Ijebu-Ode Local Gov. v. Adedeji Balogun & Co. (1991) 1 NWLR (Pt.166) 136, 158B to show the duty on the plaintiff in claims for damages in contract cases. He also relied on Shell BP. v. Jammal Engineering (1974) 4 S.C. 33. He referred the court to the finding of the High
25 Court on pages 83 lines 20-25 and the Court of Appeal's finding on pages 265 lines 23-25 that 3-6 months would be appropriate length of notice and submitted that the award made is inconsistent with this finding. Learned counsel urged the court to accept the dissenting
30 judgment of Nnaemeka-Agu J.C.A.

Professor Kasumu, for the plaintiff submitted that the Court of Appeal was wrong to have limited the award to 1 year commission and was equally wrong to have found that 3-6 months notice was adequate. He urged the court to affirm the trial court's award. In
35 plaintiff/appellant's Brief, Professor Kasumu, after a brief summary of the facts, observed that the trial Judge did not classify the contract between the parties as a yearly contract and this influenced his assessment of damages. He then submitted that the Court of Appeal was wrong in treating the contract as a yearly contract. He further

submitted that a 5 year notice of determination based on the unchallenged evidence of the plaintiff was not remote as held by the Court of Appeal. He urged the court to restore the award made by the trial High Court.

The Court of Appeal, per Ademola J.C.A; had found- *"...the notice that could reasonably terminate such a yearly contract could at the very least be a three-months notice or six months."* 5

The court, by majority, then proceeded to award N35,000.00 based on the evidence of the witness for the 1st defendant, Lawrence Umunnakwe Okafor, an official of Minet Nigeria that took over from the plaintiff as 1st defendant's broker. That witness had testified as follows: "We expect them (2nd defendant) to pay us for 1981-82 only over N72,000.00" (Brackets are mine) 10

In making its award, the court below, per Ademola J.C.A. observed: "Applying the principle in the case of Hadley v. Baxendale which talks about damages naturally following from the breach or in contemplation of the parties for the breach, the only award that could have been made in this case is for damages for loss of commission respondent could have earned in 1981. The evidence for such amount was provided by the broker who serviced the policy with the second appellant in that 548 Nigerian Weekly Law Reports 18 October 1993 (Ogundare, J.S.C.) 15 20

The award for the years thereafter up to 1987 is in my opinion remote within the principle of the case of Hadley v. Baxendale (supra). The net result of this appeal is that it succeeds on the issue of the award of damages as indicated in this judgment but fails on the issue of liability. The respondent is awarded the sum of N35,000.00 as damages. Going by the evidence of Mr. Okafor, the court below awarded about a year's commission that Minet Nigeria earned. Apart from the fact that the court below was indefinite in its finding as to the required length of notice, it confused itself more by awarding something far in excess of what was earned by Minet Nigeria in the maximum length of notice. I think this is a wrong approach to an award of damages in cases where damages are based on length of notice. If for this reason alone, the award must be set aside. And as that court was unsure as to the adequate length of notice I find it difficult to substitute some other figure. 25 30 35

Be the above as it may, Professor Kasumu having conceded before the court below, and the latter having found, that the claim for general damages could not be supported, that court was only left to consider the claims in paragraph 21(iii)(a) - (c) of the plaintiff's statement nor claim. Plaintiff's evidence in support of these claims fell
 5 far short of what was required of him. In his testimony he deposed thus:

"In 1981 alone I believe I can get no (sic) commission an amount of N35,000.00. In 1980 I had N34,605.34 as my commis-
 10 *sion. In 1982 at least N14,000.00 and in 1983, I should have earned about N60,000.00 on commission."*

How he arrived at the commission he "believed" he would have earned in 1981, 1982 and 1983 he did not explain. Ademola J.C.A. who delivered the lead judgment did not advert his mind to
 15 this lapse but Nnaemeka-Agu J.C.A. did in his dissenting judgment. He observed:

"In other words, the only damages the respondent would be entitled to, if at all would be - if it can be categorized - in the nature if special damages. This raises the question whether the respondent
 20 *proved that he had done everything on his part to enable him say that for the action of the appellants he would have been entitled to the commission. See Oshinjirin & Ors v. Alhaji Elias & Ors. (1970) 1 All NLR 153, at p.156. Now contrary to the submission of the learned*
 25 *Senior Advocate for the respondent, he is not a party to Exh. A1 which is an agreement between the 1st appellants and their workers. That cannot be looked at for the determination of the rights and obligations of the parties under the contract. The only basis of their agreement is Exh. A, a letter from the 1st appellants to the respon-*
 30 *dent dated 25th August, 1970. It says in part:*

'It is also confirmed that all pension matters when duly approved by Incar Management and Incar African Union Workers Rep-
resentatives, will be placed with the Insurance Company through your
services provided your suggestion will be acceptable by us.'

35 Now pursuant to that agreement the respondent has been dealing with such insurance business of the 1st appellants' workers as they arose. Examples are in Exhs. E1, E3, E18-19 and which relate to 1980 retirements and which on respondent's evidence, have been paid for.

These show affirmatively that the contract between the parties were by their nature separable contracts, the effect of which on the quantification I shall deal with later. The point I wish to.....now is that the commission was based not on any..... year lump sum payment but on such separate insurance business placed by the 1st appellants with the 2nd appellants through the respondent. In my view, until they are placed there can be no question of any commission being due to them. The principle of damages at large, applicable in tort, does not apply to the instant case which is based on contract".

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Later, the learned Justice added:

"But by far the greatest problem of the respondent is on the quantum of the award assuming, but not agreeing, that he was entitled to any. It is, in fact, not shown how the sum of N35,000.00 awarded in the lead judgment was arrived at. It is expressly provided in section 34 of the Insurance Act of 1976 as follows:-

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34(1) No insurer shall pay by way of commission to any insurance agent or broker or any other intermediary, an amount-

(a) exceeding 10 per centum of the premium in respect of motor vehicle, workmen's compensation or contractor's all-risks and engineering insurance; or

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(b) exceeding 15 per centum of the premium in respect of any other subdivision (not being one mentioned in paragraph (a) above) of non-life insurance business.

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(2) No alteration in the rates of commission mentioned in subsection (1) of this section shall be made except with the prior approval of the Director.

(3) Any person who pays, or any person who receives, any commission otherwise than in compliance with the provision of this section shall be guilty of an offence and liable on conviction to a fine of N1,000.00 plus an additional fine being an amount equal to such excess commission.'

I agree with Mr. Sofola that the intendment of this section is to prevent speculative claims for commission; and hence for speculative damages based on failure to pay such commissions. Even under the general law, the correct position is as stated by Diplock, L.J., in *Lavarack v. Woods of Colchester Ltd.* (1967) 2 Q.B. 278, at p.292 where he said:

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The law is concerned with legal obligations only, and the law of contract only with legal obligations created by mutual agreement between contractors - not with expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.'

5 The only evidence of the respondent in support of the claim for commission is as follows:-

'In 1981 alone I believe I can get on commission an amount of N35,000.00. In 1980 I had N34,605.34 as my commission. In 10 1982 at east N14,000.00.....'

Later he testified that he was not paid any commission for 1981. Now this piece of evidence shows that the amount of commission fluctuated from year to year. Contrary to the statute, the bulk estimate for 1981 is bereft of particulars of those workers on whom it 15 should have been earned and the rate at which it was calculated. Above all, as I said, although there is evidence from the respondent that he was paid advances on his entitlement and the balance settled yearly, it appears from some of Exhs. E series to which I have referred that it was still a divisible contract, in... that the commission on 20 every worker was earned... placing was done and the insurance business... Payments for divisible contracts are normally based.... completed portion of the work. There is no lump sum contract, for any sum between the parties. Such would have been the principle of assessment in this case: but there are no particulars and no evidence 25 to support any award. This situation becomes much more difficult for the respondent when it is noted that the conclusion in the lead judgment is that three or six months' would be reasonable notice. Assuming but not conceding, that N35,000.00 was correctly estimated as 30 commission payable on insurance for the year 1981, what portion of this was paid within three or six months of that year? With respect, I do not think that there is anything in the evidence of D.W.1., Mr. Okafor, which lumps the commission due for 1981 and 1982 at N72,000.00 again without particulars of dates etc" to help the re- 35 spondent. The result is that on the respondent's claim, as framed, he is not entitled to an award of damages based on commission. Perhaps, If he had based his claim on those jobs done in 1981 such as evidenced by Exhs. E2 and E9 he would have been on a safer wicket, although he would have collected a much smaller sum: but that is

not his case."

I agree entirely with the learned Justice in the views expressed in the above two passages from his judgment. In so far, therefore, as the claim for damages is concerned the plaintiff, on his pleadings and evidence, must fail. The result I arrive at on Question (2) is that I answer that Question too in the negative. In conclusion, the 1st defendant has succeeded in its cross-appeal while plaintiff's appeals fails. The judgment of the Court below, as well as that of the trial High Court, is set aside. The plaintiff's claims against the 1st defendant are dismissed. I award to the 1st defendant N400.00, N600.00 and N1,000.00 being costs in the High Court, Court of Appeal and this court respectively, making a total of N2,000.00.

KARIBI-WHYTE JSC

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I have read the judgment of my learned brother Ogundare, J.S.C in this appeal, just delivered. I agree with his conclusion allowing the cross-appeal by the defendant and dismissing the appeal by the plaintiff. I abide by the order for costs awarded in the lead judgment.

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WALI JSC

I have the advantage of reading in advance a copy of the lead judgment of my learned brother; Ogundare, J.S.C with which I entirely agree and hereby endorse the same as mine.

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For those same reasons to which I have nothing useful to add, I also hereby allow the cross appeal by the 1st defendant while the main appeal by the plaintiff fails.

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The judgment on the Court of Appeal as well as that of the trial court is set aside and the plaintiff's claim against the 1st defendant is hereby dismissed. I endorse the order as to costs made in the lead judgment.

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OLATAWURA JSC

I had a preview of the judgment of my learned brother Ogundare, J.S.C. just delivered. I agree with his reasoning and con-

clusions. I will allow the cross-appeal and the appeal filed by the appellant is hereby dismissed.

I abide by the orders for costs in the lead-judgment.

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ONU JSC

Having had a preview of the lead judgment of my learned brother Ogundare, J.S.C. just read, I am in complete agreement with him that the cross-appeal of the 1st defendant succeeds and it is accordingly dismissed by me. I wish, however, to add by way of emphasis my humble contribution as follows:-

In relation to issue 1. I wish to stress that when in his testimony during his examination in chief the plaintiff said inter alia"

"I want the scheme to continue as long as 1st defendant is operating in Nigeria. That was the main objective of my appointment as Consultant" and continuing he further said:

"According to my profession, the consultancy is to last as long as the scheme is in operation. If the 1st defendant intends to change me, they have to consult with me and negotiate for the compensation which has to be paid, the confirmation (sic) should be the equivalent of remuneration say for at least 5 years sometimes 10 years."

he was giving evidence of custom of a trade or business for which no custom was pleaded. Such evidence goes to no issue and ought to stand expunged. See 1. Uredi v. Dada (1988) 1 NWLR (Pt.69) 237 at 246; 2. Aranda v. Ajani (1989) 3 NWLR (Pt.111) 511 and Olanrewaju v. Bamigboye (1987) 3 NWLR (Pt.60) 353 at 359.

The nearest he said in his statement of claim regarding his consultancy or brokerage contract with Ist defendant (Exhibit 'A') in relation to the Staff retirement scheme and pension matters for 1st defendant's employees may be gathered from paragraphs 7, 8, 18, 19 and 20 thereof wherein he averred:

"7. Under the scheme the plaintiff is not entitled to receive any fee from the 1st defendant but the 2nd defendant is obliged to pay an agreed annual commission to the plaintiff on all premiums paid to the 2nd defendant by the 1st defendant.

8. Once a firm is appointed as Consultant of a Scheme such a firm continues as such so long as the Scheme is in operation except otherwise agreed.

18. *The Plaintiff was never notified about the intention of the 1st Defendant to terminate the agreement.*

19. *Alternatively, the Plaintiff will contend that even if notified (which is not admitted) such notification does not in fact and in law terminate the agreement.*

20. *The Plaintiff will further contend that the abrupt discontinuance of the 1st defendant to do business with him since January, 1982 is a breach of contract."*

I think it pertinent here to set out paragraphs 8 and 9 of the 1st Defendant statement of defence in purported rebuttal thus:-

"8. *That the letter of 25th August, 1970 on which the plaintiff claimed to have been appointed the 1st defendant's Pension Consultant was the basis of agreement between the plaintiff and the 1st defendant and the said agreement was clear as to the rights and obligations of the parties.*

9. *The 1st defendant will contend at the trial that the plaintiff could not import any terms or conditions that are not contained in the said purported letter of 25th August, 1970 which has been averred by the plaintiff to be the basis of agreement between the plaintiff and the 1st defendant."*

I have carefully read the contents of Exhibit 'A' and indeed all other documentary evidence inclusive of Exhibit A I (an agreement between 1st defendant and its Staff Workers' Union) as well as Exhibit J2 (letter dated 10th December, 1980 from 1st defendant stating that plaintiff's appointment as Pensions Consultants to it (1st defendant) had been terminated with effect from 31st December, 1980). I cannot decipher from them when placed side by side with the evidence adduced at the trial, upon what basis the trial court could have found in favour of the plaintiff for the sum of N325,000 i.e. against 1st and 2nd defendants, said to represent 5 years commission as an award based on a reasonable notice when no such stipulation for a reasonable notice can be gathered from Exhibit 'A' or any other exhibits relating to the entire transaction for that matter. Nor can the reduced sum of N35,000 which the Court of Appeal, falling into the same error as the trial court awarded in his (plaintiff's) favour as special and general damages, be justified in view of all the surrounding circumstances including the plaintiff's showing that there was no abrupt

discontinuance by the 1st defendant's business with him since January 1980. What in essence I have been saying is that the 1st defendant's acts did not amount to a breach of the contract it entered into with the plaintiff, Afortiori, the 1st defendant is not liable in damages to the plaintiff. Question 1 which therefore asks whether the
5 Court of Appeal was right in confirming the decision of the trial court on the liability of the 1st defendant for breach of contract, is accordingly answered in the negative.

If issue I is answered in the negative, then issue I which is its
10 natural off shoot and a logical concomitant which enquires into whether the court was right in its assessment of the damages due to the plaintiff from the breach, would also perforce be answered in the negative.

I do not feel that this judgment will be complete without my
15 remarking, more in passing than in condemnation, that although no violence had been done to the plaintiff's case as he presented it in the two courts below, in a case where he is the alter ego of his company than went by various names under whose canopy he did all the business giving rise to instant case, it is more in tune and always advisable
20 to head such action by stating the appellations of "Chief I.A. Ojomo: ("Carrying on business under the Trade Name (s) of)"

For the fuller reasons contained in the lead judgment of my
learned brother Ogundare, J.S.C. with which I had concurred, the
25 plaintiff's appeal be and is hereby dismissed. The 1st defendant's cross-appeal succeeds and it is accordingly allowed. There shall be costs assessed in 1st Defendant's favour for N1,000 only.

Appeal dismissed.

Cross-appeal allowed.

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