

SUPREME COURT OF NIGERIA

14TH MAY, 1993 SC.122/1988

**CORAM:- M. BELLO, A. G. KARIBI, S. KAWU,
O. OLATAWURA, M. E. OGUNDARE, JJSC**

DR. BEN O. CHUKWUMAH APPELLANT
AND
SHELL PETROLEUM DEVELOPMENT
COMPANY OF NIGERIA LIMITED RESPONDENT

CIVIL CAUSES -Wrongful termination of employ
ment-whether allegations of hatred,
malice, etc are useful - when no
reason for termination was given.

CONTRACT OF SERVICE - Payment in lieu of notice of termi
nation-where no payment nor
notice was given before termination
- whether termination is wrongful

CONTRACT OF SERVICE - Claim for declaration that it is still
subsisting - cannot be granted - save
special circumstances exist

DAMAGES - For wrongful termination of
employment - how calculated

LANDLORD & TENANT - Allegation of trespass against Land
lord - failure to prove same -
implications thereof

FACTS

The Appellant, a medical practitioner, was employed by the Re-
spondent Company as a general duties industrial medical officer under a
contract of agreement executed between the parties. Appellant performed
so well that his appointment was confirmed after one year. It would appear
that his relationship with his employer became strained after few years.

Respondent acting under the provisions of the parties' contract of
employment terminated appellant's Appointment by a letter with effect

from the date of the said letter. No notice of termination was given. Respondent merely promised to pay Appellant's salary in lieu of notice in due course. Appellant was occupying Respondent's premises for which he paid rent. Respondent gave him a month's notice to vacate the premises. It was Appellant's allegation that Respondent ejected him from the house *vi et armis* (with force).

Appellant filed an action against Respondent in the former Bendel State High Court for a declaration that his dismissal was wrongful, or in the alternative the sum N385,529.00 being compensation for loss caused to him by the Respondent in acting maliciously, capriciously, etc, to his detriment. He claimed N100,000.00 damages for trespass *vi et armis* and an injunction restraining Respondent from disturbing his possession. He sought to rely on policy letter written by the NNPC to Respondent as a joint venture agreement with statutory flavour to his benefit. Appellant's action failed and was dismissed in toto at both the trial court and Court of Appeal. On his further appeal to the Supreme Court, save that his termination was declared to be wrongful, his appeal was dismissed, the decisions of the two lower courts being upheld.

HELD (unanimously dismissing the appeal, only allowing the point as to the wrongfulness of termination of Appellant's employment)

1. Allegations of bad faith, hatred, malice, etc. concentrated upon by the Plaintiff/Appellant in his pleadings and evidence are of no consequence in determining whether or not his contract of employment was lawfully terminated by the Defendant/Respondent, considering that no reason was given for the termination. (p. 108)
2. A party seeking to put an end to a contract of service that provided a particular length of notice or payment in lieu, must pay to the other party the salary in lieu of notice at the time of termination of the contract. Offering to pay salary in lieu of notice in the letter of termination is not enough. (p. 110)
3. Termination of the Appellant's employment by the Respondent was wrongful being in breach of the contract between the parties

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since the Respondent on the date of the termination failed to give two months notice nor pay two months salary in lieu of notice as provided in the contract agreement. (p.111)

4. Respondent's letter of termination (Exhibit 14) is effective to terminate the contract even if wrongfully and the Appellant admitted as much in his statement of claim. (p. 111)
5. A declaration that a contract of service still subsists will rarely be made since under the general law the court will not grant specific performance of a contract of service. Special circumstances will be required before such a declaration is made and its making will normally be in the court's discretion. (p. 111)
6. Special circumstances have been held to arise where the employment contract has a legal or statutory flavour making it more than the ordinary master & servant relationship or where a special legal status such as tenure of public office is attached to the contract of employment. (p. 111)
7. Although the list of such special circumstances may not be exhaustive, there is no special circumstance to warrant a declaration being made in favour of the Appellant, more so when he admitted breaching a term of the contract by engaging in private medical practice. (p. 112)
8. The Appellant's employment having been wrongfully terminated he is entitled to damages which on legal authorities is only limited to what the Appellant would have earned over the period of notice. (p.112)
9. Exhibit C, a circular letter by NNPC to oil companies sought to be relied upon by the Appellant as a Joint Venture Agreement cannot be made the basis of his action unless it is incorporated into his contract of service, the said Exhibit C was never so incorporated and as such it gives the Appellant no cause of action against the Respondent. (p. 119)

10. Since contractual notice to quit was duly given to the Appellant, if
he remained in possession after expiration of notice he would
become a trespasser. But that would not give the Respondent right
to forcibly evict him. Otherwise, Respondent would be liable to
Appellant in trespass irrespective of whether he is a tenant or
5 licensee. (p. 121)

11. Although Appellant made allegations of forcible eviction against
the Respondent Company, he failed to prove the allegations as
can be seen from available evidence. (p.121)

10 12. Possibility of use of some unorthodox method by the Respondent
in securing Appellant's vacation of the house, such as preventing
the Appellant and his visitors from gaining entrance into the estate
is not the same thing as saying that trespass, as pleaded, was proved.
15 (p. 122)

13. As there is no reason to disturb the concurrent findings of the two
lower courts, Appellant's claims for damages for trespass and
injunction were rightly dismissed. (p. 122)

20 PER KARIBI-WHYTE JSC *"If there is right to do an act the fact
that the motive for doing the act is bad will not affect its validity or
legality. Similarly where there is no right, or the thing done is
illegal, the purity of the motive or magnanimity of the act done
25 will not alter the legal consequence."* (p. 138)

PER KARIBI- WHYTE JSC *"It is a well established principle of
the common law, and of Nigerian law, that ordinarily a Master is
entitled to dismiss his servant from his employment for good or for
30 bad reasons or for no reason at all. The common law recognises
and respects the sanctity of contracts. The Latin Maixim Pacta
sunt servanda is a sacred doctrine for the preservation of contracts
which is entitled to the greatest respect. Hence where parties have
reduced the terms and conditions of service into an agreement,
35 the conditions must be observed".* (p. 141)

REPRESENTATION

Chief Olisa Chukura, SAN (with him, C.O. Scott-Emakpor and C.O. Chukura), for the Appellant

T.J.O. Okpoko (with him, C.E. Mogbolu), for the Respondent

CASES REFERERED TO:

- | | | |
|-----|---------------------------------------------------------------------------------|----|
| 1. | Addis v. Gramophone Company Ltd (1909) AC 488 | 5 |
| 2. | Olaniyan & ors v. University of Lagos (1985) 2 NWLR 559 | |
| 3. | Shitta - Bey v. Federal Public Service commission (1981) 1 SC 40 | |
| 4. | Ewerami v. African Continental Bank Ltd (1978) 4 SC 99 | |
| 5. | Francis v. Kuala Lumpur Councilors (1962) 3 ALL E.R. | 10 |
| 6. | Hansen v. Radcliff U.D.C. (1922)2 CH 507 | |
| 7. | Nigeria Produce Marketing Board v. Adewunmi (1972) 1 ALL N.L.R. 870 (pt 2) | |
| 8. | International Drilling Company Nig. Ltd v. Ajijala (1976) 2 SC 115 | 15 |
| 9. | Akinfosile v. Mobil (1969) N C.L.R. 253 | |
| 10. | W.N.D.C. v Abimbola (1966) 1 ALL N.L.R. 159 | |
| 11. | College of Medicine of University of Lagos v. Dr. S.A. Adegbite (1973) 5 SC 149 | |
| 12. | Tweddle v. Atkinson 1B & s 393/1881-83 ALL E.R. 369 | 20 |
| 13. | Dunlop Pneumatic Tyre Company Ltd v. Selfridge and Company Ltd (1915) A.C. 847 | |
| 14. | Morohunfola v. Kwara State College of Technology NWLR 732 | |
| 15. | Ajayi v. Texaco Nigeria Ltd (1987) 3 NWLR 589 | |
| 16. | Hill v. Parsons & CO. Ltd (1972) A.C. 305 | 25 |
| 17. | Bello v. Eweka (1981) 1 SC 101 | |
| 18. | Jules v. Ajani (1980) 5 - 7 SC 96 | |
| 19. | Taiwo v. Kingsway stores Ltd (1950) 19 N.L.R. 122 | |
| 20. | Fashanu v. Government of Western Region (1955-56) WRNLR138 | |
| 21. | Mellstrom v. Garner (1970) 2 ALL E.R 9 | 30 |
| 22. | Guaranty Trust Co v. Hannay (1951) 2 K.B. 572 | |
| 23. | Mayor of Bradford v. Pickles (1895) A.C. 587 | |
| 24. | Webb v. England (1860) 29 Bear 44 | |
| 25. | Lumley v. Wagner (1852) 1 De G.M. & G 604 | |
| 26. | Konski v. Peet (1915) 1Ch. 530 | 35 |
| 27. | Niger Insurance Co. v. Abed Brother Ltd (1976)7 SC 35 97. | |

- 28. Adewunmi v. Nigerian Produce Marketing Board (1972) 1 ALLN.L.R. 980.
- 29. Hadley v. Bazendale (1854) 9 Ex 341
- 30. Mann Poole & Co. Ltd v. Agbaje (1922) 4 NLR 8
- 31. Garabedian v. Janakani (196.1)1 ALL NLR 177
- 5 32. Sob; & a-2Hamowo v. Federal Public Trustee (1970) 1 ALL N.L.R 257
- 33. Sule v. Nigerian Cotton Board (1985) S.C. 62
- 34. Nnadozie v. Oluoma (1963) 7 ENLR 77
- 35. Otegbade v. Adekoya (1962) 2 ALL N.L.R. 52
- 10 36. Oyeledun v. Somoye (1960) WNLR 162
- 37. Barclays Bank of Nigeria Ltd v. Ashiru & ors (1 978) 6 & 7 SC 99
- 38. Ojukwu v. Governor of Lagos State (1987) 2 NWLR (pt 10) 806
- 39. Torbett v. Faulkner (1952) 2 TLE 659

15 **STATUTES AND RULES REFERRED TO**

- 1. Rent Control And Recovery of Residential Premises Edict No.4 1977 of Bendel State
- 2. N.N.P.C. Act 1977 No. 33
- 20 3. N.N.P.C. Act 1977 s, 54 (i) (g), 4(1) (h) and s.5 (i) (e) (now s. 5 (1) (g) 5(1) (h) and 6 (1) (e) Cap 320, Vol. xviii Laws of the Federation of Nigeria 1990

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LEAD JUDGMENT BY OGUNDARE JSC

The plaintiff, Dr. Ben O. Chukwumah is a registered medical practitioner and a specialist in obstetrics and gynecology. In October 1975 he was offered (and he accepted) a locum appointment by the Shell Petroleum Development Company (Nig) Ltd, as a medical officer in the company's service at its Port-Harcourt branch. By a letter dated 26th November 1976 the company offered him (and again he accepted) a regular appointment as a general duties Industrial Medical Officer at its Warri branch with effect from 17th December 1976. He performed so well that a year later his appointment was confirmed and he became a member of the Shell-BP Contributory Pension Fund and was entitled to other benefits other employees of the company enjoyed. It would appear, however, that relations between him and employer soon became strained and by a letter dated 18th August 1981 his appointment with the Company was terminated with effect from the date of the letter.

While in the employ of the Company, the plaintiff was residing with his family in a house provided by the Company and situate within its premises at Warri. With the termination of his employment, the Company gave him a month's notice to vacate the house. According to the plaintiff, he was ejected from the house on 15th October, 1981.

Aggrieved by the termination of his employment and his ejection from the company's house he occupied as a paying tenant, plaintiff sued the Company in the High Court of the former Bendel State, in the Warri Judicial Division claiming:

"(1) A declaration that the defendants' letter dated 18th August 1981 addressed by the defendants' branch at Warri to the plaintiff at Warri by which the defendants purported to terminate the employment of the plaintiff with the defendant company is actuated by malice and bad faith, is grossly unreasonable and capricious and is ineffective to terminate the plaintiff's said employment.

(2) Further and in the alternative, the plaintiff claims from the defendants the sum of N385,529.00 (Three hundred and eighty five thousand, five hundred and twenty nine Naira) being compensation for the loss caused to the plaintiff by the defendants by reason of their so acting maliciously, capriciously, grossly unreasonably and in bad faith to the detriment of the plaintiff.

(3) The plaintiff also claims the sum of N100,000.00 (one hundred thousand Naira) being damages for trespass in that the defendants on 17th September 1981 invaded the residence of the plaintiff situate at 4

Benue Road, Ogunu, Warri, vi et armis, which at all material times is occupied and is in possession of plaintiff and therein disconnected the electric power and water supply to the premises to the inconvenience of the plaintiff and generally committed sundry, wanton acts of trespass and annoyance in the said premises in the bid improperly and unlawfully to oust
5 *the plaintiff from possession.*

(4) An injunction restraining the defendants, their servants and/or agents from disturbing the possession of the plaintiff of the said premises."

Needless to say that the company resisted the claim.

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Pleadings having been ordered and exchanged and amended with leave of court (the plaintiff also filing a reply to the amended statement of defence), the case proceeded to trial at the end of which, after addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found that:

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"The plaintiff is not entitled to any of the reliefs claimed by him. I hold that he is only entitled to the two month's salary in lieu of notice and other dues which the company stated in his letter of termination that it would credit him with. Subject therefore, this action is dismissed."

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Being dissatisfied with this judgment, the plaintiff unsuccessfully appealed to the Court of Appeal. He has now further appealed to this Court upon five grounds of appeal which, without their particulars read as follows:

"1. The Court of Appeal erred in law in its conclusion that the
25 circumstances under which a court could grant the declaration sought are:

'such circumstances arise where the employment has statutory flavour and creates an atmosphere relatively different from the ordinary relationship of master and servant or where the person dismissed or terminated
30 *occupied a special legal status such as tenure of public office..... '*

and by refusing thereby to allow the appeal from the refusal of the High Court to grant the declaration sought.

35 2. The Court of Appeal erred in law in the construction which it placed on the contract of service when it held:

"The offer to pay the money in Exhibit 14 to my mind sufficiently comply with the respondent's obligations as per Clause 11 of Exhibit 11.....I cannot accept the proposition that the money must be paid before the

termination takes effect.'

3. The Court of Appeal erred in law in failing to consider all the issues of law raised in the complaint relating to the appeal from the trial court's refusal to grant the claims for trespass and injunction by limiting its consideration to the questions: Whether the appellant was a licensee or a tenant under the Rent Control and Recovery of Residential Premises Law 1977 of Bendel State and that of issue estoppel. 5

4. The Court of Appeal erred in law in upholding the decision of the High Court which held that Exhibit 'C' a circular letter to Oil Companies by the NNPC, as agent of the Federal Government, does not form part of Exhibit 'N17' and that only the term of Exhibit 17, must regulate the rights and obligations of the appellant and the respondent. 10

5. The Court of Appeal erred in law when instead of dealing with the issues raised by the appellant, it formulated new issues and foisted them on the issues formulated by the respondent in his brief, when there was no suggestion that the issues as stated by the appellant failed to reflect accurately the grounds of appeal. 15

Pursuant to the rules of this Court, the parties, through their counsel, filed and exchanged their respective written briefs of arguments. In the appellant's brief, the following questions are set down as calling for determination in this appeal, that is to say: 20

"(i) Are the special circumstances upon which a Court should exercise its discretion to make a declaration that a termination of employment is wrongful limited to 'where the employment has statutory flavour and creates an atmosphere relatively different from the ordinary relationship of master and servant or where the person dismissed or terminated occupied a special legal status such as tenure of public office?' 25

(ii) What is the true and correct position in law in respect of a lawful determination of a contract of employment which is determinable by two months notice or the payment of two months' salary in lieu of notice - is the contract lawfully determined where neither the appropriate notice under the contract is given nor actual payment or tender of salary in lieu of notice? 30 35

(iii) Was the appellant a tenant or a licensee in the premises which he occupied of the respondent at 4 Benue Road, Ogunu Residential Area - AND if he was a tenant (OR whether or not he was a licensee therein) was

it not a breach of the tenure for the respondent to have:

(a) dispossessed the appellant and his family without due compliance with the provisions of the Rent Control And Recovery of Residential Premises Edict, No.4 of 1977 of Bendel State?

(b) ousted the appellant and his family during the pendency of a claim for injunction to restrain the respondent from turning the appellant out of possession?

(iv) Was the appellant not entitled to the damages claimed for trespass, and to the injunction prayed for to restrain his ouster, pendente lite?

(v) Can the relationship between the appellant and the respondent be isolated (or otherwise completely severed) from the expressed policy of the Federal Government of Nigeria communicated in Exhibit C, which the Nigerian National Petroleum Corporation (NNPC) was enabled to make in furtherance of its statutory functions and powers contained in the NNPC Act 1977 No.33, or otherwise ignored?"

15 For his part, learned Senior Advocate appearing for the Defendant Company set out the following four questions in his brief:

1. Were the learned Justices of the Court of Appeal wrong in affirming the judgment of the learned trial Judge dismissing the appellant's claim for the declaratory relief having regard to the state of the law and the facts established?

2. Where a contract of employment contains a mutual right of either the employer or the employee to terminate the said employment, can the exercise of that contractual right of termination be questioned on the ground that such exercise was actuated by malice, bad faith, improper motive etc, or put in another way, were the Justices of the Court of Appeal wrong in affirming the decision of the learned trial Judge that the appellant's contract of service with the respondent as evidenced by Exhibit N17 was rightly terminated by Exhibit N14?

3. Were the learned Justices of the Court of Appeal wrong in upholding the learned trial Judge's conclusion that it is Exhibit 17 (and not exhibit C) which regulated the right and obligation of the appellant and respondent in respect of appellant's employment. Did Exhibit in fact take away from the respondent, its contractual right to terminate the appointment of the appellant as provided for in Exhibit 17?

4. Were the learned Justices of the Court of Appeal wrong in upholding the judgment of the learned trial Judge dismissing appellant's claim for trespass

in this action?"

Having regard to the judgment appealed against and the grounds of appeal, it is my view that the questions as formulated in the respondent's brief are to be preferred. I must observe however that the two sets of questions are not too dissimilar. For the purpose of the determination of this appeal, I shall nonetheless adopt the questions as formulated in the appellant's brief. 5

Two exhibits stand out clearly in this appeal. They are exhibits N17 - the letter by which the plaintiff was offered employment by the defendant, and exhibit N14 dated 18th of August 1981 by which plaintiff's employment was terminated by the defendant. As these two exhibits feature prominently in this matter I shall set them out in extenso at this stage of this judgment. Exhibit "N17" reads: 10

*"THE SHELL-BP PETROLEUM DEVELOPMENT COMPANY OF
NIGERIA LIMITED POST OFFICE BOX 230, WARRI
NIGERIA* 15

DATE: 1/12/76

*TO: Dr. Benedict O. Chukwumah,
Present.*

Dear Dr. Chukwumah, 20

CONTRACT OF SERVICE NSS

We are pleased to advise you that we hereby offer you employment as a member of the Senior Staff of our company. 25

So that there may be a clear understanding of the terms of your employment, we are setting them out in this letter. They are as follows:

*1. You shall be employed as from 17th December, 1976.
2. Your place of engagement is Warri.* 30

3. After and if you complete one year's service you will be formally confirmed in your employment and you will be entitled, subject to the consent of the Trustees, to join the Company's Provident and Pension Fund. 35

4. Your salary will be at the rate of N11,502.00 per year, subject to such increases as we may grant to you from time to time at our discretion.

5. We undertake during your service to grant you such allowances, privi-

leges and benefits as we may decide from time to time.

6. You agree during your employment to give your whole time service (including rest days & Public Holidays if the work so requires) to us or any of our Associated Companies in accordance with the orders and directions from time to time given to you by us, to work and reside in such places in
5 the Federal Republic of Nigeria or elsewhere as we may from time to time require, and to obey all applicable rules, regulations and other practices from time to time in operation for the guidance and conduct of staff employed by us, or by any of our Associated Companies.

7. If it should be necessary, in pursuance of your employment to travel by
10 air, you hereby agree to be prepared to fly by fixed wing aircraft or helicopter of any recognised airline or owned or chartered by us.

8. In cases of illness, duly certified by our Medical Officers, which prevents you from performing your normal duties, we undertake to pay your full salary to a maximum of 28 days absence per year. Should your illness
15 extend beyond that maximum, your case shall be reviewed by us and our decision regarding further payments will be final. No payments whatsoever will be made if the illness is due to your negligence or misconduct.

9. You will be entitled to 36/- consecutive days' leave after each year of
20 service.

10. You will be required to make your own housing arrangements.

11. You or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one month's
25 notice in writing, or by paying one month's salary in lieu of notice. On the confirmation of your appointment, the period of notice shall be two months, or two months' salary in lieu of notice and on the completion of five years of service, the period of notice shall be three months, or three months' salary in lieu of notice.

30 12. We shall have the right at any time, summarily to dismiss you, for any cause which justifies summary dismissal, including but not limited to, serious misconduct, dishonesty, actions considered prejudicial to our interest or actions conflicting with your obligations under Clauses 6 and 13 of this
35 letter. In case of such dismissal, you shall not be entitled to any notice or payment in lieu.

13. You hereby acknowledge that you have read our rules relating to confidential information and inventions attached to this letter. You hereby agree to be bound by all the undertakings of the said rules which form part of this

letter of agreement.

Please confirm your agreement and acceptance to the above terms and conditions by completing, dating and signing over a 15k stamp, the declaration on the attached duplicate of this letter.

Yours faithfully,

*For: THE SHELL-BP PETROLEUM DEVELOPMENT
COMPANY OF NIGERIA LIMITED*

(SGD)

E.O. UGHOVWA

HEAD PERSONNEL SERVICES

TO: The Shell B.P. Petroleum Development Company of Nigeria Limited.

I, DR. BENEDICT ODIROMIWE CHUKWUMAH having read the foregoing letter and the rules concerning confidential information and inventions, accept employment with you on the terms and conditions set out therein and I agree to be bound by these terms and conditions in all respects.

(SGD)

Dr. B.O. Chukwumah"

The penultimate part of exhibit N 14 also reads as follows:

Dear Dr. Chukwumah,

Termination of Appointment

We refer to our recent discussions and hereby confirm that, in accordance with Clause II of your contract of Service dated 1st December 1976, your service will no longer be required as from today.

As at 17th August 1981 you were due 24 days' proportionate leave and a proportionate leave allowance of N1,189.16 for your service during the period 7/12/80 to 16/8/81.

Your final date on our payroll will be 18/9/81 (which includes eight (8) days' leave brought forward from your last leave), up to which date we shall pay you your current basic salary and applicable standard allowances. In addition, we shall pay you the follows (sic):

- 1. Two months' basic salary in lieu of notice.*
- 2. Your entitlement in the Shell Petroleum Development Company of Nigeria Limited Non-Contributory Pension Fund.*
- 3. Pro-rated end-of-year bonus.*
- 4. Your proportionate leave allowance stated above.*

From the above entitlements (but with the exception of Pension Fund entitlements) we shall make the usual monthly deductions for PAYE Income

Tax, National Provident Fund and Shell Medical Schemes.

The exact details on the payments and deductions referred to above will be included in a confirmatory Statement of Account which will be forwarded to you separately in due course. We would, therefore, require your future contact address.

5 *We request you contact the Staff Supervisor (PERW/11) in Personnel Services to clarify any points you may have on the above and to surrender your Shell Identity Card and Driving Permit. You should contact FIN/133 to complete certain documents in connection with the payment of*
 10 *your final entitlements.*

We normally offer to our employees leaving our service the opportunity to undergo a routine exit medical examination with our Medical Department. If you wish to avail yourself of this facility, please contact our Medical Department to make the appointment. However, if you are not
 15 *interested in the offer, would you please sign and return to us the attached waiver form.*

We would also advise you that as per Clause 12 of the Tenancy Agreement for use of your residence at No.4, Benue Road, Ogunu Residential Area, we now give you one month's notice to vacate the premises. By
 20 *16th September, 1981, we expect you to move out all your personal belongings from that house and leave the house in a habitable condition as it was when it was allocated to you.*

Finally, we thank you for your services with this Company. Your certificate of service is attached.

25 *Yours sincerely,*

Sgd. A. Moody-Stuart
Divisional Manager - West"

30 *These two exhibits are crucial in determining the terms of the contract of employment entered into between the plaintiff and the defendant and whether those terms were complied with when the defendant-terminated plaintiff's employment on 18th August, 1981. Having said as much, I now proceed to consider the merits or otherwise of this appeal adopting as I have indicated earlier, the questions as formulated in the appellant's brief.*

35 **QUESTIONS (1) & (2):** In his amended Statement of Claim, plaintiff pleaded inter alia as follows:

"7. The plaintiff was by being a confirmed employee entitled to

remain so till age of fifty-five years.

8. *The plaintiff's salary at the time of his removal from employment by the Company was N21,405.00 per annum. xxxxxxxx*

9. *The Company's policy permitted its Medical Doctors to engage in private practice; and all the Nigerian Doctors, including the plaintiff, took advantage of this policy, keeping strictly to the conditions laid down by the company for such private practice. The Company in a report referred to in paragraph 10(ii) acknowledged that the plaintiff's private practice did not engender any conflict of interest.*

10. *In or about 1978, the Company's Senior Medical Officer, Dr. Nya without any ascertainable or just cause, developed intense hatred against the plaintiff and proceeded unreasonably and capriciously to find fault in everything the plaintiff did.*

11. *Actuated by hatred, caprice, malice and improper motive, Mr. M. Moody Stuart, tried to cajole the plaintiff into resigning his appointment, but the plaintiff let it be known that as he wished to serve the company until retiring age had no intention of resigning his appointment.*

12. *Mr. Moody-Stuart purporting to act for the Company, there-upon unlawfully, but effectively, removed the plaintiff from his employment with the company by means of a letter dated 18th August. 1981, in addition to other physical threats by the servants and agents of the company.*

13. *The plaintiff will at the hearing contend that the said letter by which he was removed from his employment was actuated by malice and bad faith and is grossly unreasonable and capricious and ineffective to terminate the plaintiff's said employment.*

14. *The plaintiff avers that the company has not tendered to the plaintiff any of the terminal benefits which it referred to in its letter dated 18th August, 1981."*

There is nothing in exhibit N17 to denote the duration of the contract of employment plaintiff entered into with the defendant but clauses 11 and 12 of paragraph 2 of the said exhibit provide the manner of putting the contract to an end. Although plaintiff pleaded in paragraph 7 of his amended Statement of Claim that as a confirmed employee of the defendant, he was entitled to remain in service until age 55 years (a fact denied by the defendant), led no evidence in proof of this averment other than his ipse dixit on the issue when he said -

"The retiring age for male employees is 55 years." Plaintiff herself not produced any document to prove that, as a confirmed officer, he was

entitled to remain in service until age 55 years.

Be that as it may, the main complaint of the plaintiff was that his termination was actuated by malice. The learned trial Judge in his judgment dealt with this issue when he said:

"He sought to establish that his termination of appointment was in
 5 motivated and in fact the claim as stated on the Writ of Summons and
 incorporated by reference in the amended statement of claim uses such
 epithets as actuated by malice, bad faith, grossly unreasonable, and
 capricious. I must say that in an action like this such issues do not go to
 enhance the entitlements of a plaintiff. They do not indeed help his cause
 10 of action. They simply do not matter. They were somehow raised in *Addis*
v. Gramophone Company Limited (supra) (1909) AC 488) when the plaintiff
 claimed damages of 600 pounds because of the abrupt and oppressive way
 in which his services were discontinued but Lord Loreburn LC said that
 that contention could only breed barren controversies and increase
 15 costs (Square brackets are mine)

Later in the judgment he added:

"That being so the matter of the termination of appointment cer-
tainly resolves itself upon contractual relationship in law as the plaintiffs
employment was governed by the contract into which he entered at the
 20 *time of his appointment. The plaintiff himself said it all when he was con-*
fronted with the relevant documents. The circumstances in which the em-
ployment was terminated, the injured feelings of the plaintiff or the incon-
veniences he may have suffered cannot be taken into consideration so long
as the termination is in accordance with the terms of the contract:'

25 I agree entirely with the learned trial Judge. Both in his pleadings
 and evidence the plaintiff concentrated so much on his allegations of bad
 faith, hatred, malice etc; but all these are of no consequence in determin-
 ing whether or not his contract of employment was lawfully terminated by
 the defendant, considering that no reason was given for the termination.

30 Apart from the front on which the plaintiff predicated his claims,
 two new fronts were opened both in the pleadings and evidence and par-
 ticularly in the grounds of appeal. These create issues for determination
 and submissions of counsel before us. The two new fronts are (1) non-
 payment by defendant of plaintiff's salary in lieu of notice at the time of
 35 termination and (2) non-observance by the defendant of the circular issued
 by the N.N.P.C. I shall now proceed to consider these two new fronts not-
 withstanding that claims (1) & (2) remain unamended. The first new front
 is the basis of question 2 formulated by the plaintiff in his brief. The second
 is covered by Question 5.

The first front deals with the effect on plaintiff's termination of service of non-payment of his two months' salary in lieu of notice at the time of his termination. Exhibit N17 has reduced into writing the terms of the contract between the parties and it is this document that will determine whether or not plaintiff's employment was lawfully terminated by exhibit N14.

That being so therefore, one has to look at the contract. Clause 11 of Exhibit N17 provides for the giving of notice or the payment of salary in lieu of notice. The plaintiff's appointment having been confirmed and he not having served up to 5 years at the time his appointment was terminated, was entitled only to two months' notice or two months' salary in lieu thereof. Exhibit N14 that is, the letter of termination did not give any notice as the termination was to take effect from the date of the letter. Paragraph 3 of Exhibit N14 states that two month's salary in lieu of notice would however, be paid to the plaintiff. Plaintiff, both in paragraph 19 of his amended statement of claim (by implication though) and in his evidence, denied that he was paid any salary in lieu of notice.

In paragraph 7 of its amended statement of defence the defendant pleaded inter alia:

"The defendant denies paragraphs 16, 17, 18, 19, 21 and 22 of the Statement of Claim and states that plaintiff's employment was lawfully terminated by its letter dated the 18th day of August, 1981 in accordance with plaintiff's contract of service. It further states that in terminating plaintiff's employment, it was not actuated by malice either of its own or that of any other of its employees. Defendant shall contend that the plaintiff's employment having been terminated in accordance with the contract of service, the motive (if there was one) which moved it to exercise its right under the contract is irrelevant. Plaintiff's terminal benefits were duly paid through his usual mode of payment to wit - through the bank but these have now been returned to the defendant with advise that plaintiff has closed his account. Defendant may rely on the relevant banking documents and states that it is not obliged to employ the plaintiff until any age or the age of retirement."

It would be observed that the paragraph above speaks of payment of terminal benefits but not payment of two months' salary in lieu of notice. On the latter entitlement the paragraph is silent. D.W.4 Biliaminu Akanni Babatunde, Controller of Finance with the defendant company who testified at the trial for the defence threw some light on the issue. He deposed: *"I know the plaintiff. He was a member of staff of Shell Company. He has since left. His entitlements at the time he left have not been received by him. The defendant/company did not refuse to pay him. On 25th November 1981 we instructed the First Bank of Nigeria Limited, Warri to pay his*

entitlements to his account with that bank in accordance with the normal practice of payment of salaries and other entitlements to Shell staff. That was the normal way we were paying the plaintiff while he was in the service of the company. We got two credit advices which the said bank sent to us saying they could not pay the plaintiff."

5 Cross-examined, he testified thus:

"It is true the plaintiff nominated the First Bank for the purpose of receiving his salary paid by Shell Company. It is true his appointment was terminated in August, 1981. It is true that after his appointment had been terminated he would not expect Shell to pay his salary for subsequent
10 *months. I would not be surprised if under the circumstances he closed his account with the First Bank. Exhibit O is for salary in lieu of notice.*

On re-examination, he said:

"The salary and other entitlements are paid through the bank nominated by a staff on engagement. The plaintiff's entitlements apart from his
15 *salary were also paid through the First Bank."*

What has emerged from the evidence of this witness is that payment of salary in lieu of notice was not made to the plaintiff through his designated bank until the 25th of November, 1981.

The question now arises - is the offer of salary in lieu of notice
20 made three months after the peremptory termination of plaintiff's employment in compliance with clause 11 of the contract of service between the parties? Learned Senior Advocate, Chief Chukura, for the plaintiff, submitted both in his brief and in oral argument before us that this would not be in compliance with the terms of the contract of service. He submitted that
25 payment of salary in lieu of notice must be made at the time of termination of employment. For the defendant, the learned Senior Advocate Mr. Okpoko submitted that as exhibit N14 made to the defendant an offer of two months' salary in lieu of notice, the court should hold that there was compliance with the terms of the contract. I observe that the learned Judges of the two
30 courts below appear to have favoured Mr. Okpoko's line of argument. With profound respect, however, they appeared not to have adverted their minds to the evidence of D.W.4 to the effect that payment was not made to plaintiff's bank until 25th November 1981. In my respectful view, where a contract of service gives a party a right of termination of the contract by
35 either giving a particular length of notice or payment of salary in lieu of the length of notice and the latter course is chosen, the party seeking to put an end to the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract. It is not enough that in the letter of termination he offers to pay salary in lieu of notice. Thus in the case on

hand, the defendant having terminated plaintiff's employment without giving him the required notice, must pay him at the time of the termination, salary in lieu of notice. Payment made three months after termination cannot be in fulfilment of defendant's obligation under clause 11. The defendant ought to have paid the salary either directly to the plaintiff or through his designated bank on 18th August 1981; and, where it is by payment into bank, the plaintiff must be so informed promptly. The payment into bank on 25th November 1981 cannot, in my respectful view, by any stretch of imagination, be said to be in compliance with clause 11. Consequently I must hold that when on 18th August 1981 the defendant terminated the appointment of the plaintiff it did so without giving him two months notice nor pay him two months' salary in lieu of notice as required by clause 11 of the terms of contract between the parties. In the circumstance, I must hold also that the termination of plaintiff's employment by the defendant on 18th August 1981 was in breach of the contract between the parties and was therefore, wrongful.

Plaintiff claimed for a declaration that:

"the defendants' letter dated 18th August 1981 addressed by the defendants' branch at Warri to the plaintiff at Warri by which the defendant purported to terminate the employment of the plaintiff with the defendant company is actuated by malice and bad faith, is grossly unreasonable and capricious and is ineffective to terminate the plaintiff's said employment."

Both the trial High Court and the appellate Court of Appeal rejected this claim. To the extent that the declaration is predicated on the letter of termination being "actuated by malice and bad faith", "grossly unreasonable and capricious" "and ineffective" to terminate the plaintiff's employment, I agree with the two courts below that the claim must fail. As I said earlier in this judgment, malice, bad faith etc, are non-issues in determining the lawfulness or otherwise of the termination of the contract. Nor would it be right to say that the letter exhibit N14 is ineffective to terminate plaintiff's employment. Of course the letter is effective to terminate the contract, howbeit wrongfully. Plaintiff admitted as much in paragraph 17 of his amended statement of claim.

Having held however that plaintiff's employment was not terminated in compliance with the terms of the contract between the parties, is he entitled to reinstatement which, in effect, is what the claim for declaration is all about? This issue has been dealt with exhaustively in the judgments of the courts below. The general law is that the court will not grant specific performance of a contract of service. Therefore, a declaration to the effect that a contract of service still subsists will rarely be made. Special

circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. There is a long line of cases in support of this proposition of law: *Olaniyan & Ors. v. University of Lagos* (1985) 2 NWLR (Pt.9) 559; *Shitta-Bey v. Federal Public Service Commission* (1981) 1 SC 40; *Ewerami v. African Continental Bank Ltd.* 5 (1978) 4 S.C. 99; *Francis v. Kuala Lumpur Council/ors* (1962) 3 All ER 633; *Hanson v. Radcliff UDC* (1922) 2 Ch. 507. Such special circumstances have been held to arise where the contract of employment has a legal or statutory flavour thus putting it over and above the ordinary master and servant relationship. Equally so where a special legal status such as a
10 tenure of public office, is attached to the contract of employment. While I am not prepared to hold that the list of special circumstances is exhaustive, I must say however, that in the appeal on hand I can see no special circumstance to warrant a "declaration being made in his favour having regard to his admitted breach of clause 6 of the terms of his contract with the defendant which required that during his employment he must give his whole
15 time service to his employer. In paragraph 11 of his amended statement of claim, he admitted that during his period of service with the defendant he engaged in private medical practice. Although he claimed in that paragraph that this was in accordance with the defendant's policy, he did not prove this policy. Paragraph 11 was not admitted by the defendant - see
20 paragraph 6 of the amended Statement of Defence. In conclusion I am of the view that the Court below was right in refusing to grant a declaration in favour of the plaintiff as claimed by him.

The plaintiff also claimed, in the alternative, the sum of N385,529.00 being "compensation for the loss caused to the plaintiff by
25 defendants by reason of their so acting maliciously, capriciously, grossly unreasonably and in bad faith to the detriment of the plaintiff". In effect, he is claiming that sum as damages for wrongful (for the reasons given, which reasons are clearly untenable) termination of his employment. On the face of claim (2) as it stands and for the reason that the motive for
30 terminating a contract is not a factor in determining its lawfulness or otherwise that claim could not stand and ought to be dismissed.

Having held however that his employment was wrongfully terminated, he is undoubtedly entitled to damages. On the authorities as they stand, he is only entitled to what he would have earned over the period of
35 notice. See *Nigerian Produce Marketing Board v. Adewunmi* (1972) 1 (Pt.2) All NLR 870 where *Fatayi-Williams* 1 S.C (as he then was) delivering the judgment of this Court said at p.875 of the report:

"Where, as in this case, the defendants/appellants have failed to follow the machinery laid down in the above provisions of paragraph 1402,

the measure of damages, as Mr. Lardner has rightly pointed out, is enough money to put the plaintiff/respondent in the same position as if such machinery has been followed. In other words, the plaintiff/respondent is only entitled to what he would have received had he been given the six months' notice provided for in paragraph 1402 of the conditions of service applicable to the plaintiff/respondent. Since his salary at the time of his dismissal on the 4th May, 1958 was 2,040.00pounds. per annum, he would be entitled to only 1,020pounds, in this respect." See also International Drilling Company Nigeria Ltd, v. Ajijala (1976) 2 SC 115; Akinjfosile v. Mobil (1969) NCLR 253; WNDC v. Abimbola (1966) 1 All NLR 159. See also Mayne and McGregor on Damages 12th Edition paragraph 608 et seq. 5 10

It is not in dispute in this case that exhibit N17 constitutes the contract between the two parties. The plaintiff admitted as much when in his evidence under cross-examination he said:

"I see exhibit N 17. It is the contract of service between me and the defendant company. Clause 11 is in respect of how appointment may be terminated by either party. It is true under this clause there is actual right by either party to terminate the contract of employment. It is true that at the time my appointment was terminated, I had not served 5 years. It is true that my appointment could have been terminated by either party by giving 2 months notice or 2 months' pay in lieu of notice." 15 20

Under the contract of service plaintiff's appointment could be terminated by the defendant by giving him two months' notice or pay him two months' salary in lieu of notice. As his appointment was summarily terminated on 18th August, 1981, plaintiff was entitled to two months' salary in lieu of notice. In my respectful judgment the court below was right in holding that is all that he was entitled to. In addition, however, he would also be entitled to other allowances for the period of two months normally enjoyed by him such as car allowance, et cetera. Equally so he would be entitled to his entitlement under the pension scheme. 25 30

QUESTION 5: It is convenient to deal with this Question at this stage. Plaintiff relies on Exhibit C in support of his claim to reinstatement. In his amended statement of claim he pleaded, inter alia, as follows: 35

"3. The Government of the Federal Republic of Nigeria is the majority shareholder in the Company holding therein 80% of the equity share capital of the company; and when it does not deal directly with the company, it acts through the instrumentality of the Nigerian National Petroleum Corporation.

15. *When the Company's functionaries believed that they had perfected their grand design unlawfully to remove the plaintiff from his employment they sought the concurrence of the majority shareholders, the Government of Nigeria (per the N.N.P.C.) in their plan but by letter (reference MD, 21,1) dated 26th June 1981, the N.N.P.C. gave its considered opinion, wholly and entirely rejecting the proposal to remove the plaintiff."*

Exhibit C is a circular letter by the NNPC to oil companies and dated 16th February 1978. It is a policy circular letter and reads in full:

10 "Nigerian National Petroleum Corporation
P.M.B. 10701
Lagos, Nigeria.

Ref. No. CABC/Co.II/Vol.5 16th February, 1978

To: All Oil Exploration & Production Companies,
15 Oilfield Service Companies,
Petroleum Refining Companies, And
Petroleum Products, Marketing Companies.

Sir,

EMPLOYMENT OF NIGERIANS

20 The Federal Commissioner for Mines and Power in his circular letter No. MMP3007/S.9/15 of 3rd March, 1972 drew the attention of local oil companies to some incidents connected with their employment of Nigerians which tended to obstruct and frustrate Government's policy of effective Nigerianization within the industry. Some companies have since tried
25 to co-operate with Government in that direction but there are still indications that the proper working atmosphere is not being created to facilitate the recruitment and retention of qualified and capable Nigerians. Various management tactics are sometimes employed to justify terminating the appointments of some Nigerian employees or to obtain their resignation
30 through frustration.

This unsatisfactory situation makes it necessary for me to ask you, once again, to re-examine your recruitment and employment policies and ensure that they do not conflict with the policies of Government and they conform with the principles of good personnel management. I can assure
35 you that it has never been the intention of Government to obstruct the normal process of administration and discipline within your organisations, but I cannot remain indifferent to any practice by the companies which would tend to hinder the active and meaningful involvement of Nigerians in an industry so vital to the economic survival of this country.

In order to remove any doubts as to the category and level of Nigerian staff covered by this circular, I wish to make it clear that all cadres of staff - professional, administrative, and technical- who have been confirmed in their appointments are included.

Probationary staffs are thus not covered by the circular. Those earning basic salaries less than N6,000.00 p.a. are also not covered. In addition, those companies which have not already submitted a full list of their Nigerian employees should do so indicating their dates of appointment, positions, qualifications and salaries.

A quarterly supplement indicating changes in the list, with reasons for such changes, should continue to be submitted not later than four weeks after the end of each quarter. These and similar submissions should be marked for the attention of the Manager, Manpower Planning & Development.

The procedure currently in force concerning cases of resignation and termination of appointment will continue. For the benefit of those companies not conversant with the procedure, whenever it is intended to terminate the appointment of an affected Nigerian employee or when such an employee indicates his intention to resign his appointment, the following particulars should in each case be forwarded to the Nigerian National Petroleum Corporation:

(a) The name, appointment, salary, length of service, nature of work, etc. of the employee.

(b) The reasons, fully documented, for termination or resignation, as the case may be.

(c) Terminal benefits accruing, or paid to the employee.

(d) The names, nationalities and academic qualifications of employee by whom they will be replaced, with particulars of appointments, salaries, etc, as in (a) above.

I attach a copy of the circular outlining the procedure for your information.

Final action on your part should await the views of the Corporation. Submission of these details will facilitate prompt disposal of cases.

Yours sincerely, 35

(SGD)

(COL. M. BUHARI)

COMMISSIONER FOR PETROLEUM

FEDERAL MINISTRY OF MINES AND POWER
PRIVATE MAIL BAG 1257
LAGOS, NIGERIA

5 Ref. No. MMP/3007/S.9/15 3rd March, 1972.

TO ALL OIL EXPLORATION COMPANIES
AND OIL MARKETING COMPANIES

10 Sir,

EMPLOYMENT OF NIGERIANS

My attention has been drawn to some disquieting incidents connected with the employment of Nigerians in the oil industry. For a long time, this Ministry has not been satisfied with the efforts made by oil companies to recruit and retain capable Nigerians. In recent months, various tactics have been used by the companies to terminate the appointments of senior Nigerian employees or to secure their 'voluntary' resignation. The result is that government's policy of Nigerianisation is being openly and flagrantly frustrated by oil companies.

2. This situation cannot be allowed to continue. Government has, so far, relied on the good faith and co-operation of the oil companies to support, and actively pursue, the policy of Nigerianisation. If oil companies behave as if that faith was misplaced and continue deliberately to obstruct the policy, it may be necessary to resort to legislation. For the present, however, I wish to advise you, in your own interest, to re-examine your recruitment and employment policies and ensure that they are strictly in accordance with the policies of Government as well as of a sound management.

3. In the meantime oil companies should submit to the Director of Petroleum Resources, within 14 days of the date of this letter, the names of all senior Nigerian employees (above skilled labour grades) whose appointments have been terminated or who have been made to resign, within the last six months. In each case, full particulars should be given of

- (a) the name, appointment, salary, length of service, nature of work, etc. of the employee;

- (b) the reasons, fully documented, for termination or resignation, as the case may be;
- (c) terminal benefits accruing, or paid, to the employee;
- (d) the names, nationalities and academic qualifications of employees by whom they were replaced with particulars of appointments, salaries, etc, as in (a) above. 5
4. In future, when it is contemplated to terminate the appointment of a senior Nigerian official (above the grade of skilled worker), or when such official gives notice of his intention to resign his appointment, the procedure outlined in items (a) and (b) of paragraph 3 above should be followed. 10
In the case of proposed termination of appointments, the information should be sent to the Director of Petroleum Resources well in advance of the action contemplated, and no final action should be taken by the company until the views of the Ministry have been conveyed to the company. In this connection, all companies to whom this circular is addressed should send, 15
within 14 days of the date hereof, a full list of senior Nigerians in their employment together with particulars of their positions, salaries, date of appointment, etc. A monthly supplement indicating changes in the list, with reasons for such changes should be submitted to reach him not later than two weeks after the end of each month. 20
5. Oil exploration companies have an obligation under the law to achieve a certain degree of Nigerianisation by a specific date. The procedures outlined above are intended both to help them in the achievement of this target as well as to protect the interests of all concerned. In the case of 25
oil marketing companies, any senior Nigerian employees will not be considered as being in the true spirit of the marketer's licence by virtue of which they operate.

Yours sincerely,
(Sgd.)

30

(ALHAJI SHETTIMA ALI MONGUNO)
COMMISSIONER FOR MINES AND POWER

Learned leading counsel for the plaintiff, Chief Chukura SAN relying on Exhibit C had submitted before the trial court that where the defendant sought to terminate the employment of an employee and NNPC did not give concurrence, the defendant could not terminate. In effect, what learned Senior Advocate was urging on that court was that Exhibit C must be deemed to be incorporated into the contract of service between the plaintiff and the defendant. This is what the learned trial Judge said on this 35

submission:

"There was the contention that the company did not comply with what has been referred to as the Joint Venture Agreement between the Nigerian National Petroleum Corporation and the company. The said Joint Venture Agreement was not tendered in court and whatever it contains is a matter of mere speculation for the purposes of this litigation. It was in no way incorporated by reference otherwise into the contract of service (Exh. the said contract and binding on the parties. Therefore only the terms of Exh. 17 must regulate the rights and obligations of the plaintiff and the company: see the Supreme Court per Coker JSC in *College of Medicine of University of Lagos v. Dr. S.A. Adegbite* (1973) 5 SC 149 at 162.

In law there is no privity of contract between the plaintiff and the company in respect of whatever was agreed between it and the Nigerian National Petroleum Corporation whereby the plaintiff may be permitted to derive any benefit thereunder. This principle of law that a stranger cannot sue upon a contract entered into between two parties, he not having furnished any consideration for it, has long been settled. As far back as 1861 in *Tweddle v. Atkinson* L.B. & S.393. reported (1881-83) All ER Rep. 369, it was held to be the law. *Dunlop Pneumatic Tyre Company Limited v. Selfridge and Company Limited* (1915) AC 847, the plaintiffs/appellants sought to derive benefit from an agreement between a company known as Messrs Dew and the defendants/respondents by suing upon it. It was held by the House of Lords that they could not. The observation of Viscount Haldane LC at pages 854-855 which is quite germane here is as follows:-

"..... the form of the contract which we have to interpret leaves the appellants in this dilemma, that if they say that Messrs. Dew contracted on their behalf, they gave no consideration, and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing, and it is in the writing that we must look for the whole of the terms made between the parties. These terms cannot, in my opinion consistently with the settled principles of English law, be construed as giving to the appellants any enforceable rights as against the respondents.

The Court of Appeal agreed with the learned trial Judge on this issue. I also think that the learned trial Judge was quite correct in this exposition of the law. It is more so that the plaintiff did not make non-observance of the policy in Exhibit C part of his case for wishing to set aside his termination. I have referred earlier in this part of my judgment to the

two paragraphs of his amended statement of claim touching on the relationship between the defendant Company and the Government of Nigeria. I can find nothing in those averments to suggest that Exhibit C was incorporated into Exhibit N17 and that it was plaintiff's case that non-observance of its contents rendered plaintiffs termination null and void. In any event, whatever the position of the NNPC in Exhibit B, it had been changed 5 by its subsequent letter Exhibit S wherein it took the position
- "However, we do appreciate that the strained relationship which has now developed between your management and Dr. Chukwumah does not provide a conducive (sic) atmosphere for the latter to perform properly as a medical doctor. For that reason, we would not object to Dr. Chukwumah 10 withdrawing his services from your company under the terms of his employment".

It is in evidence from the plaintiff that he was advised by the defendant to withdraw his services but he bluntly refused. He thus left the defendant with no choice but to exercise its rights under Exhibit N17. I must also 15 observe as was rightly done by the learned trial Judge, that the joint Venture Agreement was not put in evidence even though plaintiff, in paragraph 7(b) of his reply, said he would found on it. It is, therefore, difficult to say that the policy statement contained in Exhibit C was validly made by the NNPC and binding on the defendant. It certainly could not be made 20 the basis of an action by the plaintiff or any other employee, unless it is incorporated into the contract of service of such employee.

Both in his brief and in oral argument before us, Chief Chukura, SAN referred to sections 4(1)(g), 4(1)(h) and S(1) (e) of the Nigerian National Petroleum Corporation Act, No.3 of 1977 (now sections S(1)(g), S(25 I)(h) and 6(1)(e) Cap. 320, Vol. XVIII Laws of the Federation of Nigeria 1990). These sections read:

"5(1) Subject to the provisions of this Act, the Corporation shall be charged with the duty of - 30

- (g) doing anything required for the purpose of giving effect to agreements entered into by the Federal Government with a view to securing participation by the Government or the Corporation in activities connected with petroleum; 35
- (h) generally engaging in activities that would enhance the petroleum industry in the overall interest of Nigeria.

6 (1) The Corporation shall have powers to do anything which in its opinion is calculated to facilitate the carrying out of its duties under this Act

120 Chukwumah v. Shell Pet. Dev. Ltd. (1993) 5 KLR Ogundare JSC
including, without limiting the generality of the following, the power -

(e) to train managerial, technical and such other staff for the purpose of the running of its operations and for the petroleum industry in general."

I cannot see how these sections help the plaintiff or give his contract
5 of employment with the defendant company any statutory flavour as to constitute special circumstances for granting a declaration in his favour. Section 5 relates to the general duties of the NNPC while section 6 relates to its powers. It is my respectful view that unless it is so specifically empowered in the agreement entered into with the defendant company by the
10 Federal Government "with a view to securing participation by the Government or the Corporation in activities connected with petroleum" - in short, Joint Venture Agreement - the NNPC has no power under sections 5 and 6 involve itself in the day to day running of the defendant company.

I am satisfied, on the facts of this appeal, that Exhibit C was never incorporated into Exhibit N 17 and gives the plaintiff no cause of action against the
15 defendant company. In conclusion, I am of the view, and I so hold, that both the trial High Court and the Court of Appeal are right in their view of Exhibit C as not availing the plaintiff in this case.

20 QUESTIONS 3 & 4.-

These questions deal with plaintiff's claims for damages for trespass and injunction. The plaintiff pleaded thus:

"23. The plaintiff is a tenant of the Company at No.4, Benue Road, Ogunu, Warri in that the plaintiff had exclusive possession of the said premises,
25 paying rents therefore to the Company.

24. The Company without due compliance with the law caused its servants and agents to enter the said premises on 17th September, 1981, vi et armis which at all material times was occupied by and was in possession of the plaintiff, and therein disconnected the electric power and water supply to
30 the premises to the inconvenience of the plaintiff and generally committed sundry and wanton acts of trespass and annoyance in the bid improperly and unlawfully to oust the plaintiff from possession.

25. From 17th September 1981 to 15th October 1981, the company put
35 the premises under seize (sic) harassing the plaintiff and his family even though there was a subsisting interlocutory application for an injunction pending in court.

26. On 15th October 1981 with more than 10 Policemen the Company

barred the plaintiff and his family from the said premises without permitting the plaintiff to clear all his effects therefrom. Most of the plaintiff's personal property is still in the premises and the plaintiff has been refused ingress thereto to collect the same.

27. The plaintiff will at the hearing rely on all the affidavits and counter-affidavit filed in court in urging the interlocutory application for injunction and will also rely on the decision of the court thereon made on 15th October, 1981, to found a plea of estoppel per res judicata in respect of the Trespass herein complained of.

The learned trial Judge, after reviewing and evaluating the evidence led on this issue found the claim not proved. The Court of Appeal agreed with him. Trespass, of course, is a wrong against possession of land. It is not in dispute that by virtue of his employment, the plaintiff was let into possession of the premises situate at 4 Benue Road in the defendant Company's estate at Ogunu and was paying rent to the Company.

Under the contract by which he held the premises he was to quit the premises within one month of his ceasing to remain in the employ of the Company. When plaintiff's employment was terminated on 18th August 1981, he was given notice by the Company to quit the premises by 18th September 1981. If he remained in possession after that date, he would become a trespasser. But this fact did not give the defendant company right to forcibly evict him. If it did so, it would be liable to the plaintiff in trespass. It is immaterial, in my respectful view, that he was a tenant or a licensee.

Plaintiff had made allegations of forcible eviction against the defendant company. I have examined the evidence proffered in support of these allegations but I regret to say that I found them unproven. Plaintiff alleged that the defendant disconnected power and water supplies to his premises. But in his evidence he said:

"Electricity is supplied by NEPA and water by Bendel State Water Board. Electricity and water bills are now paid directly by Shell and deducted from the salaries of staff members."

Indeed, there is nothing in his evidence nor in that of his 2nd, 3rd and 4th witnesses to support his allegation of trespass. One is left with the evidence of plaintiff's wife (P.W.S), Mrs. Maureen Chukwumah. She testified thus:

"I recall Thursday the 17th September, 1981. My husband traveled that day to Benin to return the next day. On 18th September he did not come back. He telephoned about 9 p.m. to say that he had been barred from entering the Shell Residential area by Shell security Nigeria Policemen at the gate. He said as a result, he would spend the night in town with a friend. I was not surprised about his experience because earlier

that day at about 2.15 p.m. on my way back from a Dental Surgery I was prevented at the gate from entering the residential area by Inspector Benson Oniyara and Sergeant Akpovite who said they had instructions not to allow me into the area. I asked who gave the instruction they said it was the Management. I asked whether it was Mr. Moody-Stuart or Mr. Ademiluyi. They said it was both of them."

The witness gave further account of how she and her children were confined to within their premises for about 8 days and how eventually they vacated the premises. The learned trial Judge, commenting on the evidence of this witness, observed:

"Anyway, looking at her evidence as it stands I find it extremely difficult to see any issue of trespass. At the best what it tends to show may be stated as (a) unlawful imprisonment and (b) breach of contract in respect of the licence." The Court of Appeal agreed with this observation. Musdapher J.C.A., in his lead judgment observed:

"I entirely agree, that it was only Mrs. Chukwumah, the wife of the appellant who gave evidence that she was at first refused entry into the Shell Compound and later when she entered, she was debarred from leaving. There is also the evidence of some visitors who were refused entry. These to my mind are no facts of trespass or put it in the words used in the particular of claim - 'The defendants on 17th September, 1981 invaded the residence of the plaintiff situated at No. 4 Benue Road, Ogunu, Warri vi et armis' was not proved at all.

I have carefully read the evidence adduced, and I cannot find any proof that the respondents 'invaded' the premises aforesaid. In my view, the appellant had failed to make out a case for trespass and the Judge was justified in refusing to make an award for damages and order an award for an injunction."

I have no reason to disagree with the above observation. It may be that the defendant company used some unorthodox method in seeing to it that the plaintiff vacated the house, such as preventing plaintiff and his visitors gaining entrance into the estate thereby preventing them coming to the house where he lived with his family. It is not the same thing as saying that trespass, as pleaded, was proved. In view of this conclusion I consider it necessary to dwell in depth on the issue whether the plaintiff was a tenant or licensee in respect of the premises, the subject matter of the claim for damages for trespass and injunction. I have no reason to disturb the concurrent findings of the two courts below. I hold, therefore, that the claims for damages for trespass and injunction were rightly dismissed.

The net result of all I have been saying is that this appeal succeeds only on the point as to the wrongfulness of the termination of plaintiff's employment, he not having been given two months notice nor paid two

months' salary in lieu of notice at the time of the termination. Subject to this, I affirm the dismissal by the two courts below of his claims as contained in his writ of summons. As the authorities now stand, he is only entitled, as damages, to two months' salary in lieu of notice and, in addition, to his terminal benefits - all of which were awarded him by the two courts below. To that extent I affirm the judgment of the two courts below. 5
For the avoidance of doubt, plaintiff is entitled by way of damages not only to two months' basic salary but to other monthly allowances (for 2 months) normally enjoyed by him when in the service or the defendant and to prorated end of year bonus and proportionate leave allowance. The damages herein awarded are clear of any deductions such as enumerated in Exhibit N14. That is, those deductions are not to be made from the damages 10
herein awarded. In addition to the damages awarded, the plaintiff is to be paid his entitlement in the Company's Non-contributory Pension Fund. The orders for costs made in the two courts below are set aside. Each party is to bear its costs of this appeal. 15

BELLO CJN

I have had the advantage of reading in draft the lead judgment just delivered by my learned brother, Ogundare J.S.C. I agree with his reasoning and conclusions save that I would not go to the extent of holding that 20
where a contract is terminable by payment of salary in lieu of notice, the payment must be made at the time of termination of the contract.

I think the mode and time of payment of the salary in lieu of notice depends on the circumstance of each case. Thus in *Morohunfola v. Kwara State College of Technology* (1986) 4 NWLR (Pt.38) 732 at 744, the 25
Court of Appeal held the payment of the salary in lieu of notice to the Bank of the employee where his salaries had been ordinarily paid to be sufficient compliance with the term of the contract relating to payment in lieu of notice. As was the case in *Ajayi v. Texaco Nigeria Ltd.* (1987) 3 NWLR 30
(Pt.62) 577, the letter of termination of an appointment might also inform the employee that salary in lieu of notice and his other entitlement would be paid to him and the actual payment made thereafter. In *Olaniyan & Ors. v. University of Lagos* (1985) 2 NWLR (Pt.9) 559 a cheque for the 35
salary in lieu of notice was sent with the letter of termination.

In the case on appeal, the portion of the letter of termination relevant to the issue reads:

"We refer to our recent discussions and hereby confirm that, in accordance with Clause II of your Contract of Service dated 1st December, 1976, your service will no longer be required as from today.

5 *As at 17th August, 1981 you were due 24days' proportionate leave and a proportionate leave allowance of N 1,189.16 for your service during the period 7/12/80 to 16/8/81.*

10 *Your final date on our payroll will be 18/9/81 (which includes eight (8) days leave brought forward from your last leave), up to which date we shall pay you your current basic salary and applicable standard allowances. In addition, we shall pay you the follows (sic):*

15

1. *Two months' basic salary in lieu of notice.*
2. *Your entitlement in the Shell Petroleum Development Company of Nigeria Limited Non-Contributory Pension Fund.*
- 20 3. *Pro-rated end-of-year bonus.*
4. *Your proportionate leave allowance stated above.*

From the above entitlements (but with the exception of Pension Fund entitlements) we shall make the usual monthly deduction for PAYE Income
 25 *Tax, National Provident Fund and Shell Medical Schemes.*

The exact details on the payments and deductions referred to above will be included in a confirmatory Statement of Account which will be forwarded to you separately in due course. We would therefore, require
 30 *your future contact address.*

We request you contact the Staff Supervisor (PERW/11) in Personnel Services to clarify any points you may have on the above and to surrender your Shell Identity Card and Driving Permit. You should contact FN/133 to complete certain documents in connection with the payment of
 35 *your final entitlements."*

It appears the appellant did into furnish to the respondent his contact address and did not contact the Staff Supervisor as requested by the letter of termination. The evidence shows three months after termina-

tion, the respondent paid the salary in lieu of notice to the Bank where the appellant's salaries had been when he was in their employment. The Bank returned the salary in lieu of notice to the respondent because the appellant had closed his account at the Bank.

In my view, since the respondent had been paying the appellant's salaries to his bank, the respondent ought to have paid the salary in lieu of notice to the Bank immediately after the appellant had failed to contact the Staff Supervisor. To wait for three months before making the payment was not compliance with the term of the contract. The time of payment exceeded the two months period of notice for terminating the contract. Accordingly, the contract was wrongfully terminated.

I endorse the Orders made by my learned brother, Ogundare J.S.C.

KARIBI-WHYTE JSC

This is an appeal from Dr. Ben Chukwumah, to this court. His appeal to the court below against the judgment of the trial High Court was dismissed. This appeal has raised again, the recurring issue whether declarations can be made where contract of service, unlawfully terminated still subsists. The common law principle is that no specific performance could be awarded for wrongful dismissal: accordingly, where a contract is purported to have been determined, even if wrongfully, it ceases to exist.

This otherwise simple and straight forward case of the dismissal of an employee by his employer from his employment has several interesting features. In claiming redress for the dismissal Dr. Chukwumah as plaintiff claimed from defendants, (a) A declaration that the purported termination of his employment with the defendant company in the letter dated 18th August. 1981 is grossly unreasonable and capricious and ineffective, having been actuated by malice and bad faith. (b) Compensation for the sum of N385,529 (Three hundred and eighty five thousand five hundred and twenty-nine naira) for the loss caused to the plaintiff, by the purported termination. (c) N100,000 (One hundred thousand naira) being damages for trespass (d) An injunction to restrain the defendants, their servants and/or agents from disturbing the possession of the plaintiff of the house allocated to him.

The facts of this case are quite simple and in material respects undisputed.

Dr. Chukwumah, the appellant, is a registered medical practitio-

ner. He is a specialist in Obstetrics and Gynaecology. He was on the 26th November, 1976, in writing offered a temporary appointment as a General Duties Medical Officer in the service of the respondent company with effect from 17th December, 1976. The contract is "Exhibit N17" in these proceedings. Appellant accepted the offer. The appointment was to be confirmed 5 after a probationary period of one year. In accordance with Exhibit N17 after this period, appellant's appointment was confirmed with effect from December 17, 1977. Exhibit N17 contained the provisions for termination of the contract on either side. He had also become a member of the Shell BP Contributory Pension Fund, and entitled to the retiring benefits for the 10 respondent's employees. On the date of his termination, appellant was 37

15 years old and had been with respondent for only about five years.

Appellant, at all times when he was in respondent's employment, was occupying the house allocated to him by the respondent at No. 4 Benue Road Ogunu, Warri. Respondent's case was that this was to facilitate the discharge of his duties. He had exclusive possession and paid rents 20 to the respondent appellant claimed that respondent committed acts of trespass at No.4 Benue Road Ogunu, Warri. This was denied by the respondent. The learned trial Judge found as a fact that no trespass was committed.

Everything appeared to have gone well with the appellant till 1981 25 when things began to go wrong. There were complaints about appellant's work. In that year in a letter dated 18th August, 1981, respondent wrote to the appellant purporting to have terminated his employment from that date giving him two months' salary in lieu of notice. The respondent claims to have acted under the terms of his contract.

30 On receipt of the letter purporting to terminate his appointment appellant wrote to the respondent - Exh. N15 - asking the respondent to reconsider its decision and reinstate him, thus rejecting the repudiation. The respondent refused.

Appellant thereupon issued a writ of summons dated 23rd Sep- 35 tember, 1981, claiming from the defendant as indicated above. The trial was on pleadings. Plaintiff gave oral evidence, called witness, who was cross-examined.

The learned trial Judge dismissed the claims of the plaintiff in their entirety. He held that as a matter of termination of appointment, the

plaintiff's appointment was governed by the contract into which he entered at the time of his appointment. He also held correctly that the circumstances in which the employment was terminated, the injured feelings of the plaintiff or other inconveniences were irrelevant and could not be taken into consideration in determining the right to terminate the contract. He held that the defendant acting under the terms of their contract validly exercised the right to terminate plaintiff's contract. 5

The learned Judge rejected as untenable, the contention that the terms for the termination of the contract were breached because plaintiff's entitlements were not given physically to him at the time of the termination in lieu of notice. He held that appellant could not get more than his contract of service provided for as may be calculated from the items enumerated. 10

Learned trial Judge referred to and rejected the submission that defendant having breached the Joint Venture Agreement between the Nigerian National Petroleum Co. and the defendant, the termination of the plaintiff in contravention thereof was invalid. In his view, since the Joint Venture Agreement was not tendered in evidence, its terms were therefore a matter of speculation irrelevant in the instant case. Again, the Joint Venture Agreement was not incorporated by reference into the contract of service, between the parties. Exh. N17. Accordingly the parties were concerned and bound by Exh. N17 only. 15 20

The learned trial Judge dismissed also the claim for trespass. His reasons were that plaintiff who was a licensee of No.4 Benue Road, Ogunu, Warri, was in occupation and possession of the property for the convenience of his work. There was no evidence that any money was paid for the occupation. The learned trial Judge held that plaintiff was not a tenant. The claim for injunction was understandably also dismissed. 25

On appeal, the Court of Appeal affirmed the judgment of the learned trial judge. On the issue of declaration, it was held that appellant had failed to prove that in issuing Exh. N14, respondent had breached any condition or had acted against the spirit and tenor of the Agreement contained in Exh. N17. It was also held that the appellant was a servant under Exh. N17 and the respondents are entitled as per Exhibit N14 to terminate his appointment by offering two months' pay in lieu of notice. 30

The Court of Appeal referred to the contention that the letter of termination. Exh. N14 was invalid and ineffective because the two months' salary in lieu of notice offered was not paid at the time Exhibit N 14 was issued. It was contended that accordingly Exhibit N 14 was issued in breach of clause 11 of Exhibit N17. The Appellant was therefore entitled to the declaration that his employment subsists. 35

The Court of Appeal rejected these arguments as not representing the case of the appellants on the pleadings. The case of the appellant on their pleadings was that Exhibit N14 was null and void because it was issued in "bad faith" and "for improper motive". In the view of the Court below, since Exhibit N14 was issued in accordance with the provisions of
 5 Exh. N17 his appointment had ceased to exist.

The Court of Appeal also referred to the submission that Exhibit N14 was invalid being in contravention of Exhibit C. and agreed with the learned trial Judge that appellant being: a stranger to Exhibit C had no locus standi to enforce its provisions.

10 On the issue of trespass, it was held that the onus is on appellant to establish all the facts and ingredients of trespass. The learned trial Judge found as a fact that appellant was a licensee and not a tenant of the respondent and therefore failed to establish the claim.

15 Appellant filed five grounds of appeal in this court. The first ground is a challenge on the failure of the courts below to grant the declaration sought. The second ground relates to the proper construction of the contract of service, and the conditions for the valid termination of the contract.

The third ground, is a challenge of the refusal to grant the claim for trespass. The fourth ground complained about the decision that Exhibit C, a circular letter from the Nigerian National Petroleum Company to the Oil Companies cannot regulate the right of the parties. That the right of the parties can only be determined by Exhibit 17. Finally, the Court of Appeal judgment is challenged for formulating issues for the parties not arising
 20 from the grounds of appeal.

Learned Senior Counsel on both sides filed and exchanged briefs of argument. They also formulated issues for determination arising from the grounds of appeal. The five issues for determination formulated by Chief Chukwurah for the appellant could be covered in the four issues of
 30 Onomigbo Okpoko, SAN. I have for the purpose of this judgment and in the interest of clarity adopted the following five issues, (i) (ii) (iii) (iv) (v) formulated by appellant.

Learned Counsel to the appellant in the formulation of these issues have not taken into account ground five of the grounds of appeal
 35 which complains about the court below foisting an issue not formulated by the parties. Ground 5 is deemed -to have been abandoned.

On a proper construction, issue (i) (ii) of the appellant correspond with issue 1, 2 of the respondents, issue 3 of the respondent correspond with issues (v) of the appellant.

Herein below are the issues for determination -

ISSUES IN THE APPEAL

The issues that call for determination in this appeal are summarised as follows as follows -

- "(i) Are the special circumstances upon which a court should exercise its discretion to make a declaration that a termination of employment is wrongful limited to 'where the employment has statutory flavour and creates an atmosphere relatively different from the ordinary relationship of master and servant or a special legal status such as tenure of public office'?*
- (ii) What is the true and correct position in law in respect of a lawful determination of a contract of employment which is determinable by two months salary in lieu of notice - is the contract lawfully determined where neither the appropriate notice under the contract is given nor actual payment or tender of salary in lieu of notice?*
- (iii) Was the Appellant a tenant or a licensee in the premises which he occupied of the Respondent at 4 Benue Road, Ogunu Residential Area- AND if he was a tenant (OR whether or not he was a licensee therein) was it not a breach of the tenure for the Respondent to have:-*
- (a) dispossessed the Appellant and his family without due compliance with the provisions of the Rent Control And Recovery of Residential Premises Edict, No.4 of 1977 of Bendel State'?*
- (b) ousted the Appellant and his family during the pendency of a claim for Injunction to restrain the Respondent from turning the Appellant out of possession?*
- (iv) Was the appellant not entitled to the damages claimed for trespass, and to the injunction prayed for to restrain his ouster, pendente lite?*
- (v) Can the relationship between the Appellant and the Respondent be isolated (or otherwise completely severed) from the expressed policy of the Federal Government of Nigeria communicated in Exhibit C, which the Nigerian National Petroleum Corporation (NNPC) was enabled to make in furtherance of its statutory functions and powers contained in the N.N.P.C. Act 1977 No.33, or otherwise ignored?"*

I shall consider the issues above seriatim, beginning with issues (i) &

(ii) Issue (i) is based on the first relief in the action which is as follows -

"A declaration that the Defendant's letter dated 18th August, 1981, addressed by the Defendant's branch at Warri to the plaintiff at Warri by which the Defendant purported to terminate the employment of the plaintiff with the Defendant Company is actuated by malice and had faith, is grossly unreasonable and capricious and is ineffective to terminate the plaintiff's employment."

Concisely stated, the declaration sought by appellant in the action was that the termination of his appointment with the defendant company was ineffective on the ground that it was actuated by malice and bad faith, and grossly unreasonable and capricious.

Chief Chukwura, S.A.N, in elaborating on appellant's brief of argument, submitted that the learned trial Judge refused to consider the evidence tendered by the plaintiff to establish the malice and bad faith alleged on the grounds that they did not assist plaintiff's claim. It was submitted that the case of *Addis v. Gramophone Co. Ltd. (1909) AC, 488* relied upon by the learned trial Judge was quoted out of context.

Chief Chukura submitted that in a proper case a declaratory order could be made declaring a termination of a contract of service between a master and servant, invalid. The learned senior counsel cited *Ewarami v. A.C.B. Ltd. (1978)4 SC.99*; *Hill v. Parsons & Co. Ltd. (1972) AC.305*; *Olaniyan v. University of Lagos (1985) 2 NWLR, (Pt.9) 559* in support of his proposition. It was further submitted that the special circumstances for the making of the declaratory order with respect to termination of appointments was not limited to contracts with a statutory flavour, or special legal status or employment in the public service - *Hill v. Parson & Co. Ltd. (1972) AC.305*.

It was submitted that there was in the instant case a unilateral repudiation of the contract by the defendant in "Exhibit N14" which was not accepted by the plaintiff; as in Exhibit N15. The remedy is to restore plaintiff to his status quo ante.

Learned Senior Counsel to the respondents made an elaborate reply to the above submissions both in his brief of argument and oral submission before us.

He pointed out that issue was joined on the pleadings on whether or not appellant was entitled to the declaratory brief sought on the grounds of malice, bad faith, grossly unreasonable, and caprice, alleged. It was not whether or not the High Court power or jurisdiction to grant a declaratory

relief. It was submitted that Appellant did not prove the allegations made and the courts below were quite right in refusing the declarations sought.

Onomigbo Okpoko SAN, relying on *Bello v. Eweka* (1981) 1 SC.101 submitted that a declaratory relief is essentially discretionary, and could be refused even when applicant has made out a case. The applicant ought to satisfy the court that he is entitled to the declaration - *Jules v. Ajani* (1980) 5-7 SC.96.

Learned Counsel then referred to the right of the respondent to terminate appellant's appointment and submitted that appellant's appointment was terminated under and by virtue of clause 11 of the contract of service. The right of the defendant in that regard, is not denied. It was submitted that the motive for the lawful exercise of the right is irrelevant and does not invalidate the exercise of the right - *Taiwo v. Kingsway Stores Ltd.* (1950) 19 NLR.122. 10

It was submitted that granting the declaration sought will tantamount to an order for specific performance of a contract of service; it will be imposing an employee on an employer - *Francis v. Municipal Council of Kuala Lumpur* (1962) 3 All ER 633 *Olaniyan & Ors. v. The University of Lagos* (1985) 2 NWLR (Pt.9) 599. The Court of Appeal considered these cases and held that in the instant case, the order was inappropriate. 15

It was submitted that nothing has been shown from the contract of service to warrant the grant of a declaratory relief. 20

I have set out comprehensively, the elaborate submissions of learned counsel to the parties in this appeal. In my opinion the determination of the issues argued in this appeal depends for their acceptance or rejection, success or failure, on whether the exercise by the defendant of the power to terminate the appointment of appellant was valid. Learned Counsel to the appellant's submission was that it was invalid and ineffective because it was actuated by malice and bad faith, is grossly unreasonable and capricious. Accordingly, the court should declare that the appointment still subsists and that he is still in the employment of the respondent. 25 30

On the other hand, the contention of the respondent was that appellant's appointment was validly terminated in exercise of the right vested in it by clause 11 of Exhibit N17, enabling either side to determine the contract of service by the giving of notice prescribed therein.

The issue before the Court in respect of the claim for a declaration, is whether the relief that the contract between the parties still subsists can be made on the pleadings and evidence? The determination of this relief brings us to the consideration of what is a declaratory relief. 35

It is appropriate to bear in mind some of the governing principles.

The procedure of seeking a relief by means of a declaration is very common in cases of disputes as to title to land. It is also the usual procedure adopted in challenging the validity of appointments. - See *Fashanu v. Govt of Western Region* (1955-56) WRNLR 138 - or recognition of chiefs. It has now assumed considerable importance as a procedural device for ascertaining
5 and determining the rights of parties or for the determination of a point of law.

10

Although the power to make a binding declaration of right is a discretionary power, the plaintiff must establish a right in relation to which the declaration can be made. Hence the Court will not generally decide hypothetical questions, declaration will be granted even when the relief has been
15 rendered unnecessary by the lapse of time for the action to be tried, if at the time the action was brought it raised substantial issues of law. The claim to which the declaratory relief relates must be substantial - A declaration will only be granted where there is a breach See *Mellstrom v. Garner* (1970)2
20 All ER.9.

It is the practice that a declaratory relief will be granted where the plaintiff is entitled to relief in the fullest meaning of the word. Furthermore the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant. It should also not be
25 contrary to the accepted principles upon which the court exercises its jurisdiction - See *Guaranty Trust Co. v. Hannay* (1951) 2 KB at 572.

It is common ground in this action that there was a valid contract of service between the parties. It is in evidence and relied upon by the parties as Exhibit N17. It is also in evidence that there are conditions for
30 determining the contract of service. The appellant is an employee of the defendant company. The question here is whether the appellant's contract of service still subsists, that is whether it was not lawfully determined by the defendant? As the plaintiff contends, or has been lawfully determined in the view of the defendant. This can only be determined by a proper construction of the contract of service and the conditions prescribed therein for
35 its determination.

I reproduce the letter tendered as Exhibit N17 in these proceedings for ease of reference -

"THE SHELL-BP PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
POST OFFICE BOX 230. WARRI, NIGERIA.

To: Dr. Benedict O. Chukwumah, DATE: 1/12/76
Present, Dear Dr. Chukwumah
Dear Dr. Chukwumah.

5

CONTRACT OF SERVICE NSS

*We are pleased to advise you that we hereby offer you employment
as a member of the Senior Staff of our Company.*

10

*So that there may be a clear understanding of the terms of your
employment, we are setting them out in this letter. They are as follows:*

15

1. You shall be employed as from 17th December. 1976.

2. Your place of engagement is WARRI.

20

*3. After and if you complete one year's service you will be formally con-
firmed in your employment and you will be entitled, subject to the consent
of the Trustees, to join the Company's Provident and Pension Fund.*

25

*4. Your salary will be at the rate of N11,502.00 per year, subject to such
increases as we may grant to you from time to time at our discretion.*

*5. We undertake during your service to grant you such allowances, privi-
leges and benefits as we may decide from time to time.*

30

*6. You agree during your employment to give your whole time service (in-
cluding rest days & Public Holidays if the work so requires) to us or any of
our Associated Companies in accordance with the orders and directions
from time to time given to you by us, to work and reside in such places in
the Federal Republic of Nigeria or elsewhere as we may from time to time
require, and to obey all applicable rules, regulations and other practices
from time to time in operation for the guidance and conduct of staff em-*

35

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ployed by us, or by any of our Associated Companies.

7. *If it should be necessary, in pursuance of your employment to travel by air, you hereby agree to be prepared to by fixed wing aircraft, or helicopter*
5 *or any recognised airline owned or chartered by us.*

8. *In cases of illness, duty certified by our Medical Officers, which prevents you from performing your normal duties, we undertake to pay your full salary to a maximum of 28 days absence per year.*
10 *Should your illness extend beyond that maximum, your case shall be reviewed by us and our decision regarding further payments will be final. No payments whatsoever will be made if the illness is due to your negligence or misconduct.*

9. *You will be entitled to 36 consecutive days' leave after each year of*
15 *service.*

10. *You will be required to make your own housing arrangements.*

11. *You, or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one month's notice in writing, or by paying one month's salary in lieu of notice. On the confirmation of your appointment, the period of notice shall be two months, or two months' salary in lieu of notice and on the completion of five years of service, the period of notice shall be three months, or three months' salary in lieu of notice.*
20
25

12. *We shall have the right at anytime, summarily to dismiss you, for any cause which justifies summary dismissal, including but not limited to, serious misconduct, dishonesty, action considered prejudicial to our interest, or*
30 *actions conflicting with your obligations under Clause 6 and 13 of this letter. In case of such dismissal, you shall not be entitled to any notice or payment in lieu.*

13. *You hereby acknowledge that you have read our rules relating to confidential information and inventions attached to this letter. You hereby agree to be bound by all the undertakings of the said rules which form part of this letter of agreement.*
35

Please confirm your agreement and acceptance to the above terms and

conditions by completing, dating and signing over a 15k stamp, the declaration on the attached duplicate of this letter.

Yours faithfully,
for: THE SHELL-BP PETROLEUM DEVELOPMENT
COMPANY OF NIGERIA LIMITED.

5

SGD.
E. O. UGHOVWA
HEAD OF PERSONNEL SERVICES

10

TO: The Shell- BP Petroleum Development Company of Nigeria Limited.

I, Dr. BENEDICT ODIROMIWE CHUKWUMAH having read the foregoing letter and the rules concerning confidential information and inventions, accept employment with you on the terms and conditions set out therein and I agree to be bound by these terms and conditions in all respects.

15

SIGNED? ? ?

Date: 1/12/76"

20

Paragraphs 11 and 12 of Exhibit N17 reproduced above contains the terms for determination of the contract. Paragraph 12 of Exhibit N17 deals with summary dismissal for any cause including serious misconduct, and dishonesty considered prejudicial to the interest of the defendant company. This is not applicable to this case. Paragraph 11 which is applicable and on which defendant relied for termination of the contract enables either party to terminate the contract of service by giving notice in writing or by paying salary in lieu of notice as follows - (i) Before confirmation of appointment not less than one month's notice, or paying one month's salary in lieu of notice. (ii) On confirmation of appointment but before the completion of five years of service, the period of notice shall be two month's notice or two month's salary in lieu of notice. (iii) On the completion of five years of service, the period of notice shall be three months, or three months' salary in lieu of notice.

25

30

Appellant whose date of appointment took effect from the 17th December, 1976, will on the 18th August, 1981, have been employed for less than five years; he therefore falls within the second category which requires two months' notice or two months' salary in lieu of notice.

35

Acting under and by virtue of clause II of the contract of service

Exhibit N17, the defendant company wrote to the plaintiff a letter dated 18th August, 1981, which reads -

"THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
(Incorporated in Nigeria)
P.O. Box 230, Warri, Nigeria.

10 18th August, 1981

Exh. N14

Confidential/Personnel

Dr. B. O. Chukwumah.
Medical Department,

15 The Shell Petroleum Development Company,
of Nigeria Limited,
P. O. Box 230,
Warri.

20 Dear Dr. Chukwumah,

Termination of Appointment

We refer to our recent discussions and hereby confirm that, in
accordance with Clause II of your Contract of Service dated 1st December,
25 1976, your services will no longer be required as from today.

As at 17th August, 1981 you were due 24 days proportionate leave
and a proportionate leave allowance of N1189.16 for your service during
the period 7/12/80 to 16/8/81.

Your final date on our payroll will be 18/9/81 (which includes eight
30 (8) days' leave brought forward from your last leave), up to which date we
shall pay you your current basic salary and applicable standard allow-
ances. In addition, we shall pay you the following:

1. Two months' basic salary in lieu of notice.
- 35 2. Your entitlement in the Shell Petroleum Development Company of
Nigeria Limited Non-Contributory Pension Fund.
3. Pro-rated end-of-year bonus.

4. *Your proportionate leave allowance stated above.*

From the above entitlements (but with the exception of Pension Fund entitlements) we shall make the usual monthly deductions for PAYE Income Tax, National Provident Fund and Shell Medical Schemes. 5

We request you contact the Staff Supervisor (PER/11) in Personal Services to clarify any points you may have on the above and to surrender your Shell Identity Card and Driving Permit. You should contact FIN/133 to complete certain documents in connection with the payment of your final entitlements. 10

We normally offer to our employees leaving our service the opportunity to undergo a routine exit medical examination with our Medical Department. If you wish to avail yourself of this facility, please contact our Medical Department to make the appointment. However, if you are not interested in the offer, would you please sign and return to us the attached waiver form. 15

We would also advise you that as per Clause 12 of the Tenancy Agreement for use of your residence at No.4 Benue Road, Ogunu Residential Area. We now give you one month's notice to vacate the premises. By 16th September, 20

1981, we expect you to move out all your personal belongings from that house and leave the house in a habitable condition as it was when it was allocated to you.

Finally, we thank you for your services with this Company. Your Certificate of Service is attached. 25

Yours sincerely,

Sgd. A. Moody-Stuart 30
Divisional Manager - West"

This is the letter of termination, subject-matter of the declaration in issue No.1. It is "Exhibit N14" in these proceedings.

35

There is no doubt "Exhibit N14" declares unequivocally the intention to pay plaintiff his two month's basic salary in lieu of notice. The final date for which he would be paid was indicated as 18th September, 1981. Plaintiff was to be paid his entitlements in the defendant company.

Has the defendant company by "Exhibit N14" terminated Exhibit N17 in accordance with Clause 11 therein? This is the issue.

It is important to reiterate the terms for termination of the contract. They are two months notice, in which the employee will remain in the service of the employer for two months at the expiration of which his employment comes at an end. Or two months basic salary in lieu of remaining in the service for two months. In the latter case the termination of the service takes immediate effect on the payment. In the former case the employee continues in service. Termination of the contract takes effect at the expiration of two months. In order to comply with Exhibit N17, paragraph 11, defendant company must pay plaintiff two months' salary in lieu of notice.

I consider it necessary to say something about the phrase "in lieu of notice" which is liable to be misunderstood, in this connection. The phrase has been defined in the Concise Oxford Dictionary of English Language 4th Ed. page 687 as "in the place, instead of".

Black's Law Dictionary, Sixth Ed. P.787, also defines the phrase as "instead of, in place of, in substitution of... Thus when the condition of termination of the contract of service is the giving of two months' notice or the payment of two months' salary in lieu of notice, it can only mean the payment of two months' salary instead of, in place, in substitution of the giving of two months notice.

Appellant, in accordance with his pleadings in paragraph 18 is seeking a declaration that the contract of service is subsisting and was not validly terminated because" ...the said letter by which he was removed from his employment was actuated by malice and bad faith and is grossly unreasonable and capricious and ineffective to terminate the plaintiffs said appointment." In essence the only grounds on which appellant relies for challenging the validity of "Exhibit N14" were on the motive of the defendant company.

With due respect to learned Senior Counsel to the appellant the proposition that the motive for doing an act does not necessarily determine the legality of the act is too well settled to require discussion. - See *Mayor of Bradford v. Pickles* (1895) A.C 587; *Taiwo v. Kingsway Stores Ltd.* (1950) 19 NLR 122. If there is a right to do an act, the fact that the motive for doing the act is bad will not affect its validity or legality. Similarly where there is no right, or the thing done is illegal, the purity of the motive or magnanimity of the act done will not alter the legal consequence. The

motive of the party determining the contract is not one of the conditions stipulated for termination of the contract in "Exhibit N17".

Appellant has challenged Exhibit N14, neither on the length of the notice given nor the nature of the payment of salary in lieu which are the conditions, prescribed in clause 11 of Exhibit N 17. These matters therefore, *stricto sensu* do not fall for consideration. In fact, paragraph 19 of the amended statement of claim only alleged that defendant had not tendered to plaintiff any of the terminal benefits. There was no averment that he was not paid the two months' salary in lieu of notice in accordance with Clause 11 of Exhibit N17. The breach of Exhibit N17 did not in the opinion of plaintiff include non-payment of the two months' salary in lieu of notice. 10

It is an elementary but fundamental requirement of a declaratory relief to satisfy the court that he is entitled in law to the relief claimed.

Chief Chukura, S.A.N, learned counsel to the appellant has contended that the Court below refused to consider all the evidence tendered in proof of bad faith, malice, unreasonable and capricious behaviour in the action of the defendant Company in terminating the contract of service of appellant. He referred to contracts with statutory flavour as those in which declaratory orders may be made and citing *Ewerami v. ACB Ltd. (1978) 4 SC.99* and *Hill v. Parsons & Co. Ltd. (1972) 1 Ch.305*, as those in which declaratory reliefs have been granted outside contracts with statutory flavour, special status, or employment in the public service. 15 20

Chief Chukura submitted that appellant promptly rejected the unilateral repudiation of Exhibit N17 by the defendant by Exhibit N15 requesting the defendants to reconsider their decision. Thus he submitted that the result of the unlawful action of the defendant is to restore the plaintiff to his status quo ante. 25

It seems to me that Chief Chukura learned Counsel to the appellant has taken a clearly novel view of the principles governing establishment of declaratory relief. Parties are bound by their pleadings and are not allowed to introduce issues not raised in the pleadings. Indeed, evidence at the trial on matters not raised in the pleadings go to no issue. In this case issue was joined on the questions of malice, bad faith, capriciousness raised in the pleadings. These are issues of fact. The learned trial Judge before whom evidence was led, and witnesses were cross-examined, did not find any evidence of bad faith, malice, etc. against any of the persons alleged to 30 35

have acted. The Court of Appeal agreed with these findings. Learned Counsel to the appellant has not given reasons why these concurrent findings of facts should now be rejected and set aside. I am bound to accept, and accordingly adopt the findings. Having held that bad faith, malice, caprice, improper motive, were not established, it is *stricto sensu* not necessary to consider whether they are factors in the instant case necessary in the grant of a declaratory relief in an action for breach of contract.

10

In this appeal, appellant can only be entitled to the declaratory relief claimed if he is able to establish on the evidence before the court that his contract of service was not lawfully determined, and is therefore still subsisting. That was the situation in *Ewerami v. African Continental Bank Limited* (1978) 4 SC.99. In that case, Ewerami claimed for a declaration that by reason on his wrongful dismissal by the defendant bank he was still in their employment. The facts found by the trial Court which were not challenged was that plaintiff was employed by the defendant bank on 21st March, 1964. At the commencement of action in 1974, he was a member of the permanent staff of the defendant bank in the post of Archivist. On the 25th June, 1973 plaintiff received a letter from the defendant, transferring him from the Ring Road Branch, Benin City where he was then posted to their Jos Branch, he was to resume there on the 2nd July, 1973. Plaintiff was under subpoena to appear before the High Court Benin City on 2nd July, 1973 to testify in an action brought by the Customer of the defendant bank against the Bank. Then a catalogue of events followed. An order of court was applied for and obtained restraining the defendant bank from transferring plaintiff to Jos till the suit in which he was subpoenaed to give evidence was disposed of. Plaintiff fell ill and was issued with sick leave certificate excusing him from duty. Unknown to plaintiff, defendant proceeded on the 3rd August, 1973 to transfer him to Jos. Meanwhile the Ring Road Branch of the defendant had stopped paying plaintiff's salary.

On the 25th September, 1973, plaintiff instructed a Solicitor to write to defendant bank. In their reply dated 13th November, 1973, plaintiff learnt for the first time that he had been instructed in another letter dated 3rd August, to proceed to Jos. The defendant formed the view that plaintiff was guilty of gross insubordination by refusing to go on transfer to

Jos.

Before the learned trial Judge the issue was whether plaintiff was lawfully dismissed by his employers for insubordination, or whether a case for dismissal had not made out in the absence of proof that he had received the letter of 3rd August, 1973 transferring him to Jos? 5

At the trial defendant did not offer any evidence. Relying on the case made by the plaintiff, the trial Judge held that the purported dismissal of plaintiff from the employment of the defendant company was null and void. He accordingly declared that plaintiff was still in the employment of the defendant company. Defendant company appealed. 10

On appeal, this Court held that there was no material before the court from which it could hold that the plaintiff had been insubordinate by failing to proceed on transfer to Jos pursuant to a letter of August 3, 1973 from the defendant directing that he should do so. Their Lordships held that the onus of establishing the existence of this letter was on the appellant and that they had failed to do so. It was held that the learned trial Judge was right. 15

Hill v. Parsons & Co. Ltd (1971) 3 All E.R. 1345, is a case where a purported notice to terminate the contract of service was held to be a wrongful repudiation of the contract of service and a nullity. The English Court of Appeal held that where a master had unlawfully repudiated a contract of service by giving a notice of dismissal which was too short to comply with the terms of the contract, the notice was not effective to terminate the contract unless the servant accepted it. - See also Olaniyan & Ors. v. University of Lagos (1985) 2 NWLR (Pt.9) 599. 20 25

It is a well established principle of the common law, and of Nigerian law, that ordinarily a master is entitled to dismiss his servant from his employment for good or for bad reasons or for no reason at all. The common law recognises and respects the sanctity of contracts. The Latin maxim *pacta sunt servanda* is a sacred doctrine for the preservation of contracts which is entitled to the greatest respect. Hence where parties have reduced the terms and conditions of service into an agreement, the conditions must be observed. 30 35

Ordinarily and consistent with the common law principle, the Court will not impose an employee on an employer. - See Webb v. England (1860) 29 Bear.44, Lumley v. Wagner (1852) 1be G & M & G.604. Hence an order for specific performance of contract of employment is an aberration which

will rarely be made - See Francis v. Municipal Council of Kuala Lumpur (1962) 3 All ER, 633.

In the ordinary case and following the common law principle, termination of a contract of service even if unlawful brings to an end the relationship of master and servant, employer and employee. This rule is based on the principle of the confidential relationship between master and servant which cannot continue in the absence of mutuality.

10

Nevertheless the distinction has now been made between the ordinary domestic cases of master and servant and the other more diffused and impersonal relationship of employer and employee where confidential relationship does not fully exist or assumes little prominence. There may also be special circumstances where the nature of the employment, or the consequences and circumstances of unilateral termination, the court may exercise its discretion to grant a declaration that the relationship of employer and employee still subsisted and the employer could be stopped by injunction from treating the contract as at an end - See Hill v. C.A. Parsons (1971) 3 All ER.1345. See Lumley v. Wagner (1852)1 De G.M & G, 604.

In the instant case, plaintiff can only be entitled to the declaration sought if he can show that the defendant's contract of service subsists notwithstanding "Exhibit N14. It must also be shown that plaintiff has a legal right which should be protected by the declaration. A plaintiff cannot on a mere academic issue hope to be granted a declaratory relief.

Plaintiff did not in his pleadings, namely paragraphs 17, 18 allege that the appropriate notice was not given or that the salary in lieu of notice was not tendered on the day the notice was issued to him. - See Konski v. Peet (1915) 1 Ch.530. These were not the issues canvassed in the pleadings.

Chief Chukwura, S.A.N. has argued in his appellant's brief, and this is the second issue formulated for determination, that a contract of employment determinable by two months' notice or payment of two months' salary in lieu of notice is not determined where neither the appropriate notice under the contract is given nor actual payment or tender of salary in lieu of notice is made.

Learned Counsel spelt out the conditions prescribed for determin-

ing the contract of service in Clause 11 of Exhibit N17 as

(i) by giving the other party two months' notice of the intention to terminate, OR

(ii) by payment of two months' salary in lieu of notice. 5

He referred to Exhibit N14 which stated that plaintiff's service will no longer be required from the date of the letter, as incompetent in satisfying the condition for giving two months' notice.

10

It was submitted that clause 11 of Exhibit N17 would have been satisfied if the defendant had paid on the date the termination of appointment was to be effective, the two months' salary in lieu of notice. Plaintiff was neither offered nor paid, the two months' salary in lieu of notice stipulated in Clause 11 of Exhibit N17. Accordingly, having not satisfied the condition for termination as stipulated, the contract of service subsists. 15

The Courts below considered and rejected this submission. In the trial Court, the learned Judge held, that the defendant offered to pay plaintiff in compliance with Clause 11 of Exhibit N17, two months' salary in lieu of notice, but that plaintiff did not go to the appropriate section of the defendant's office to complete the necessary documents in connection with the payment of his final entitlements. The conclusion was that it was not, on the authorities cited, the law that those entitlements must be physically given to the plaintiff at the time of termination of his appointment in lieu of notice for such termination to be effective. The authorities referred to are *Addis v. Gramophone Company Ltd. (1909) AC.488 N.P.M.C. v. Adewunmi (1972) 1 All NLR.433; Int. Drilling Co. (Nig.) v. Ltd v. Ajiiala (1972) 2 SC 115.* 20 25

30

One of the reasons for the court below disposing of the argument summarily are stated as follows:

"The offers to pay the money in Exhibit N14, to my mind sufficiently comply with the respondent's obligation as per Clause 11 of Exhibit 17. The appellant was asked to leave his forwarding address, he was asked to see the staff supervisor in order to clarify any point. The appellant did not go..." 35

The other reason was that it was not the case of the plaintiff on his

pleadings that he was not paid on the date Exhibit N14 was issued to him and therefore Exhibit N14 was null and void. The second reasoning is more acceptable.

After referring to the evidence and finding that the money was paid into the normal Bank Account of the plaintiff, but was returned to
5 defendant because the account was closed the court concluded as follows:-

"In my view, since Exhibit N14 was issued in accordance with the provisions of Exhibit N17, and the appellant had sworn to that fact, his appointment with the respondents had ceased to exist."

10

I agree with learned counsel to the respondent and the courts below that the above issue having not been raised on the pleadings is not an issue before the court and needed no consideration.

15

I have already referred to the meaning of the phrase "in lieu of used in Clause 11 of Exhibit N17. There is no ambiguity in the expression of two months' salary in lieu of notice. It is plain and unambiguous. It must be given its ordinary plain meaning. In my opinion since payment of two
20 months' salary is stipulated in Exhibit N17, "in place of" or "instead of" two months' notice, it is difficult to conceive how a mere offer to pay can be regarded as the same as payment to satisfy the condition for termination stipulated in Exhibit N17. As offer to pay speaks in future, so payment is immediate. In the circumstances where parties to a contract, mutually agree
25 that the condition for termination of the appointment is the giving of notice, or payment of equivalent salary in lieu of notice, the only valid notice to discharge a party from his obligation under the contract is the giving of the appropriate period of notice stipulated or the payment on the effective date of the notice of the salary or other prerequisites, covering the period of
30 notice in accordance with the contract of service. - See Niger Insurance Co, v. Abed Brothers Ltd (1979) 7 S.C. 35.

In *Konski v Peel* (1915) 1 Ch. 530, I gave Miss Peel a week's salary due to her and another week's salary for the forthcoming week and terminated her employment with him. It was held it was not a breach of the
35 agreement with her. He had discharged his obligation.

In view of the analysis of the right established by the plaintiff on the pleadings and evidence before the court, there appears to me no basis for the declaration sought. It has not been shown that respondents were in breach of any of the conditions stipulated in clause 11 of Exhibit N17 for

the mutual determination of appellant's contract of service. Plaintiff has accordingly not acquired any right by the determination of the contract of service other than as stipulated under clause 11 of Exhibit N17.

In the circumstances, plaintiff's contract of service having not been established to have been unlawfully terminated, the contract is at an end. There is therefore no contract, the subsistence of which a declaration can be made. 5

The above conclusion is in spite of the view that respondent did not determine the contract of service in accordance with clause 11 of Exhibit N 17. The answer to issues 2 as formulated would be that the contract of service Exhibit N17 was not lawfully determined since respondent did not at the time of determination tender the two months' salary in lieu of notice stipulated in clause II therein. Since this was not an issue between the parties, having not been pleaded and relied upon, it is not necessary for the determination of the case. In any event even where a servant is wrongfully terminated, the contract comes to an end. He has his remedy in damages. 15

Appellant also claimed in the alternative the sum of N385,529.00 being "compensation for the loss caused... by defendants by reason of their so acting maliciously, capriciously, grossly unreasonably and in bad faith to the detriment of the plaintiff." This claim was based on the assumption that plaintiff's appointment was wrongfully terminated. There is no doubt if appellant had established that his appointment was wrongfully terminated, he would be entitled to damages. And this would be what was due to him for the period of notice. See *Adewunmi cv. Nigerian Produce Marketing Board* (1972) 1 All NLR, 870; *WNDC v. Abimbola* (1966) 1 All NLR 159; *Akinfosile v. Mobil* (1969) NCLR 253; *International Drilling Company (Nig) Ltd v. Ajijala* (1976) 2 S.C. 115. This is consistent with the contract between the parties, which has stipulated the measure of damages. It is however arguable, though not in issue here, that such damage should apply only where the contract has been lawfully terminated. Where it has been wrongfully terminated the rule in *Hadley v. Baxendale* (1954) 9 Ex. 341 ought to apply. The measure of damages should be such as may fairly and reasonably be considered either arising naturally or as may be reasonably supposed to have been in the contemplation of the parties at the time of the contract as the probable result of the breach. - See *Mann Poole & Co. Ltd. v. Agbaje* (1922) 4 NLR 8; *Garahedian v. Jamakani* (1961) 1 All NLR 177. In my opinion where damages are claimed on the ground that the contract was not lawfully determined the action is *stricto sensu* not on the contract, but on general principles of common law. This is because the 20 25 30 35

contract having been determined is no longer in existence and be relied upon for the damages stipulated therein.

Appellant has in the instant case failed to prove on the pleading and evidence that his appointment was wrongfully terminated by the respondent. Nevertheless he is still entitled to the two month's salary in lieu of

10 notice stipulated in clause 11 of Exhibit N17, since the contract was determined at the instance of respondent. It is not in dispute that Exhibit N17 constitutes the contract between appellant and respondent and is binding. Under clause 11 of Exhibit N17, appellant's appointment could be terminated by the respondent giving him two months' notice or payment to him
15 of two months' salary in lieu of notice. This is what is involved as damages as in the contemplation of the parties at the time of the contract as the probable result of the breach.

The damages awarded here in not because appellant has proved
20 that the contract was wrongfully determined by the defendant. It is because respondent has determined the contract and is liable for the damages stipulated.

25 THIRD ISSUE

I now turn to the third issue which relates to whether appellant could on the determination of his appointment with the respondent company be dispossessed of the house allocated to him without due compliance with the provisions of the Rent Control and Recovery of Residential
30 Premises Edict No.4 of 1977 of Bendel State. I also will consider whether it was not a breach of the tenure to have ejected appellant and his family from the property during the pendency of a claim for injunction to restrain the respondent from turning the plaintiff out of the house.

35 It is not in dispute that appellant was in occupation of 4 Benue Road, Ogonu Residential Area Warri. It is also not in dispute that the house was allocated to him by respondent company, and this was in consideration of his employment as General Duties Medical Officer. Appellant paid rents, monthly deducted from his salary to the respondent.

Respondent in exhibit N14 dated 18th August, 1981, gave notice to the plaintiff to vacate the property on or before 16th Sept., 1981.

Chief Chukura has submitted that appellant falls within the definition of tenant by virtue of the Rent Control and Recovery of Premises Edict No.4 of 1977. It was submitted that appellant could only be dispossessed in accordance with the provisions of "Landlord" and "tenant" in section 2 of the Edict and submitted that plaintiff was occupying No. 4 Benue Road, Ogunu Reservation Area, Warri within the meaning no Section 2, *Soharnowo v. Federal Public Trustee* (1970) 1 All NLR 257 was cited and relied upon, *Sule v Nigerian Colton Board* (1985) 6 S.C. 62 (1985) 2 NWLR (Pt.5) 17 was also cited. Learned counsel submitted that the relationship of tenant and landlord, existed between the appellant and respondent company. Appellant is not a licensee as was held in the courts below.

The contention was that since Exhibit N17, the contract of service was mutually determinable on the giving of two months' notice, appellant was entitled to two months' notice. If however under section 18(b) of the Rent Control Edict, the requisite period of notice is one month the notice in Exhibit N14 is bad. Learned counsel relied on *Nnadozzie v. Oluoma* (1963) 7 ENLR.77; *Otegbade v. Adekoya* (1962) 2 All NLR, 52; *Oyeledun v. Somoye* (1960) WNLR 162.

It was submitted that respondent company evicted appellant from the property by force when the claim for trespass was still pending. The application for interlocutory injunction restraining the respondent company from evicting appellant filed on 24th Sept., 1981 was dismissed on the 15th October, 1981. Our courts frown at the action of a party who adopts extra judicial methods. *Barclays Bank of Nigeria Ltd v. Ashiru & ors.* (1978) 6 - 7 S.C. 99; *Ojukwu v. Governor of Lagos State* (1987) 2 NWLR (Pt. 10) 806.

Learned counsel submitted that appellant was entitled to damages claimed for trespass, and injunction. It was submitted that on the admitted facts of this case, and the nature of the eviction, appellant was entitled to aggravated damages. Several decided cases were cited in support of the submission.

Learned counsel to the respondent company in his reply to the above submissions pointed out that the issue on the pleading was not whether the relationship of landlord and tenant existed between respondent company and appellant, but whether respondent company had committed trespass, and whether appellant established the claim. It was submitted that the claim of the appellant that he was entitled to damages for trespass and that he was a tenant of the respondent company are both untenable.

The learned trial Judge found that plaintiff was a licensee and not a tenant of 4 Benue Road Ogunu Warri. This finding was affirmed by the court below. Plaintiff has not appealed against this finding.

It is appropriate in the determination of this issue to refer again to the claim of the plaintiff. I reproduce it for ease of reference.

5 ' The plaintiff also claims the sum of N100,000 (one hundred thousand naira) being damages for trespass in that the defendant on 17th September 1981, invaded the residence of the plaintiff situate at No.4 Benue Road, Ogunu, Warri, vi et armis which at all material times is occupied and is in possession of plaintiff. and therein disconnected the electric power and
10 water supply to the premises to the inconveniences of the plaintiff and generally committed sundry, wanton acts of trespass and annoyance in the said premises in the bid improperly and unlawfully to oust the plaintiff from possession.

15 The alleged acts constituting trespass were pleaded in paragraphs
24, 25, 26 of the statement of claim. The allegations were that on the 17th
September, 1981 defendant's servants entered the premises of 4 Benue
Road Ogunu, Warri, and disconnected the electric power and water supply
to the inconvenience of the appellant. They also committed sundry and
20 wanton acts of trespass. (See para. 24). Paragraphs 25, 27 speak of put-
ting the premises under siege and harassing appellant and his family.

The evidence before the court which remained uncontradicted is that appellant was allocated and in occupation of 4 Benue Road Ogunu because of his employment by the respondent as the General Medical Officer. This is to facilitate the discharge of his duties. The terms and conditions of housing provided by the respondent company and accepted by plaintiff include among other restrictions, the following.

X X X X

"7. The premises are allocated to you on the understanding that the sole
30 occupants will be your wife and dependant children as registered with the
company.

8. You must permit the company or its agents reasonable access to the premises to carry out repairs, maintenance and inspections. You must also
35 permit the regular spraying of the accommodation internally twice yearly and fogging of the compound as required.

12. x x x x
The company or yourself may terminate this agreement by giving one

month's notice in writing. In any event the agreement will become void, should you be transferred or should your employment with the company terminate for any reason (including retirement). In such circumstances, you will be required to vacate the entire premises within one month of such transfer or termination unless the company determine otherwise, leaving the premises with all it contains in good condition just as it was when you initially occupied it." 5

Accordingly appellant was in occupation of 4 Benue Road, Ogunu, Warri on the above conditions. Respondent in Exhibit N14 properly referred appellant to clause 12 above, giving him one month's notice to vacate the premises. This notice expired and took effect on the 17th September 1981. 10

It is crucial to the claim of the appellant to determine the nature of his occupation of 4 Benue Road, Ogunu. It was the contention of the plaintiff that a tenancy existed, and the relationship of Landlord and Tenant existed between defendant and himself. 15

Appellant relied on the fact that he pays rent to the respondents and therefore claims to be a tenant. He however, admits that he is in occupation in his capacity as the General Medical Officer of the respondent company. He is also not denying that his occupation is subject to the restrictions and terms and conditions of Exh. D. disclose unequivocally that no interest or estate was created in favour of the premises more than his occupation and enjoyment thereof during employment and for one month thereafter. In the situation appellant merely enjoyed the privileges of his employment to live in the premises with the licence of the respondent company. 20 25

In *Torbett v. Faulkner* (1952) 2 TLR 659, it was held that where a servant is given the personal privilege to live in a house for the greater convenience of his work, and this is treated as part of his remuneration, then he is a licensee, even though the value of the house is quantified in money. However, where he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant, and nonetheless a tenant because he is a servant. 30

Appellant in the instant case has no interest in the land even during his occupation of the premises. The licence to remain is automatically revoked on his retirement or for any cause ceasing to be employed. He cannot therefore be a tenant for the purposes of the housing arrangement made by respondent for its employees. 35

On the evidence before the learned trial Judge respondent entered on the said premises on the 17th September, 1981 *vi et armis*. Neither

appellant nor his wife PW.5 gave evidence of any entry by the respondent or its servants. The conclusion of the learned trial Judge on the evidence of the PW. 5 was that the conduct of respondent's servants was at most unlawful imprisonment and breach of contract in respect of the licence.

But properly considered the licence to remain in the property expired
5 on the 16th September, 1981, Respondent gave appellant due notice of intention to take possession in Exhibit N14 in accordance with clause 12 of Exh. D. It is not disputed that respondent would be committing a wrongful act if they had evicted or tried to evict plaintiff with force as alleged. There was no finding that respondent used any force in evicting the plaintiff.

10 The Court of Appeal affirmed the finding of the trial Judge that plaintiff was a licensee. I have no reason to disturb these findings.

It is well settled law that a licensee cannot maintain an action in trespass against his landlord. There is therefore no legal basis for the claim in trespass. The court below was right to have dismissed the claim. I do not
15 therefore consider it necessary to consider the claim for damages.

Whether appellant's contract of appointment is one with statutory flavour.

Appellant is also relying on exhibit C for his contention in support of reinstatement. It is the proposition now too commonly relied upon of
20 employment with statutory flavour giving rise on breach to reinstatement. In the instant case, appellant is relying on the fact that the Federal Government is holder of 80% of the equity share capital in the company. This was pleaded in paragraph 3 of the amended statement of claim. There was no evidence of the equity share even though issue was joined. He also relied on
25 exhibit C a circular from the Nigerian National Petroleum Corporation to oil companies and dated 16th February, 1978, controlling the employment and retention of employees of oil companies except with the concurrence of the Nigerian National Petroleum Corporation. Chief Chukura's contention is that the intendment of the policy of this circular is to incorporate into
30 every contract of service the policy of non-termination of an employee of the oil companies without concurrence of the NNPC. Accordingly any such termination without concurrence which is obviously a violation of the circular will result in breach of the contract of service.

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The learned trial Judge rejected the contention. The Court of Appeal agreed with him. I think they are both right. The reasoning that this

argument is not part of the case of the plaintiff in setting aside Exhibit N14, is unassailable. I have not found in any of the paragraphs of the statement of claim, an averment suggesting that the circular exhibit C was incorporated into Exhibit N17, the contract of service. Appellant also has not contended that non-observance of the policy of Exhibit C rendered Exhibit N14 null and void. Exhibit C not being incorporated into the contract of service and having not been relied upon to nullify the letter of termination Exhibit N14, cannot form the basis of an action by the appellant challenging the validity of the termination of his appointment and claiming reinstatement. 5

With the above views, consideration of the Nigerian National Petroleum Corporation Act No.3 of 1977 to which our attention was directed in oral argument seems to me clearly irrelevant and inapplicable. 10

I am satisfied on my analysis of the facts, consideration of the law in holding that exhibit C is of no assistance to the plaintiff in the instant case. I also so hold. 15

It seems to me the object is to show that appellant's contract of service is one with a statutory flavour. With due respect to Chief Chukura, there is no provision of the Act which governed either the appointment, discipline or determination of appellant's contract of service. For instance, neither section 5 which imposes a duty on the NNPC to do anything required for giving effect to agreements securing participation with the Federal Government or the NNPC in activities connected with Petroleum or section 6 empowering the NNPC to do all things to facilitate the training of staff to run its operations and the petroleum industry, directly related to plaintiff's contract of service. The cases referred to and relied upon, such as Olaniyan & ors v. University of Lagos (1985) 2 NWLR (Pt. 9) 559; Shitta-Bey v. Federal Civil Service Commission are all cases where statutory provisions govern either appointment, discipline or determination of the contract of service. In such a case a violation of the statutory provision is a necessary incident of the breach of the contract. 20 25 30

The contract of service of the appellant Exhibit N17, does not fall within that category and his appointment cannot properly be regarded as one with a statutory flavour. It seems to me somewhat strange and unusual extension of language to read Exhibit C as part of Exhibit N17. It may well be that the policy to protect employees of oil companies applies generally. But this is still subject to individual contracts entered into between the parties. At any rate sections 5 and 6 of the NNPC Act No.3 of 1977, cannot conceivably be so construed. The nearest of the provisions to the contention is section 6(1) which states: 35

"The Corporation shall have powers to do anything which in its opinion is calculated to facilitate the carrying out of its duties under this Act including without limiting the generality of the following, the power:-

(e) *to train managerial, technical and such other staff of the purpose of running of its operations and for the petroleum industry in general."*

10 Appellant surely does not fall within the purview of this provision, and it is not easy to conceive of how it gives his contract of service a statutory flavour. Exhibit N17, the contract does not rely for its effect on these provisions, and the issuance of Exhibit N 14, the letter of termination has not violated the provisions above considered.

On the analysis of the facts, and law in this appeal, I think appellant is only entitled to damages of two months' salary in lieu of notice stipulated in Exhibit N17. This is because it was mutually agreed on both sides as a condition for the determination of Exhibit N17. He is also entitled to his terminal benefits awarded to him by the two courts below. For the avoidance of doubt appellant is entitled by way of damages not only to two months' salary in lieu of notice, but in addition to all other allowances which he would have enjoyed were his contract of service not so determined. The damages indicated herein are to be free from any such deduction as are enumerated in Exhibit N14. In addition to the above, appellant is to be paid his entitlement in the company's Non-Contributory Pension Fund. I have read the judgment in this appeal of my learned brother Ogundare, J.S.C. I agree that the appeal should be allowed as stated therein. The orders for costs made in the courts below are hereby set aside. Each party is to bear its costs of this appeal.

KAWU JSC

I have had the advantage of reading, in draft, the lead judgment of my learned brother, Ogundare, J.S.C. which has just been³⁵ delivered. I am in complete agreement with him that the appellant's appointment was wrongfully terminated since he was not given two months notice nor paid two months' salary as provided by the terms of his employment. He is therefore entitled, by way of damages to two months' salaries in addition to other monthly allowances normally enjoyed by him when in

service for the same period. I abide by the other consequential orders made in the lead judgment, including the orders as to costs.

OLATAWURA JSC

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It will be repetitive to set out the facts of this case which have been admirably set down in the lead judgment of my learned brother Ogundare, J.S.C. However if it will be necessary to support my conclusions I will refer to those facts and pleadings.

The determining factor in this appeal is whether the appointment of the appellant has been lawfully determined. There is this undisputable fact that the appellant's appointment containing the terms and conditions is as set out in his letter of appointment tendered and admitted in evidence as exhibit N17. The clause that calls for interpretation is Clause 11 which states:

15

"You, or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one months' notice in writing, or by paying one month's salary in lieu of notice. On the confirmation of your appointment, the period of your notice shall be two months or two months' salary in lieu of notice and on the completion of five years of service, the period of notice shall be three months, or three months' salary in lieu of notice." It is agreed on both sides that the applicable length of notice is two months or two months' salary in lieu of notice. The appellant's appointment was purportedly terminated when the respondent forwarded a letter admitted as Exhibit N14. The appellant admitted in evidence that Clause 11 stipulates how the appointment may be terminated by either party. Under cross-examination he said:

20

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"It is true that under this Clause there is mutual right by either party to terminate the contract of employment. It is true that at the time my appointment was terminated I had not served 5 years. It is true that my appointment could have been terminated by either party by giving 2 months' notice or 2 months' pay in lieu of notice. I see Exhibit 14. It is the letter by which the defendant/company terminated my appointment."

30

The question now is: Has Exhibit N.14 complied with Clause 11 of Exhibit N14? Exhibit N.14 dated 18/8/81 states inter alia:

35

Termination of Appointment

5 We refer to our recent discussions and hereby confirm that, in accordance with Clause 11 of your contract of service dated 1st December 1976, your services will no longer be required as from today (i.e. 18th August 1981)... In addition we shall pay you the follows (sic):

- 10 1. Two months basic salary in lieu of notice
....." (My emphasis)

There can be no doubt, and in fact this has not in any way been challenged, that the required notice was given by the respondent. This I believe
15 has led to the 2nd issue formulated in this Court by the appellant. It is the gravamen of the appeal. The 2nd issue reads as follows:

*"What is the true and correct position in law in respect of a lawful termination of a contract of employment which is determinable by two months' notice or the payment of two months' salary in lieu of notice - is
20 the contract lawfully determined where neither the appropriate notice under the contract is given nor actual payment or tender of salary in lieu of notice?"*

In this appeal the appropriate notice as specified and stipulated under Clause
25 11 was given.

Chief Chukura, S.A.N. in the appellant's brief argued thus:
"In purporting to terminate the appellant's employment the respondent served him with Exhibit 14 in which it stated:

30 *"..... your services will no longer be required from today..... "*
This means that the condition for giving two months' notice was not fulfilled or contemplated by the letter. The termination of the contract would have been in order if the respondent applied the alternative condition - or by paying two months' salary in lieu of notice."

35 The learned Senior Advocate in his oral submission before us elaborated on this aspect of his submission when he said that the appellant's salary should be tendered or paid to him at the time of the termination of his appointment or the amount should have been tendered.

In his own oral submission on Issue 2, Mr. Okpoko, S.A.N., the learned counsel for the respondent pointed out that the cause of action was based on mala fide and not a question of tendering the amount and therefore the appellant should not make a new case different from the cause of action on which the case was fought.

I will remind myself again that the appellant knew and appreciated that the length of notice required was two months. He gave that evidence. The main claim is the declaration sought:

"A DECLARATION that the defendant's letter dated 18th August 1981 addressed by the defendants' branch at Warri to the plaintiff at Warri by which the defendants purported to terminate the employment of the plaintiff with the defendant/company is actuated by malice and bad faith, is ineffective to terminate the plaintiff's said employment."

There is no doubt that explicit from this claim is the allegation that the action of the defendant was "actuated" as a result of malice e.t.c. and consequently the notice was ineffective. It was in paragraph 19 of the Statement of Claim that the cause of the alleged breach of contract was made manifest where the appellant averred:

"19 The plaintiff avers that the company has not tendered to the plaintiff any of the terminal benefits which it referred to in its letter dated 18th August 1981."

The defendant/ respondent in the Amended Statement of Defence in its paragraph 7 averred as follows:

"The defendant denies paragraphs 16, 17, 18, 19, 21, and 22 of the Statement of Claim and states that plaintiff's employment was lawfully terminated by its letter dated the 18th day of August, 1981 in accordance with plaintiff's contract of service. It further states that in termination plaintiff's employment, it was not actuated by malice either of its own or that of any other of its employees. Defendant shall contend that the plaintiff's employment having been terminated in accordance with the contract of service, the motive (if there was one) which moved it to exercise its right under the contract is irrelevant. Plaintiff's terminal benefits were duly paid through his

156 Chukwumah v. Shell Pet. Dev. Ltd. (1993) 5 KLR Olatawura JSC
*usual mode of payment to wit - through the bank but these have now been
returned to the defendant with advice that plaintiff has closed his account.
Defendant may rely on the relevant banking documents and slates that it is
not obliged to employ the plaintiff until any age or the age of retirement. "*

5 Mr Okpoko, S.A.N. has rightly submitted in his brief that both, at
the trial of the case i.e. in the High Court and in the Court of Appeal, the
issue of malice on which the declaratory relief was based was not proved. I
agree. What is really important and of great legal concern is the wrongfulness
10 or otherwise of the determination of the contract of employment. But
where an employee is given the due notice of specific duration of termination
of his appointment without the offer of the equivalent amount of money
in lieu of notice, the employee must continue to work throughout the length
of notice stipulated in the contract. If he refuses to carry out his duties for
15 the duration of that notice the employee terminates his own employment.
The fear that the loyalty and dedication required for that period will no
longer be given is the main cause of the offer of money in lieu of notice. If
the employer therefore elects to pay the amount in lieu of notice, the payment
cannot be deferred until sometime later. It must be paid as at the
20 time the letter of termination is delivered to the employee. The convenience
of the employer in the payment of other entitlements such as leave bonus
or money for any other benefits which had accrued is a separate and distinct
claim from the money due in lieu of notice. The non-payment will therefore
in my view amount to a breach. The argument that the salary for
25 the period shall be paid in future ignores the condition of the agreement
which does not stipulate it must be paid at the pleasure of the employee.

30 There was no evidence that at the time Exhibit N14 was written that the
respondent was not in a position to know the amount due. It is within the
right of the employer to terminate the services of the employee, but where
conditions for such terminations are terms of the contract of service, such
35 conditions must be satisfied. I cannot brush aside or close my eyes to
paragraph 19 of the Statement of Claim where the appellant averred and
led evidence in support:

"19. The plaintiff avers that the company has not tendered to the

plaintiff any of the terminal benefits which is referred in its letter dated 18th August 1981."

One of these was "two months' basic salary in lieu of notice". It is for this reason that I will agree that as at the time the respondent purported to terminate that appellant's appointment on 18th August 1981, the termination was clearly in breach of the agreement and was therefore wrongful. 5

I will agree with Ogundare, J.S.C. that the entitlements of the appellant are limited to two months' salary in lieu of notice and other benefits awarded by the courts below as set out in the judgment of Ogundare, J.S.C. There will be no order as to costs as each side will bear the costs of the proceeding in this court and the court below. Appeal allowed in part. 10

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