

SUPREME COURT OF NIGERIA
2ND JULY, 1993. SC.84/1987
CORAM:- S. KAWU, S. M. A. BELGORE,
A. B. WALI, O. OLATAWURA, U. OMO, JJSC

WARNER AND WARNER INTERNATIONAL PLAINTIFF/APPELLANT
ASSOCIATES (NIG) LIMITED
AND
FEDERAL HOUSING AUTHORITY DEFENDANT/RESPONDENT

- APPEALS - *Court of Appeal's finding - not based on evidence - whether justified - submission that findings of the trial court were not challenged - when held to be erroneous.*
- APPEALS - *Court of Appeal - failure to consider attacked findings of trial court - merely because it resolved issue of breach of contract in defendant's favour - whether proper.*
- CIVIL CAUSES - *Action for wrongful termination of contract - award of damages by the trial court - set aside by the Court of Appeal - when to be restored in part by the Supreme Court.*
- CIVIL CAUSES - *Successful proof of indebtedness - whether to be affected by fact of counter claim.*
- CIVIL CLAIM - *Contracts - claim on quantum meruit when held not to arise - erroneous striking out of defendant's counter claim - not a bar to the consideration of the Plaintiffs claim.*
- CONTRACTS - *Contract agreement - whether varied subsequently - or stuck to by the parties - where no completion date is stated in the agreement - whether time for completion is contemplated.*
- CONTRACTS - *Building contracts - submission that time is never of the essence in such contracts - whether correct - instance where time is not of the essence at inception of the building contract - nor*

2 WARNER & WARNER LTD. V. F.H.A. (1993) 8 KLR 1; (1993)

subsequently.

CONTRACTS - *Termination of contract - without complying with the provisions - whether such termination can be valid - when a breach of contract - is deemed to have been committed.*

DAMAGES - *Awarded by trial court - on debt items - when not to be interfered with - confirmation of some damages awarded by trial court - whilst varying an item - for being speculative.*

EVIDENCE - *Award of aspect of damages - by the trial court - not based on evidence - whether proper. Striking out of counter claim - by the trial Judge - when not justified - proper order to be made.*

PRACTICE &
PROCEDURE - *Striking out of counter claim - by the trial judge - when not justified - proper order to be made.*

FACTS

The parties to this appeal entered into a written building contract (Exh. 1) in 1974, at an agreed sum for the Plaintiffs to construct 199 Duplex buildings in two different locations. The contract provided for the initial payment of mobilisation fee to the Plaintiff (contractor) to be followed by payments made on the basis of stage of work. The Defendant purported to terminate this contract sometime in 1976. Plaintiff was later asked to return to the site and it continued the work. As a result of lots of continued controversy and the Defendant's dissatisfaction with the Plaintiffs delays in completing the job, the Defendant finally terminated the contract via a letter written by it. Being aggrieved, the Plaintiff, filed an action before the Lagos High Court for a declaration - that the purported termination was null and void, that the contract is valid and still subsisting; a perpetual injunction restraining the Defendant's from taking possession of the building sites or re-awarding the contract: Or in the alternative, the sum of N15,000,000.00 (Fifteen million naira) being special and general damages for wrongful termination of the contract by the Defendant. The Defendant's counter-claim for the sum of N 10,000,000.00 as general and special damages was erroneously struck out by the trial Judge without considering it.

The trial court awarded the total sum of N11,572,284.00 to the

Plaintiff under three headings. The Defendant's appeal was allowed by the Court of Appeal which ordered a retrial of the Defendant's counterclaim and the Plaintiffs claim before the High Court. Both parties being dissatisfied have now appealed to the Supreme Court. The apex court had to determine inter alia, whether time is of the essence in the building contract between the parties and whether the Defendant's letter effectively terminated the contract. Was the Court of Appeal correct in directing a retrial of the whole action?

HELD (unanimously allowing the appeals in part by awarding a lesser sum to Plaintiff for breach of contract and ordering a retrial of the Defendant's counter-claim before the High Court).

1. There is no evidence on the record to justify the Court of Appeal's finding to the effect that the parties' contract agreement (Exh. 1) was varied at the time the Plaintiff was reinstated to continue work on the site. (p.19 L31)
2. Whether or not the Contract (Exh. 1) was terminated in 1975, the parties still stuck to the said Exh. 1 and made no new agreement regulating their relationship. (p.20 L4)
3. A careful perusal of Exhibit 1 reveals that no completion date was stated therein. The parties cannot, therefore, be said to have contemplated a time for the completion of the buildings at the time of signing the contract. (p.21 L22)
4. The Plaintiffs submission that time is never of the essence in a building contract merely because of its speculative provisions is not correct for there is nothing to prevent the parties from inserting a time condition. And time may subsequently be of the essence if the parties so provide. (p.21 L31)
5. In the instant case, time was not of the essence of the contract at its inception nor did it so become when the contract was reinstated in 1976. (p.21 L36)
6. There would have been no difficulty in coming to the conclusion that time became of the essence at a stage by the parties' subsequent agreement, if not for further developments in the parties' contractual relationship. (p.21 L9)

7. For time to be of the essence of a contract, the agreement as to time must be firm and unequivocal. As this was not the case here time cannot be said to be of the essence even subsequently. (p.22 L36)
8. From the facts of this case, even if time is of essence of the contract, non-performance within the agreed time was waived by the Defendant. (p.23 L35)
9. The purported termination of the contract by the Defendant through the letters written by it, is invalid for non-compliance with provisions of the contract agreement as to procedure for termination and period of notice required to be given. (p.27 L1)
10. In view of all the failures of the Defendant by virtue of steps taken or omitted by it, the Defendant has committed a breach of the contract. (p.27 L24)
11. A successful proof of indebtedness cannot be affected by the fact of Defendant's counter claim against all or any of the items. (p.28 L22)
12. It is not correct that only Plaintiff's claim on quantum meruit can be sustained since a claim on quantum meruit means that no specific sum can be claimed or proved. (p.28 L24)
13. The fact of the trial court's erroneous striking out of the Counter claim without considering it, does not mean that the claim itself cannot be established. (p.29 L2)
14. Plaintiff's submission that the findings of the trial court were not challenged by the Defendant before the Court of Appeal is not correct - as those findings were attacked in some of the Defendant's grounds of appeal. (p.29 L6)
15. The Court of Appeal's failure to consider the specific findings of the trial court on the view that once the issue of liability for breach of contract had been decided in favour of the Defendant there was no need to consider any other ground, was erroneous. (p.29 L10)
16. The learned trial Judge's award on each item of debt is a very painstaking job that is confirmed as nothing has been urged to justify any interference with the said Judge's award. (p.29 L23)
17. Out of the three items under the sub-heading of special damages

awarded by the trial court, two are confirmed needing no further comment as there was evidence before the learned trial Judge in support of his finding that those two items have been proved. (p. 29 L27)

18. On loss of profit (an item under special damages) the trial Judge is confined to a claim on the unfinished balance of the contract not on the current value of the whole contract. Only estimates were made and no conclusive evidence was given as to the percentage of the contract remaining to be done. (p.30 L38) 5
19. There is, therefore, no legal basis on which the learned trial Judge arrived at the award of 15% of the current value of the contract sum under loss of profit. That award is at best speculative having regard to his comments/findings that led to it. The burden of proof not having been discharged, the award on loss of profit is set aside. (p.31 L6) 10
20. The cause of the parties' contract agreement (Exh. 1) relied upon by the trial court does not justify the striking out of the Defendant's counter-claim. The Court of Appeal's decision restoring the counter-claim for hearing by the High Court being in order, is hereby affirmed. (p.32 L20) 15

20

REPRESENTATION

Chief G.O.K. Ajayi, SAN, A. Adebayo Oriola, for the Appellant
Ladi Williams S.A. Mbagwu (Miss), for the Respondent

CASES REFERRED TO:

25

1. Quandrangle Development and Construction Company Ltd. v. Jenner (1974) 1 W.L.R. 68
2. Lukas v. Godwin (1837) 3 Bing N.C 737
3. Lamprell v. Billericay Union (1849) 3 Fxg 283
4. Carr v. Barriman Property Ltd. (1953) 89 C.L.R. 327
5. Charles Richards Ltd v. Oppennian (1959) 1 K.B. 616
6. Chandler Bros Ltd v. Boswell (1936) 3 A.E.R. 179
7. Lodder v. Slowey (1904) A.C. 442

30

RULE REFERRED TO:

35

Court of Appeal Rule Order 3 Rule 6

BOOK REFERRED TO:

Keating on Building contracts 3rd & 4th Edition.

LEAD JUDGMENT BY OMO JSC

The parties to this appeal entered into a written contract in December, 1974 for the plaintiff to construct 199 Duplex buildings (Type H4-H3a) at a contract sum of N13,372.800.00. 140 of these houses were to be constructed in Festac (Festival of Arts and Culture) Town, and the balance of 59 at another location called Ipaja. This contract, copy of which was tendered and admitted in evidence as Exhibit 1 (vide pp. 993-1038 Volume 3 of the record of proceedings), provided for the initial payment of mobilization fee to the contractor, to be followed by payments made on the basis of "stage of work" agreed upon. A fixed date for the completion of the buildings was also agreed upon. Sometime in 1976, defendant purported to terminate this contract. Following the intervention of the Federal Minister of Housing, Urban Development and Environment, this termination was set aside and the plaintiff returned to the site and continued his work. The contract however continued to be dogged with controversy and so by another letter dated 2nd March, 1979 (Exhibit 76), the defendant finally terminated the aforesaid contract. Aggrieved by this action, the plaintiff sued the defendant in the High Court of Lagos claiming, as per its final amended statement of claim (vide p.600 et seq of Vol. 2 of records of proceedings).

- "A (i) A declaration that the letter dated 2nd March, 1979 reference No. FHAC 29A, purporting to terminate the Building Contract (hereinafter called 'the Contract') dated 5th December, 1974, between the plaintiffs and the defendants, is invalid, null and void, and entirely of no effect.
- (ii) A declaration that the Contract is valid and is still subsisting.
- (iii) A perpetual injunction restraining the defendants by themselves and or their servants agents and whosoever other wise from taking any steps pursuant to the letter of termination of the Contract and in particular from taking possession of the building sites hitherto being worked upon by the plaintiffs at the Festival Town, Badagry Road, Lagos, and from re-awarding the Contract for the construction of the buildings the subject matter of the Contract to another Contractor or Contractors and further from, interfering with any of the fixtures, construction

equipment and materials, e.t.c. of the plaintiffs now lying on or being at their various building sites in the said Festival Town, Badagry Road, Lagos.

AND IN THE ALTERNATIVE TO 'A' ABOVE

- (i) The sum of N15,000,000.00 (Fifteen Million Naira) being Special and General Damages for wrongful termination of the contract by the defendant. 5

PARTICULARS OF DEBTS:

- (a) Payment due to the plaintiffs on claim for preliminaries as agreed with the defendants on 25th July, 1979 in the Federal Ministry of Works and Housing, Lagos (vide that Ministry's letter dated 3rd August, 1978) i.e. N1,764,149.78 LESS N190,041.60 already paid to the plaintiffs by Certificate No.14A dated 29th January, 1979 . -N1574, 108.18 10
- (b) Claim for refund in respect of additional expenditure by the plaintiffs due to Port congestion, i.e. in air freighting aluminium mould son the express advice of the defendants in 1975. A formal claim of which was submitted on 4th December, 1978, vide plaintiffs' letter ref. WIA. EKEM. 300 (3)/78 under the Contract provision for 'Force Majeure' -370,141.89 15 20
- (c) Underpayment certified under the Contract Agreement by the Defendants' Consultants (i.e. Quantity Surveyors) with their letter, ref. BOF/101.27 of 17th January, 1977 -141,079.56
- (d) Claim in respect of Clearing and Leveling of Sites I and II on the Festival Town as agreed on 25th July, 1978 with the defendants at the Ministry of Works & Housing on the plaintiffs' formal claim submitted on 16th March, 1978 -462,862.50 25
- (e) Plaintiffs' claim for Clearing, Fulling and Levelling of Site III on 1st Avenue, Festival Town, payable under the contract's item on 'Contingencies' - 44,798.25 30
- (f) Claim on Heavy Foundations as provided for in the contract vide defendants' letter to our Bankers dated 9th August 1977, i.e. N1,344,000 LESS: N740,488.44 already paid under Certificate No. 14A of 29th January 1979. Balance remaining now due to plaintiffs - 603,551.56 35
- (g) Balance of payment on materials on site not yet paid for by the defendants, i.e. N1,314,562.27 LESS: N856,575.67 already paid

- to date as per Certificate No. 14A of 29th January, 1979 . -457,986.60
- (h) Difference in valuation upon resumption of work in October 1977, not yet paid for by defendants as evidenced by the Federal Ministry of Information's letter dated 25th October, 1976, LESS:
- 5 Payment made to the plaintiffs' under Defendants' Consultant Quantity Surveyor's Payment Certificate No. 1 of 13th January 1977, for N426,117.83. -N1,178,618.17
- (i) Underpayment on consultant Quantity Surveyors' Report on Work Done as at 2nd November, 1978 (vide page 2 of Defendants' Consultant Quantity Surveyors' letter dated 2nd November, 1978) i.e. N2,658,480 out of which payment on Certificate No. 12 of 20th September, 1978, i.e. N1,651,341.16 was made. Balance now due to plaintiffs -N1,007,138.84
- 10 (j) Money deducted from Plaintiffs' Certificate of Payment No.14 with out cause or explanation -30,218.25
- 15 (k) Refund of deposit for supply of Ceramic Tiles ordered by plaintiffs from Messrs. Renaissance Marbles Works Ltd. and delivered by the latter to the defendants which the defendants did not in turn deliver to the plaintiffs. -25,000.00
- 20 (l) Value of Work Done between 9th January and 28th February, 1979 when plaintiffs were forcibly ejected from site as per plaintiffs own measurement -347,680.00
- (m) Fluctuation in market prices for material and labour and equipment from 1974-79 as provided for under the Contract
- 25 (i) 1974-75 @ 15.1% unpaid = N402,053.98
- (ii) 1975-79 @ N2,613,957.80-
3,016,011.78
- N10,259,193.58
- (ii) PARTICULARS OF SPECIAL DAMAGES
- 30 (a) Interest on plaintiffs' Bank Loan of N564,661.67 taken in order to meet unpaid indebtedness of the defendants. -60,720.00
- (b) Interest on other credits given to the plaintiffs by various suppliers. i.e. on N1,306,115.08 worth of equipment and materials. -130,611.51
- 35 (c) Cost of Austin Crane in defendants' custody and not released to the plaintiffs after proof of ownership. - 82,000.00
- (d) Cost of vehicles, equipment, materials e.t.c. of plaintiffs unlawfully seized by the defendants between 28th February and 1st March, 1979 .-848,128.48

(e)	Loss of profits on the Contract, i.e. 20% of current value of Contract, i.e. N29,905,325.18	- 5,981,065.04	
	Total claim on Debts and Special Damages.	-17,361,718.61	
(f)	Less: The BALANCE OF MOBILISATION ADVANCE i.e. N2,674,560.00 Less N792,717.17 already illegally deducted from monies due to the plaintiffs	-N1,881,842.83	5
	Balance now due to plaintiffs	- N15,479,875.78	
	(iii) General Damages	-N520,124.22	
	TOTAL CLAIM (i.e. DEBTS, SPECIAL AND GENERAL DAMAGES)	-N16,000,000.00	10

DATED THIS 27th DAY OF MAY, 1983".

Pleadings were duly filed by the parties. After hearing several witnesses, admitting and considering over 180 Exhibits, and hearing counsel on their behalf, the learned trial Judge on 15/6/83 delivered his judgment, which covers about 60 pages of the record of proceedings. In it he gave judgment for the plaintiff in the sum N11,572,284.00 made up as follows:

(1) Debts	-	N7,548,078.00	
(2) Special Damages	-	N3,534,084.00	
(3) General Damages	-	<u>N0,490,124.00</u>	20
		<u>N11,572,284.00</u>	

The defendant also counter-claimed for the sum of N10,000,000.00 as general and special damages, full particulars of which are set out in its amended statement of defence (vide page 192 Vol. 1 of the record of proceedings), as follows:

(1) Excess Payment & Mobilization	-	N5,275,480.46	
(2) Excess Expenditure to Complete buildings contracted for	-	N3,769,314.50	
(3) Loss of rent on buildings not delivered by Contractor	-	N0,352,335.32	30
(4) General Damages	-	<u>N0,602,870.18</u>	
		<u>N10,352,335.32</u>	

With regard to the defendant's counter-claim, the learned trial Judge held that it is premature because the time provided in Clause 22(3)(d) of the Contract (Exhibit 1) for the defendant to make any claim had not yet arrived; and proceeded to strike same out.

Dissatisfied with this judgment, the defendant appealed to the Court

of Appeal seeking a reversal of the whole judgment. Briefs were duly filed by the parties, who were subsequently heard in oral argument. On 31/7/86, the Court of Appeal delivered its reserved judgment and held thus:

5 *"In the end, this appeal succeeds and it is allowed. The judgment of Ishola Oluwa J. in Suit No. LD/447n9, delivered on the 15th June, 1983 is set aside. The appeal against the learned Judge's order striking out the counter-claim of the appellants is also allowed. The counterclaim having been accepted as properly filed is remitted back to the High Court. I think this is a proper case in which a retrial of the plaintiffs' claim and the defendants counter-claim should be ordered so as to do justice to both parties. And I order accordingly. The appellants are entitled to the costs of this appeal which I assess at N4,000.00 in this Court and N2,000.00 at the court below."*

15 Both parties have now appealed to this Court against the judgment of the court below. The plaintiff appealed against the whole judgment, whilst the defendant appealed against the penultimate order for a rehearing of the case. It is because of this that they will be referred to in this judgment as plaintiff and defendant. Both sides also filed briefs in support of their appeals and presented oral arguments in further expatiation.

20 Sixteen (16) grounds of appeal are setout in the plaintiff's notice of appeal filed on 17/7/87. These grounds, without their particulars, are as follows:

25 *"(1) The learned Judges of the Court of Appeal misdirected themselves in law and on the facts when they wrongly held that the contract between the parties (Exhibit1) was terminated in 1975 by Exhibit 12.*

30 *(2) The learned Judges of the Court of Appeal with respect acted on nonexistent evidence and allowed their judgment to be affected by such non-existent facts and irrelevant considerations when it held that 'a Commission of Inquiry was instituted to look into the happenings at Festival Town. There were other contractors apart from the respondents who were also involved in shady deals in the execution of their contracts and all of them were to be inquired into'.*

35 *(3) The learned Judges of the Court of Appeal misdirected themselves in law and on the facts when they held that the parties herein agreed to be bound by Exhibit 1 with some variations.*

(4) *The learned Judges of the Court of Appeal erred in law and came to a wrong conclusion on the facts when they held that 'time' is of the essence of Exhibit 1 and continued to be of essence of this contract until its purported termination in 1979 by Exhibit 70.*

(5) *The learned Judges of the Court of Appeal erred in law and misdirected themselves on the facts when they held that:* 5

*'It is an accepted position of the law of contract that where notice is given fixing a reasonable time of performance time becomes of the essence of the contract for both parties'.
and that:* 10

'the parties were bound by their agreement that the contract would be completed on 30th June, 1978.'

(6) *The learned Judges of the Court of Appeal misdirected themselves in law and on the facts when they erroneously held that the respondents herein have not waived their right - if any - to make time the essence of this contract.* 15

(7) *The learned Judges of the Court of Appeal erred in law and misdirected themselves on the facts when they held that Exhibit 70 - the purported letter of termination - 'did not strictly follow the provisions of Clause 22 of the Agreement' (Exhibit 1) but that 'the reasons for determination of the contract was (sic) clear'.* 20

(8) *The learned Judges of the Court of Appeal erred on the facts and came to a wrong conclusion in the case when they held that the appellants herein agreed to a change in the methods of payment under the contract i.e. from 'stage payment' to payment by measurement of work done.* 25

(9) *The learned Judges of the Court of Appeal also misdirected themselves on the facts by wrongly holding that the parties agreed to the excision of the Ipaja site from the contract works.* 30

(10) *The learned Judges of the Court of Appeal misdirected themselves on the facts when they held that Chief Sobo Sowemimo was correct in his submission before them in Reply i.e. to the effect that shortage of water, cement, lack of electricity e.t.c. were obligations of the respondents when there was no issue before the learned trial Judge nor the Court of Appeal on those issues.* 35

(11) *The learned Judges of the Court of Appeal erred in law in holding that the appellants herein are not entitled to recovery for breach but recovery only by way of quantum meruit, which type of recovery they claim must be specially claimed and pleaded.*

5 (12) *The learned Judges of the Court of Appeal erred in law in holding that the counter-claim of the respondents herein should be retried when there was no basis in law for such holding.*

10 (13) *The learned Judges of the Court of Appeal erred in law and came to a wrong conclusion in the case when they ordered a retrial of the plaintiffs' claim and the defendants' counter-claim when there was no basis for such orders.*

15 (14) *The learned Judges of the Court of Appeal misdirected themselves in law and on the facts in failing to affirm the judgment of the learned trial Judge in the sum of N7,548,078.00 for debts and or value of work done and unpaid for against which debt there was no appeal before them.*

20 (15) *The learned Judges of the Court of Appeal erred on the facts and in law in making a wholesale reversal of all the main and germane findings of facts made by the learned trial Judge in contravention of the applicable principle of law.*

(16) *The judgment of the learned Judges of the Court of Appeal is against the weight of evidence."*

25 In its appeal against the decision of the court below ordering a retrial of the plaintiff's claim, the defendant filed only one ground of appeal set out without its particulars, as follows:

30 *"The learned Justices of the Court of Appeal misdirected themselves in law in ordering a retrial of the plaintiff/respondent's claim when the Court itself had held that the plaintiff/respondent had failed to prove its case and no claim in quantum meruit had been specifically claimed or pleaded."*

From the sixteen grounds of appeal filed by the plaintiff, five issues for determination were set out thus:

35 (i) *Whether or not Exhibit 1 was terminated in 1975 and if so whether the parties made a new agreement at the time for regulating their relationship with the respondents.*

Grounds 1, 3, 8 and 9 cover the issue.

(ii) *Whether 'time' is ever of essence of contracts like Exhibit*

1 and 'even if time is of such essence', whether on the facts of this case the appellants have waived their rights arising out of the alleged failure of the respondents to keep to such time Grounds 4, 5, and 6 of the Respondents' Notice of Appeal cover the issue.

- (iii) *Whether the Appellants' Notice of termination Exhibit 70, effectively terminated Exhibit 1 or whether Exhibit 70 is a valid Notice of Termination within the meaning of Clause 22 of Exhibit 1. Ground 7, raises this issue.* 5
- (iv) *Whether the learned Judges of the Court of Appeal directed their attention to the proper and relevant issues before them or whether they allowed themselves to be carried away and affected by irrelevant considerations and matters of prejudice which are not properly germane nor before them for just determination. Grounds 2, 10 and deal with this issue.* 10
1 1 15
- (v) *Whether the learned Judges of the Court of Appeal were right in holding that the Counter-claim of the respondents which was struck-out by the learned trial Judge should be retried. Ground 12 raises this issue; and whether the learned Judges of the Court of Appeal properly exercised their statutory powers in ordering such re-trial of both the respondents' claim against the appellants as well as the latter's Counterclaim."* 20

From its single ground of appeal the defendant set out two items for determination thus: 25

- "(i) Whether the court below was correct in directing a retrial of the entire action thereby reopening issues of liability which it had determined after hearing arguments from both sides
- (ii) Whether, in view of the findings made by the courts below (which the defendant accepts) the plaintiff's case ought not to have been dismissed.

The defendant's two issues are covered by the issues set out by the plaintiff, which will therefore be the basis on which this appeal will be considered and finally determined. Before proceeding to consider the issues raised however I propose to give a short background of the events leading to the present case on appeal together with a summary of the decisions of the High Court and the Court of Appeal. 35

The contract into which the parties entered on 5/12/74, which forms

the basis of their subsequent relationship, was admitted in evidence in the trial court as Exhibit 1. It provided for the building of 199 houses, 140 at Festac Town and 59 at Ipaja to be completed and delivered on or before 7/12/74 and 1/2/75 respectively. Payment for work done by the plaintiff agreed on as to be N13,372,800 was to be made by "stage payment" in six stages

5 set out as follows:

No.1	N2,674,560	-	Mobilization payment upon signing of (of agreement) 20% of contract sum.
No.2	N1,337,280	-	31/3/75
No.3	N1,337,280	-	30/4/75
10 No.4	N1,337,280	-	31/5/75
No.5	N2,006,920	-	30/6/75
No.6	N1,337,280	-	31/7/75

Soon after the very first stage payment, some disagreement arose between some individuals within the plaintiff company. Allegations of financial mis-
15 appropriation were made which resulted in the plaintiff finding it difficult to carry out it's contract obligations right from its inception. Between May and October 1976 the plaintiff was involved in a Commission of Enquiry known as the Festac Inquiry, as a result of its inability to carry out its obligation under the contract; which also made it impossible for the Festac buildings it
20 was to construct to be used for the World Festival of Black Arts and Culture. After the report of the Enquiry had been considered, its contract was reinstated by a letter dated 8/10/76 (Exhibit 13). No specific new date for completion of the contract was agreed upon at this point. Later however, the defendant demanded and the plaintiff appears to have agreed on 30/6/
25 78 as a new completion date, for the Festac buildings only. Before the "suspension" of the contract in 1976, the stage payment set out earlier had ceased to be effective quite obviously because of plaintiff's lack of performance. Although the last stage payment was to have been made in July 1975, only the third stage payment had been made in full by January,
30 1977.

On 1st April, 1976, Mr. Fortune Ebie became the General Manager of the defendant. He was clearly of the view that one of the flaws in the agreement, which caused the problem with the plaintiff, is the failure to tie the stage payments to progress of work on the site. He therefore, without
35 specific prior agreement with the plaintiff, abandoned the stage payments systems and replaced it with payment on the basis of work certified to have been done plus the value of materials on the site. Payment under this new system was to be made on the strength of valuation certificates prepared by the defendant's Quantity Surveyor. This change appears to have been "back-

dated" because it was used to arrive at the conclusion that the plaintiff had been overpaid; which is contrary to its contention that it was being owed over N1 million (Exhibits 61A and 18A refer). Defendant also proceeded to deduct, by installments, these alleged overpayments from subsequent payments due to the plaintiff. The plaintiff protested strongly against this unilateral decision which worsened its financial crunch. At a reconciliation meeting which it held with the defendant and the Ministry on 2/8/77 a decision was arrived at that:

"Stage payments were now out of the question and payments will be made strictly on the basis of certified work done or materials on site" (vide paragraph 7(e) of Exhibit 61D copied at page 1183, of volume IV of the copy of proceedings)

This ended that controversy.

The plaintiff continued work on the Festac site. It claims it had multiple obstacles in the course of its attempt to complete this contract. Prominent among these were undue late payments by the defendant, cost over-runs, repeated disagreements as to its entitlements, fluctuations, shortage of water and electricity and refusal of its bank to finance it adequately. The defendant, on its part, was very dissatisfied with the work of the plaintiff, and was of the view, certainly before 2/8/77, that it "does not possess the capacity to do any more effective work" (Exhibit 61D supra refers). What is more, the defendant failed to deliver the Ipaja site to the plaintiff which could therefore not commence the building of the 59 houses it contracted to construct there per Exhibit 1.

25

By a circular letter dated 14/2/78, (Exhibit 102), the defendant called on all contractors at Festival Town and Ipaja involved in the rust phase construction to indicate in writing their proposed completion date. In reply, the plaintiff gave the date 31st October, 1978, on conditions that (a) it had a regular supply of cement, (b) its entitlements were promptly paid and (c) water and electricity were regularly available (Exhibit 102A dated 15/2nS at page 1183 of Volume IV of record or proceedings refers). On 27/6/78, it wrote another letter applying for extension of time to complete its contract, claiming that conditions enumerated in Exhibit 102A (supra) had not been met. No new completion date was however offered. On the 23rd of February, 1979, eight months after the completion date 30/6/78 given by the defendant to the plaintiff had expired, defendant wrote a letter to the plaintiff terminating its contract with the plaintiff, on the ground that it had committed a breach of contract by its failure "to deliver all the housing

35

units fully completed by the agreed time which was 30th June, 1975" (vide page 709 of the records - Volume 2). Under the terms of Exhibit 1, the plaintiff is entitled to a seven days notice of this termination. Were service of same promptly and successfully effected, this notice would end on the 2nd March, 1979. Unfortunately service was not effected because the letter
5 was returned unclaimed. On 2/2/79 therefore defendant wrote another and more detailed letter of termination (Exhibit 76). It was therein specifically stated that "This determination takes effect immediately on your receipt of this letter". This registered letter according to the defendant's General Manager "bounced from one Post Office to the other", and was returned to the
10 defendant which reposted it on 14/3/79. But on 5/3/79 the termination of the plaintiff's contract had been announced at a Press Conference convened by the defendant. By 9/3/79, it is the finding of the trial court that the plaintiff's workers had been chased off their building sites and wanton damage inflicted thereon. Plaintiff's protest and notice of intention to proceed
15 to Arbitration (Exhibits 72 to 74 refer) having proved of no avail, it filed the present action.

In it's judgment, the High Court, made the following findings:

20 (1) that the defendant committed the following breaches of
Exhibit 1

- 25 (a) changing the stage system of payment to that by computation/valuation of work done without prior agreement with the contractor (plaintiff) - vide Clauses 9(1)(ii) and 23 of Exhibit 1. Plaintiff did not consent to this.
- (b) Ipaja site was not released to plaintiff for the performance of its contract thereon.
- 30 (c) notice and letter of termination (Exhibits 70 and 76) are both bad, null and avoid.
- (d) Defendant deliberately breached Exhibit 1 which is still valid, subsisting and binding. The plaintiff is entitled to damages for this wrongful termination.

35 (2) There is no logic in attempting to reinstate the plaintiff on the site when Federal Housing Authority's witnesses have stated that the houses have been redistributed to other contractors.

(3) The plaintiffs alternative claim and damages is "the only

reasonable possibility in this matter"

- (4) The defendant waived its right to insist on a definite completion date for the performance of the contract.
- (5) Amount due to the plaintiff as at the time of change of the system of payment is N1.6 million.
- (6) Plaintiff's further claim for the appointment of an arbitrator has been overtaken by events, an application to the Court to that effect being refused. 5

It is important to observe that the learned trial Judge did consider in his judgment all the items of special damages and debts owed the plaintiff by the defendant (pleaded the plaintiffs), and made specific findings on them. At the end of that exercise he awarded the plaintiff a total sum of N11,572,286, under three specific headings: 10

- (1) Debts - N7,548,076
- (2) Special Damages - N3,534,084
- (3) General Damages - N0,490,124 15

He struck out the plaintiffs counter-claim for the sum of N10,000,000 on the ground that it is premature.

The Court of Appeal in its judgment made the following findings:

- (1) That there was a termination of the Contract (Exhibit 12 refers). This contract was however reinstated in 1976 subject to some variations. 20
- (2) That the two variations to Exhibit 1 introduced by the defendant did not constitute a breach of contract, because
 - (a) the change of payment from "stage payment" to a system of payment by measurement of work done was agreed upon by the parties - Exhibit 61D refers. 25
 - (b) failure to release Ipaja contract sites was in order because this was agreed upon/or confirmed at a meeting between the plaintiff, the defendant and the Ministry on 30/8/77. The reason for such decision being that the plaintiff could no longer cope with 'the job' - Exhibit 61F refers. 30
- (3) That time was of the essence of the reinstated contract, 30/6/78 being agreed upon as the completion date by the parties. 35
- (4) That delay to terminate the contract for a period of six months after the date of its completion did not amount to a waiver.

(5) That the contract sum did not include site clearance, general site leveling, electrical and water distributions.

(6) That shortage of water, cement and lack of electricity were not the responsibility of the defendant, but that of the plaintiff. No evidence was led to show that the defendant undertook these obligations.

(7) Plaintiff's counsel is right that Clause 22 was not strictly followed in writing Exhibit 70 - notice of termination: The intention of the defendant therein set out is however explicit as to the reasons for determination of the contract; and this was understood by the plaintiff.

(8) In any event, the service of a letter of termination was on the facts of this case superfluous since the respondent have, by their conduct, evinced an intention not to be bound by the contract.

(9) Since the plaintiffs had failed to perform, having built only 15% of the houses contracted between 1974 and 1979, the defendant is entitled to determine the contract.

(10) Nor is the writing of Exhibit 76 on the 7th instead of the 8th day, vital to a decision in respect of the notice of termination.

Having come to the conclusion that the trial court erred in its decision that the defendant had committed a breach of the contract between the parties, which is the subject of the defendant's second ground of appeal, the Court of Appeal did not consider any of the other grounds which it held were framed in the alternative. It therefore held the view that the defendant is not liable to the plaintiff except on a claim in quantum meruit, which must be specifically claimed and pleaded, it also allowed the appeal against the striking out of the counter-claim which it remitted for retrial. Its final order, which it predicated to be in the interest of justice, is that the plaintiff's claim and defendant's counter-claim should be retried.

The plaintiff's first issue for determination is re-stated as follows:

"1. *Whether or not Exhibit 1 was terminated in 1975 and if so whether the parties made a new agreement at the time for regulating their relationship with the respondent*".

As stated earlier, one of the findings of the court below is that Exhibit 1 was terminated in 1975 and was reinstated in 1976 with some variations. There was indeed a letter Exhibit 12, which was written by the

General Manager of the defendant in 1975 to the plaintiff, stating inter alia that:

"It has been decided by the appropriate Authority that your contract should be terminated in accordance with 'Clause 22 of the Contract Agreement....."

The contract therein referred to is Exhibit 1. It is however the contention of the plaintiff in its brief that at a meeting held between the parties and the Ministry in 1976, it was decided (a) that the letter of purported termination
aforementioned, could not be regarded as a letter of termination, it being
at best only a notice of intention to terminate (b) that the plaintiff be
returned to continue with his contract and (c) that plaintiffs return was on
the basis of the existing contract - Exhibit 1, and without any pre-conditions.
10 With regard to (a), plaintiff proceeded to show that Exhibit 12 could
not have terminated the contract Exhibit 1 since it did not comply with
Clause 22 thereof setting out how that contract can be terminated. This
sub issue as to whether or not Exhibit 12 effectively terminated Exhibit 1
15 seems to be an unnecessary issue to further explore having regard to the
other decisions of the parties in 1976. It is enough that the parties, in the
course of settlement, doubted its efficacy. What is important is the decision
that Exhibit 1 should continue to bind the parties as it did in 1974/5. As to
20 (c), the finding of the court below that Exhibit 1 was reinstated "with some
variation" has been rightly attacked by plaintiff in its brief. This finding
purported to follow and rely on a submission in the defendants brief in the
court below in which it stated thus:

*"So, it would seem that from the point of view of the defence the
relationship of the parties was governed by the first Contract (Ex
hibit 1) as varied by subsequent agreement between the parties."
(Note: italics mine)*

The finding of the court below and the argument of the defendant before it
are however not the same. Whilst the Court of Appeal's finding means that
there were variations of Exhibit 1 at the time of it's reinstatement in Octo-
ber 1976, defendant's argument does not say so. Rather, it states that the
variations which governed the parties came subsequent (later), to the afore-
said reinstatement. The Court of Appeal wrongly relied on the defendant's
35 argument. It is also correct that there is no evidence on record to justify the
Court of Appeal's finding. Exhibit 13 which welcomed the plaintiff back to
his contract merely states, inter alia that

"I am pleased to inform you that approval has been given for you

to return to site and commence work"

and nothing more. The answer to issue 1 is therefore that whether or not Exhibit 1 was terminated in 1975, the parties made no new agreement for regulating their relationship. They stuck to Exhibit 1.

The second (2) issue asks

5 "2 *Whether 'time' is ever of essence of contracts like Exhibit 1 and even if time is of such essence, whether on the facts of this case the appellants have waived their rights arising out of the alleged failure of the respondents to keep to such time.'*

10 In coming to the conclusion that time is of the essence of this contract, the court below relied on it's finding that both parties had agreed to a date for completion of the contract - 30/6/78. In so finding the court relied, inter alia, on Exhibits 61F and 102B. Exhibit 61F is the Minutes of a Meeting between the parties and the Supervising Ministry. In it the Chief Executive
15 of the plaintiff Dr. Kumolu Johnson, is noted as promising on behalf of the plaintiff "to have everything completed by the end of June, 1978". A few days to the end of the month, on 27/6/78 to be precise, he applied formally to the defendant for an extension of time to complete the contract, Exhibit 102B refers. The Court also held that where notice is given fixing a reason-
20 able time for performance, time becomes of the essence of the contract vide Quadrangle Development and Construction Company Ltd v. Jenner (1974) 1 WLR 68. It is however the contention of the plaintiff that "time is never of essence" in a building contract such as Exhibit 1 which provides for (a) extension of time to complete the works (b) liquidated damages for late
25 completion and (c) a bonus for early completion vide Lucas v. Godwin (1837) 3 Bing N.C. 737 (744); Lamprell v. Billericay Union (1849) 3 Exq. 283 (308); Keating on Building Contracts 4th Edition pages 60/61. The position, as far as time for completion being an essence of the contract is concerned, is stated in Keating on Building Contracts 3rd edition at p. 60/
30 61 thus:

"TIME FOR COMPLETION

1. *Generally*

35 *If no time is specified for completion of the contract a reasonable time for completion will be implied. What is a reasonable time is a question of fact. If no time is specified but words are used such as "as soon as possible" or "within a reasonable time:" it is a question of construction in the circumstances to determine the time for completion.*

2. *When time is of the essence*

If a time is specified for completion it is a question of construction whether completion by the contract time is a condition precedent to payment. Where it is a condition precedent time is said to be of the essence of the contract. The normal rule is that in an ordinary building contract time is not of the essence. If time is not of the essence then the mere fact of non-completion to time does not release the employer from the contract, though if completion to time was a term of the contract he is entitled to damages.

Time will be of the essence if the contract expressly so makes it or if there are clauses showing that the parties intended it to be of the essence, or if after a delay by one of the parties the other gives a notice making time of the essence. The right to serve a notice making time of the essence applies either where time was not originally of the essence, or where although it was originally of the essence the time for completion has by waiver or agreement ceased to apply. In such a case the employer may serve a notice on the contractor fixing a reasonable time for completion, and can dismiss the contractor if he fails to complete by that time."

(Note: Italics mine)

I have perused Exhibit 1 carefully and find that no completion date is therein specified. Even the date on which the contractor is to be let into possession of the site in which he is to work is not specified in the contract, vide Clause 19, which provides that such date will be stated in the Appendix to the contract. Ex facie therefore, the parties cannot be said to have contemplated, at the time of signing the contract a time for the completion of the buildings therein set out. This accords with the statement in Keating's Building Contracts (cited supra), that "The normal rule is that in an ordinary building contract time is not of the essence vide Lucas vs. Godwin" (supra). The submission of plaintiff that time is never of the essence in such contracts merely because of its special provisions is however not correct, because there is nothing to prevent the parties from inserting a time condition in a building contract. Time may however subsequently become of the essence if the parties so provide. In this particular contract therefore time was not of the essence a building contract. Time may however subsequently become of the essence if the parties so provide. In this particular contract therefore time was not of the essence of the contract at its inception nor indeed (and surprisingly so) did it so become when the contract was reinstated in 1976. The only question that is left to be determined is whether time became of the essence when the parties arrived at the agreement that all the housing units contract at the Festival Town would be delivered by the end of June, 1978 (Exhibit 61F refers). It is to be noted

that the agreement was not arrived at in vacuo nor was the plaintiff under any particular pressure to agree. The plaintiff presented to the problems-resolution meeting a work programme chart whether time became of the essence when the parties arrived at the agreement that all the housing units contract at the Festival Town would be delivered by the end of June, 1975
5 (Exhibit 61F refers). It is to be noted that the agreement was, not arrived at in vacuo nor was the plaintiff under any particular pressure to agree. The plaintiff presented to the problems-resolution meeting a work programme chart by which it voluntarily undertook to complete its contract by August, 1975, inclusive of the Ipaja site houses. End of June 1975 for Festival Town
10 only was therefore very favourable agreement for the plaintiff. I would have had no difficulty in coming to the conclusion that time became of the essence as from 30/8/77 (date of Exhibit 61F) but for Exhibits 102, 102A and 102B which came later. Six months after the "agreement" in Exhibit 61 F, the defendant sent out a circular letter to all contractors on its Festival
15 Town and Ipaja projects asking them to indicate a firm date on which they would hand over the contracts being handled by them (Exhibit 102 refers). In reply the plaintiff wrote Exhibit 102A dated 15/2/78 in which it gave its firm date to be 31/8/77 (a change from Exhibit 61F of 30/10/77) "on the condition that we have regular supply of cement, minimum of 2,000 bags
20 a day and prompt payment of our entitlements and claims and the availability of electricity and water". This meant therefore that the plaintiff, in response to the defendants invitation, gave a new and conditional completion date. There is no evidence on record that the defendant wrote to insist on plaintiff abiding by either the earlier date 30/6/78 or the new date 31/10/
25 78 without any preconditions. Instead it was the plaintiff who on 27/6/78 formally applied by letter of that date (Exhibit 102B) requesting an indefinite extension of time to complete the contract detailing, inter alia, the non-fulfillment of the conditions set out in its Exhibit 102A.

30 In so doing the contractor was complying with the provisions of Exhibit 1, Clause 21 of which permits him to give notice of delay to the Employer, who if the reasons for the delay are considered by him to be excusable under the conditions set out in the Clause, "shall make in writing a fair and reasonable extension of time for completion of the works". Even
35 at this stage the defendant did nothing. In these circumstances therefore the agreement between the parties as to time for completion was at best a loose one. For time to be of the essence of a contract, the agreement as to time must be firm and unequivocal. I regret to observe that this was not the case here, and therefore time cannot in my view be said to have become of

the essence even after 30/8/77. The submission of appellant's counsel on this is therefore right, and part of the answer to Issue 2 must be that time was never an essence of Exhibit 1.

I will now consider the second leg of Issue 2, i.e. whether, if time is of the essence, the defendant had waived its right to so insist on the plaintiff performing within time, because of the delay which it permitted in the performance of the contract. It is the submission of the plaintiff that failure to meet the time limitation is not a fundamental breach of the contract which can be therefore regarded as a repudiation of the contract vide Carr v. Berriman Property Ltd (1953) 89 CLR 327. This is because Exhibit 1 has penalty provisions for failure to complete any/or all the buildings in time vide Clause 20 thereof The failure of the defendant to insist on completion, eight months after the time it purported to give for completion of the contract, is therefore nothing but a waiver of whatever rights it had. In coming to the conclusion that there was no waiver the court below was influenced by its finding that only 7 houses out of 140 had been built by the plaintiff. Plaintiff has succeeded in showing in its brief (see pages 15 to 27 thereof refer) that this is not a correct assessment of the situation. It has demonstrated convincingly that 130 buildings out of 140 were at various levels of construction. So much work was proceeding on the sites that it was not a situation in which the plaintiff can be said to be doing nothing. I will rely on the same reasons I gave earlier for coming to the conclusion that time was never an essence of this contract, in coming to the conclusion that the conduct of the defendant constituted a waiver of the time completion "condition". After Exhibit 61F, the defendant gave the plaintiff an opportunity to resile from the agreed date of 30/6/78 by sending Exhibit 102 to him. When he replied by writing Exhibit 102A and subsequently wrote Exhibit D 102B, there was no letter to him insisting on the 30/6/78 or any other subsequent date, making it clear that failure to comply with that date would constitute a failure to perform the contract, which it would regard as a breach thereof. Instead, the plaintiff was left to believe that it was business as usual i.e. to deliver the houses subject to further negotiations to meet his conditions/ reasons for failure to complete. My firm answer to this second leg therefore is that if I am wrong, and time is of essence of the contract, non-performance within the agreed time was waived by the defendant.

Issue 3 asks

"3 Whether the appellant's notice of termination Exhibit 70, effectively terminated Exhibit 1 or whether Exhibit 70 is a valid notice

of termination within the meaning of Clause 22 of Exhibit 1"

On the 23rd of February, 1979 the defendant wrote Exhibit 70 to the plaintiff, and it reads thus:

"FEDERAL HOUSING AUTHORITY

23rd February, 1979

Ref No. FHAC. 29A

Messrs Warner & Warner International Associates (Nig) Ltd
104 Lewis Street
P.O. Box 6094
Lagos

Dear Sirs,

Notice of Intention to determine contract
for construction of Type H4-H3a buildings
of Festival Town

In accordance with the provision of the Contract Agreement dated 5th December, 1974 made between the Federal Housing Authority and yourselves and subsequently modified at a meeting held on 30th August, 1977, I for and on behalf of Federal Housing Authority hereby notify you that you are in breach of that agreement as modified and unless this breach is rectified within seven days hereof, the Federal Housing Authority will determine the contract in accordance with the provisions of the said agreement.

2. The specific nature of the breach is that you have failed to deliver all the housing units fully completed by the agreed time which was 30th June, 1978.

Yours faithfully

(Sgd.) S.C. NDIBE
A.G Principal Legal Officer
for: General Manager.
Federal Housing Authority

On the date the seven days notice was expected to terminate, 2nd March, 1979, the defendant wrote a letter terminating the contract (Exhibit

76) the heading and paragraphs 1 and 2 of which state as follows:

Dear Sir.

Notice of Determination of Contract for Construction of Type H4-H3a
Building at Festival Town

5

I am directed to refer to our letter FHAC.29A of 23rd February, 1979 which specified certain breach by you of the contract agreement dated 5th December, 1974 as modified at a meeting held on 30th August, 1977. Your failure to proceed regularly and diligently with the work has resulted in your not being able to deliver all the buildings fully completed by 30th June, 1978 the agreed date. 10

2. The Federal Housing Authority having taken notice that up to date 2nd March, 1979 you have not yet rectified that breach within the period specified in that our letter, hereby determines the contract between yourselves and this Authority. This determination takes effect immediately on your receipt of this letter. You are hereby requested to move out all your workers from the site which henceforth reverts to Federal Housing Authority." 15

20

It had been found by the trial court and not controverted that Exhibit 76 was not received by the appellant until after 14/3/79. Before then the defendants had on 5/3/79 given a Press Conference at which it announced that the plaintiff contract had been terminated; and before 9/3/79 had driven the plaintiffs workers from the site. Various and differing reasons were given by the defendant for the termination of plaintiffs agreement. Whilst Exhibit 70 said it was for non-delivery of the houses on 30/6/78. Exhibit 76 stated that it was for "failure to proceed regularly and diligently with the work with the result that the buildings were not completed by 30th June, 1978" and in its letter dated 13/3/79 to the plaintiff the contract was said to be validly determined in accordance with the provisions of Clause 22 of Exhibit 1. The learned trial Judge proceeded in his judgment to find that both the notice of and the letter of termination are bad and are nullities because (a) the full 7 days notice of termination had not been given (b) Exhibits 70 and 76 give different reasons as cause for termination, which should not be the case (c) whilst Clause 22 provides that "failure to proceed regularly and diligently" is a ground for termination of the contract, "failure to complete the buildings" is not a ground for termination thereunder. What is more there is no specific evidence of lack of 25 30 35

regularity and diligence before the Court, (d) the defendant had waived its right to terminate the contract. The Court of Appeal agreed that plaintiff's counsel is correct in his submission that the appellants did not strictly follow the provisions of Clause 22 of Exhibit 1 in writing Exhibit 70.

It however held (per Mohammed, J.C.A.) that

5 *"the intention of the appellants was explicit as to the reason for their determination of the contract and I accept that what was communicated in the letter had been understood by the respondents"*

(my note: the defendant).

10 and relied on paragraph 2 thereof which gives the specific nature of the breach to be "failed to deliver all the housing units fully completed by the agreed time which was 30th June, 1978". It also regarded as very relevant, and was persuaded by the observation of the defendant's counsel that:

15 *"In any event the service of a letter of termination was on the facts of this case, superfluous since the respondents here, by their conduct evinced an intention not to be bound by the contract"*

The relevant portion of Clause 22 of the Contract states thus:

"22. *Determination by Employer:*

20 (1) *If the contractors shall make default in anyone or more of the following respects, that is to say:*

(a) *If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or*

25 (b) *If he fails to proceed regularly and diligently with the Works, or*

(c) *.....or*

(d) *If he fails to comply with the provisions of Clause 15 of those conditions*

30 *then the Employer may give to him a notice by registered post or recorded hand delivery specifying the default, and if the contractor shall continue such default for seven days after receipt of such notice, then the employer without prejudice to any other rights or remedies, may within seven days after such continuance by notice by registered post or recorded hand delivery forthwith determine the Employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously"*
 35 *(Note: italics mine).*

It is quite clear from this Clause of Exhibit 1 that Exhibit 70 is defective as

to the reason for termination therein set out, since it requires that the specific default committed shall be set out. If Exhibit 70 is defective in this respect, such defect cannot be cured by Exhibit 76 which should contain the same reason as Exhibit 70. The reliance by the court below on the specific nature of the breach as set out in paragraph 2 of Exhibit 70 is therefore unfortunate, because it does not comply with the provisions of Clause 22, and is therefore invalid to terminate the contract. This is in addition to the shortfall in the period of notice given, which is not disputed. The termination procedure in Clause 22 must be complied with, no matter how inelegant may be it's drafting. The Court of Appeal compounded its several errors on this issue by allowing itself to be persuaded that the provisions of Clause 22 as to notice can be treated as superfluous, merely because, in it's very erroneous view the plaintiff had evinced an intention not to be bound by the contract. As stated earlier, this must be wrong because failure to complete within time cannot be regarded as a fundamental breach which can be regarded, without more, as a repudiation of the contract. Finally, it is well to remember, that the defendant had waived it's right to terminate the contract on the ground of non-completion on 30/6/78. The only way in (that situation that time can be reinstated to be as of essence is to serve the plaintiff with a notice fixing a reasonable time for completion vide Keating all Building Contracts (supra) and Charles Richards Ltd v. Oppenheim (1959) 1 K.B. 616. This was not done. Having failed on all these steps taken or omitted, the inevitable conclusion must be that the defendant has committed a breach of the contract Exhibit 1. What is now left to be determined is the consequence of such a breach.

In his judgment the learned trial Judge gave judgment for the plaintiff, as set out earlier, under 3 headings, which may be re-stated thus:

(1) Debts	- N07,548,078.00	
(2) Special Damages	- N03,534,084.00	30
(3) General Damages	- <u>N00,490,124.00</u>	
	<u>N11,572,284.00</u>	

It is the submission of the defendant in its brief that the defendant is not liable to pay debt or damages to the plaintiff. For this submission it relied on the finding of Uthman Mohammed, J.C.A. that:

"They are not liable in any way to the respondents except on a claim in quantum meruit which must be specifically claimed and pleaded."

Kutigi, J.C.A. (as he then was) whilst agreeing that the plaintiff is not entitled to damages for breach of contract stated that:

"They are certainly entitled to pay for work done and for materials at the site in accordance with the terms of the contract."

5 He was however unable to make any such award because in his view the valuation reports and accounts are conflicting and not easily reconcilable. Kolawole, J.C.A. felt there was no basis for the trial court making any award because these can only be justified

10 *"If the value of the work done had been ascertained and the value exceeded the amount paid to respondents. The respondents would have been entitled to the difference."*

Defendant's counsel finally submitted that the correct order for the trial court to make and which the Court of Appeal failed to make is one of
15 dismissal of the plaintiffs claim.

Plaintiff's counsel, both in plaintiff's brief and in oral submission before us, has drawn attention to the fact that the judgment of the trial court is in three separate sub-headings set out earlier. The first - debts - does not owe its proof to whether or not liability for breach of contract is established. The items under this sub-head are debts which are alleged to have
20 accrued to the plaintiff in the course of the execution of Exhibit 1. Whether they are all established or only some are proved entirely depends on the pleadings and evidence led. The fact that the defendant has a counter-claim aimed directly against all or any of the items, does not affect a
25 successful proof of indebtedness. It is therefore not true that only a claim on a quantum meruit can be sustained. A claim on quantum meruit, means that no specific sums can be claimed and proved. If they can, then each item stands or falls on the basis of evidence led. It is true that there are conflicting claims by the parties, and that many Exhibits have been ten-
30 dered, and that the records of appeal run into five volumes. But this cannot prevent proof of specified items lifted from the mass of evidence tendered, being considered and decided upon. The learned trial Judge is to be com-
mended for making a serious effort to consider each item claimed under the first sub-head, and deciding, on the basis of evidence led before him,
35 whether or not such item has been proved. With regard to the concluding observation of Kolawole, JCA. cited earlier, the drawing of a balance sheet by a joint consideration of the specific claims of both parties is not only desirable, but was within the contemplation of both parties; a claim and counter-claim having been filed. It is a matter for regret that the counter-

claim failed to be considered for reasons which would be shown to be wrong. The fact that the counter-claim was thrown out erroneously, and without being considered, does not mean that the claim itself cannot be established. The learned trial Judge considered each item under this sub-head separately, and decided whether to make an award and for how much. It is the submission of plaintiff's counsel that his findings have not been challenged by the defendant, in it's grounds of appeal filed against the judgment of court of trial. I am afraid I do not think that is correct. The defendant in Grounds 2, 3, 5, 7, 16 and 17 of it's notice of appeal dated 20/6/83 attacked these findings. The Court of Appeal however failed to consider these specific findings, taking the erroneous view that once the issue of liability (responsibility) for breach of contract had been established and decided in favour of the defendants, there was no need to consider any other grounds. In effect lying the issue of debts to the issue of liability for breach of contract. The issue of liability to pay debt has been raised in defendant's brief (paragraph 3.4 and 3.5 thereof refer). In it's notice of appeal dated 23rd October, 1986 the defendant, although its ground of appeal was really against the order of re-trial, predicated same on the plaintiff's inability to prove it's case (which includes the items of debts and damages). It can therefore be taken that the findings of the trial court on these sub-headings are still being challenged. I therefore propose to consider them and decide whether they have been established. I have gone through the learned trial Judge's award on each item of debt. He did a very painstaking job with which I find myself in complete agreement. Nothing has been urged to justify any interference with his award, which I therefore hereby confirm.

There are three items under the sub-heading of special damages. Two of them - cost of Austin Crane and cost of vehicles do not in my view need any further comment. There was evidence before the learned trial Judge in support of his finding that those items have been proved. The court below did not specifically consider this sub-heading, having held the plaintiff liable for breach of the contract-Exhibit 1. I therefore confirm the finding of the trial court aforementioned. The third item "Loss of profit" however is deserving of closer consideration. In awarding the plaintiff 15% of the "current value" of the contract sum of N29,905,325.18 i.e. N4,485,780.00, the learned trial Judge stated as follows:

"W and W (my note: the plaintiff) optimistically puts it's Loss of Profit at 20%. This is based on the evidence of their own Quantity Surveyor and also partly on the evidence of Federal Housing Authority's Quantity Surveyor as well. I have doubt that W and W

would have made some profit If it was not in a state of seige since the lime when Ebie look over and decided to upset the agreement. But there appears to me to be no really dependable material be sides what the two Quantity Surveyors said for me to award 20%. W and W by its own showing in losing a greater part of the mobi lization advance due obviously to its own mismanagement cannot be heard to say it would have made a 20% profit on its invest ment. I would judiciously put W and W down for a profit margin of 15% which means N4,485,798.78".

(Note: Italics mine)

This award was attacked in its brief as appellant, by the defendant in the court below.

The statement of the law on the measure of damages where there is a breach by the employer resulting in the contract being partly performed is set out in Law and Practice of Building Contracts by Keating, 3rd Edition at pages 158/159 thus:

"Where the contract work has been partly carried out and the contract is brought to an end by the employer's repudiation, the contractor has the option of either suing for damages, when the measure of damages is normally the loss of profit on the unfinished balance, plus the value of the work done at contract prices, or of ignoring the contract and claiming a reasonable price for work and labour done on a quantum meruit. The latter course will be chosen if a reasonable price is higher than the contract prices."

(Note: italics mine).

vide Chandler Bros. Ltd. v. Boswell (1936) 3 A.E.R. 179 (185-186); Lodder v. Slowey (1904) A.C. 442 (453). Also vide Hudson's Building and Engineering Contracts 10th edition at pages 601/2. Where therefore the claim is not founded on quantum meruit only two heads of claim are available (a) Loss of profit on the unfinished balance and (b) the value of the work done at contract prices. It is true that the plaintiff has not founded his claim on these two headings specifically. That however does not mean that the sub-heads under which he has claimed are not available to him. He certainly can sue for damages for breach of contract as he has done, setting out items of damages complained of vide Emden and Gills Building Contracts and Practice 7th edition Chapter 12 page 272. On loss of profit however he is confined to a claim, not on the current value of the whole contract, but

only on the unfinished balance of the contract. No conclusive evidence was given as to the percentage of the contract remaining to be done. Only estimates were made. Whilst the defendant stated that work value at only 15% of the total contract sum had been done, an estimate which the court below accepted, the plaintiff, in its brief in this court, succeeded in satisfying me that a much higher percentage of the work had been done. There is therefore no legal basis on which the learned trial Judge arrived at the award he made under the sub-heading of "loss of profits". Even if the calculation can correctly be based on the value of the whole contract, the comments/findings set out earlier on which the trial Judge arrived at the figure of 15% is at best speculative. He found 20% claimed to be optimistic. He found that the plaintiff "would have made some profit if....." This means that, and that is a distinct possibility, it may have ended the contract without making any profit. This could possibly arise from his finding that a greater part of the mobilization fund, then standing at over N5 million, had been mismanaged. Yet he awarded 5% less the amount claimed. How he arrived at 15% instead of 20% is nowhere stated. When it is remembered that the item to be proved is an item of special damage, the error in the decision of the trial Judge becomes more glaring. The burden of proof of an item of special damage has most certainly not been discharged. The award under that sub-head cannot therefore be confirmed. It is hereby set aside. The total award on special damages is therefore only N930,128.00. When the award of general damages of N490,124.00 is added to it, the total award under special and general damages would be only N1,420,252.00.

Issue 5 challenges the court's order on the counter-claim and proceeding to order a retrial of the whole case. It asks:

"5 *Whether the learned Judges of the Court of Appeal were right in holding that the counter-claim of the respondents which was struck-out by the learned trial Judge should be retried. Ground 12 raised this issue; and whether the learned Judges of the Court of Appeal properly exercised their statutory powers in ordering such re-trial of both the respondents' claims against the appellants as well as the latter's counterclaim.*"

The learned trial Judge struck out the defendant's counterclaim for the sums of N10,000,000 on the grounds that it is premature. There was no appeal by the defendant against this decision of the trial High Court dated 20/6/83 which contained eighteen grounds of appeal (vide p. 820 vol. 111 record of proceedings). But that order was attacked in the brief of

the defendant (as appellant in the Court of Appeal), and replied to by the plaintiff in its respondent's brief. Relying on Order 3 rule 6 of its Rules, the Court of Appeal proceeded to consider the order striking out the counter-claim. It set aside the Order and remitted same back to the High Court for retrial. Order 3 rule 6 provides that:

5 "(6) *Notwithstanding the foregoing provisions the court in deciding the appeal shall not be confined to the ground set forth by the appellant; Provided that the Court shall not if it allows the appeal rest its decision on any ground not*
10 *set forth by the appellants unless the respondent has had sufficient opportunity of contesting the case on that ground."*

There is no doubt that the Court of Appeal has the power it exercised under this rule. Plaintiff's counsel has not opposed the Court's exercise of this power. What it has opposed is the very counter-claim which it restored, on the ground that it has been reformulated during the argument of the appeal as a claim in restitution which was not before the court, it having not been: pleaded as such. That was however not the grounds on which the learned trial judge struck out the appeal. Clause 22(3)(d) of Exhibit 1 which he relied on does not justify the order which he made. It merely provides for a reconciliation of accounts which does not in any way prevent any claim by the employer (defendant). I do not intend to set out that Clause in this judgment since it would appear that both sides are
25 agreed that it does not prevent the defendant from filing any claim which it believes it may have. Whether that claim is justified can only be decided when it is properly and fully considered. That is not the case here. The decision of the Court of Appeal restoring the counter-claim for hearing by the High Court is therefore in order and is hereby affirmed.

30 As to the decision that the whole case be retried, no serious argument has been urged in favour thereof. The plaintiff's claim has been proved to the extent of its affirmation in this judgment. There is no basis for its dismissal. The answer to Issue 5 therefore is that whilst the order restoring the counter-claim is upheld, the order dismissing the plaintiff's claim in its
35 entirety is set aside.

In conclusion, the appeal of the plaintiff largely succeeds. Its claim against the defendant succeeds to the tune of N8,968,330.00. The judgment of the Court below setting aside the judgment of the High Court on

the plaintiff's claims and ordering a retrial thereof is hereby set aside. The order of the court below restoring the defendant's counter-claim and ordering it's being retried in the High Court is hereby affirmed.

The parties are entitled to costs as follows: N800 to the plaintiff and N200 to the defendant.

5

KAWU JSC

I have had the advantage of reading, in draft, the lead judgment of my learned brother, Uche Omo, J.S.C. I agree with him entirely and for the reasons lucidly stated in the said judgment, I too will allow the plaintiff's appeal. I abide by all the consequential orders made in the judgment, including the order as to costs. 10

BELGORE JSC

15

I read in advance the lead judgment of my learned brother Omo, J.S.C., with which I am in full agreement.

For the reasons ably articulated therein, I also agree that this appeal succeeds in part. I make the same consequential orders as made in the lead judgment in allowing the appeal in part. 20

WALI JSC

I have the advantage of reading in advance a copy of the lead judgment of my learned brother, Uche Omo, J.S.C. and I agree with his reasoning and conclusion that the appeal succeeds in part and to that extent it is allowed. 25

I abide by the consequential orders contained in the lead judgment. 30

35

OLATAWURA JSC

I had a preview of the judgment of my learned brother Uche Omo, J.S.C. I agree with his reasoning and conclusions. It is in respect of the allegation of breach of the contract that I now wish to make some comments.

5 Both parties were dissatisfied with the judgment of the Court of Appeal dated 31st July, 1986. It is better to refer to the parties as plaintiff and defendant so as to reflect the title used in the court of trial.

The claims of the plaintiff and the counter-claim of the defendant are already set out in the lead judgment. At the end of the trial the learned
10 trial Judge, Oluwa, J. entered judgment in favour of the plaintiff as follows:

(a) Debts:...	N7,548,078.00
(b) Special Damages...	3,534,084.00
(c) General Damages: ...	490,244.00
Total:	N11,572,286.00

15 with costs assessed at N2,000.00 in favour of the plaintiff.

The counter-claim filed by the defendant was struck out on the ground that it was premature.

The defendant appealed to the Court of Appeal. On 31st July, 1986 the Court of Appeal allowed the appeal filed by the defendant, in the
20 lead judgment of Uthman Mohammed, J.C.A. (as he then was) with which Kutigi, J.C.A. (as he then was) and Kolawole, J.C.A. agreed, the lower court concluded its judgment as follows:

25 *"The judgment of Ishola Oluwa, J. in Suit No.ID/447/79, delivered on 15th June, 1983 is set aside. The appeal against the learned Judge's order striking out the counter-claim of the appellants {sic} is allowed. The counter-claim having been accepted as properly filed is remitted back to the High Court. I think this is a proper case in which a retrial of the plaintiffs' {sic} claim and the defendants {sic} counter-claim should be ordered so as to do justice to*
30 *both parties. And I order accordingly. The appellants {sic} are entitled to the costs of this appeal which I assess at N4,000.00 in this Court and N2,000.00 at the court below."*

It is against this judgment that both the plaintiff and the defendant have now appealed to this Court.

35 The claims and counter-claim were based on Exhibit 1 i.e the contract dated 5th December, 1974. It was the determination of the said contract that led to this action. If the contract was wrongly terminated then one will have to consider the claim in the alternative to the relief sought under Head A. The damages - Special and General - were itemised and

they totalled N15,000,000.00 (Fifteen million Naira).

Now to the determination of the contract. The lower court was of the view that Exhibit 12 terminated Exhibit 1, i.e. the Contract of Agreement. It relied on Clause 22 of the agreement i.e. Exhibit 1, Clause 22 relates to the power of the Employer, which in this case is the defendant, to determine the contract. The relevant conditions are:

- "(1) If the contractors shall make default in anyone or more of the following respects, that is to say:
- (a) If he without reasonable cause wholly suspends the carrying out of the works before completion thereof,
 - (b) If he fails to proceed regularly and diligently with the works, or
 - (c) If he refuses or persistently neglects to comply with a written notice from the employer requiring him to remove defective work or improper materials or goods and may by such refusal or neglect the works are materially affected, or"

The central figure in this case was one Mr. Fortune Ebie who was, when the construction was being carried out by the plaintiff, the General Manager of the defendant. The trial Judge did not form any favourable impression of him, and in fact his conduct appeared to be that of a man who had a grouse against the plaintiff as his lop-sided interpretation of the Agreement and his complete distrust of the way the work was handled by members of the Federal Housing Authority led to his erroneous view that the plaintiff was in breach of the agreement. Without a thorough understanding of the terms and conditions which would entitle him to terminate the contract, he relied heavily on the directives given to him by the Federal Ministry of Housing. The learned trial Judge minced no words when he said:

"The fact that Ebie was as he said carrying out the directive of the Ministry of housing e.t.c. does not entitle him or that Ministry to breach the terms of the Agreement. The fact that Federal Housing Authority is a Government Corporation gives it no right or power to breach a contract term between Federal Housing Authority and any other Organisation."

Mr. Ebie's predecessor-in-office would appear to be satisfied with the

work done until Mr. Ebie decided that there were some errors made by his predecessor-in-office.

Before there can be an effective termination of a contract, there must be strict compliance with the conditions laid down for the termination of the contract. To make a party liable for its breach, the court should not import, in an attempt to interpret the contract, conditions not within the contemplations of the parties. The parties must be confined within the terms of the contract. Exhibit 12 which earlier purported to have terminated the contract has not stated in clear terms the conditions stated in Clause 22 of Exhibit 1. Exhibit 12 reads:

10

"Dear Sir

FEDERAL HOUSING AUTHORITY TERMINATION OF CONTRACT

15

I am directed to inform you that it has been decided by the appropriate Authority that your contract should be terminated in accordance with Clause 22 of the Contract Agreement. You should not tamper with any of the movable or fixed equipment on the site. Copies of this letter have been sent to the Inspector General of Police, Force Headquarters, Moloney Street, Lagos and the Commissioner of Police, Lagos State.

20

(Sgd.) Yours faithfully,

E.O. Martins

for General Manager

Federal Housing Authority"

25

At the lower court submissions were made that Exhibit 12 could not have been regarded as a valid letter of termination of the contract. Uthman Mohammed, J.CA. (as he then was) in the lead judgment rejected the submission and in an attempt to justify the reason for rejecting the submission, the learned Justice said:

30

"Surely if the respondents did not accept that Exhibit 12 had effectively terminated their contract they would not plead that it did so."

35

Where a contract gives conditions for the termination of a contract, the letter of termination should specify the condition breached by the party said to be in breach of the contract. The conditions under which the contract can be terminated are already reproduced above. I will therefore agree with the plaintiff where in its brief on page 10 said:

"The Judges of the Court of Appeal in their said effort even failed to see that, Exh. 12 is in any event, at variance with Clause 22 of Exhibit 1 and is thereby incapable of effecting a termination of

Exhibit 1"

It appears to me that the defendant having realised its error in its purported termination of the contract through Exhibit 12 retraced its step and resorted to Exhibit 13. I will therefore hold that the defendant was in Breach of Agreement when it purported to have terminated the said agreement, i.e. Exhibit 1. 5

It is for these reasons and the fuller reasons and meticulous details in the lead judgment that I will also hold that the appeal succeeds in part and I abide by the orders for retrial of the counter-claim and costs in the lead judgment. Appeal allowed in part. 10

15

20

25

30

35