



CONTRACTS - Breach - Public Officers Protection Ordinance s.2 - Application - The section does not apply to cases of contract (H4)

PLEADINGS - Counter affidavits - Refusal of - Propriety - Courts were right to refuse use of the affidavits - Since facts of the matter are not disputed - And arguments were based on law (H5)

STATUTES - Performance of duty - Regulated by statute - Method - When procedure for carrying out a matter is provided in statute - Party must comply with the provisions (H6)

CONTRACTS - Oil Prospecting Licence - Revocation - Reasons for - Rationale for terminating the contract is irrelevant - But it amounts to breach of contract - Where termination was done contrary to statute (H7)

COURTS - Consequential order - Correctness of - Under O.7 r.3 Federal High Court Rules - Trial court rightly gave the order - Since there was no claim for damages (H8)

### ***FACTS***

Plaintiff/respondent applied for an allocation of offshore Oil Blocks. The approval of the application was subject to conditions that respondent paid application and bidding fee of N50, 000 and US \$10,000 respectively. And also pay a further US \$20m as bonus and reserved value. Respondent informed 5th appellant of the acceptance of the offer as well as payment of the application and bidding fees and promised to pay the bonus and reserve value in due course.

However, appellants purportedly acting under the recommendation of panel appointed to review all contracts made between 1<sup>st</sup> January and 28<sup>th</sup> May 1998 on 13th April, withdrew the allocation of an oil block earlier given to respondent. Consequently, respondent instituted this action at the Federal High Court, Abuja seeking to nullify the revocation of its contract with appellants. After the hearing, the court held that there was valid contract between the parties and ordered that the contract be concluded. Aggrieved, appellants appealed to the Court of Appeal, Abuja. The appeal was dismissed.

Appellants have filed further appeal to Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Does the trial court possess jurisdiction to entertain this suit in view of the Public Officers Protection Act, Cap. 379, LFN, 1990?*

*2. Was the Court of Appeal right in affirming the refusal to allow the appellant to use the counter affidavit and did this not amount to a violation of the appellants’ right to fair hearing?*

*3. Was there an existing contract between the parties as at 8th July, 1999?*

*4. Was the Court of Appeal right in affirming the trial court’s holding that the provisions of the Petroleum Acts Cap 350, LFN, 1990, applied in the circumstances of this case?*

*5. Did the 6th appellant’s panel violate the principles of natural justice and the rules of fair hearing in this matter?*

*6. Was the Court of Appeal right in affirming the judgment of the trial court which granted reliefs not sought or claimed or which were inappropriate in the circumstance?”*

**HELD** (Dismissing the appeal by a majority decision

per **MOHAMMED JSC**, EJIWUNMI JSC dissenting)

*CONTRACTS - Offer - Acceptance - In unilateral contract*

**1. The respondent accepted the offer by the letter dated 22nd March, 1999, and paid N50,000.00 and \$10,000.00 U.S. Dollars. However, the company did not pay the 20 million U.S. Dollars for signature bonus and reserved value within the stipulated 30 days. Learned counsel for the Appellants, Adetokunbo Kayode, SAN, submitted in his brief that the offer had lapsed. I do not think that the offer had lapsed. The offer can lapse only where the offeree requests exclusively that acceptance can only be made by performance of the requested act, so that the offer can be revoked at any time before the performance is completed. It is pertinent to reproduce condition (v) of the conditions which the Appellants stipulated for the allocation of OPL 248. Condition (v) reads”**

***“(v) that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within 30 days of the***

*date of this letter, (if the amount due is not paid by that date, i.e., 7th April, 1990, the acreage may be re-allocated without further reference to you);”*

Two issues are involved in this condition. The first requirement is acceptance of the offer within 30 days, and the second is payment of statutory fees also within 30 days of the offer. Next, the appellants emphasised that if the statutory fees are not paid within 30 days the acreage may be reallocated without further reference to the respondents. What is clear in this additional condition is that even if the Respondent communicated its acceptance of the offer within 30 days, if the statutory fees are not paid, the appellants are at liberty to revoke the offer. However, it is settled law that the offer to enter into a unilateral contract is accepted on commencement of performance, even though completion of performance is a condition precedent to the offeror’s liability to perform his promise.

Coming back to the case in hand, the respondent had paid N50,000.00 and \$10,000.00 U.S. Dollars before the expiration of 30 days. It is therefore clear that the respondent had commenced performance of the conditions laid down by the Appellants. The offer could not therefore be held to have lapsed after the expiration of 30 days. (pp. 3185 A/3186 B)

*CONTRACTS - Offer - Mode of acceptance*

2. I have indicated earlier in this judgment that the respondent had accepted the offer and had made part-payment of the signature bonus/reserved value of \$1 million U.S. Dollars. By this token the appellants have no alternative but to keep the offer open since the offeree has commenced performance. In a decision of this court it was held that acceptance of an offer may be demonstrated by the conduct of the parties as well as by their words or by documents that have passed between them. I therefore agree that on the 8th of July, 1989, when the appellants withdrew the allocation of OPL 248 from the respondent there was a validly existing and legally binding contract between the appellants and the respondent.

(p. 3187 B)

*WORDS & PHRASES - Public officers - Meaning*

**3. I think the argument whether the appellants are public officers or not has been settled by my Lord Iguh, JSC, who wrote the lead judgment in Ibrahim's case, supra. In that case, Iguh, JSC., interpreted the meaning of "Public Officers" or "any person" used in the Public Officers (Protection) Law, Cap 111 of Northern Nigeria 1963 thus,**

***"...I did hold that the words public officer or "any person in public office as stipulated in Section 2 of the Public Officers (Protection) Law, 1963, not only refer to natural persons or persons sued in their personal names but that they extend to public bodies, artificial persons, institutions or persons sued by their official names or titles."***

**All the appellants are therefore public Officers within the meaning of the Public officers Protection Act. (p. 3188 A)**

*CONTRACTS - Breach - Public Officers Protection Ordinance s.2*

**4. Mr. Akpamgbo, SAN, submitted, quite rightly, that this court, while interpreting the provisions of Section 97 of the Ports Act, which is in pari materia with Section 2 of the Public Officers Protection Ordinance, held in the case of Nigerian Ports Authority v. Construction Generali Farsura Cogefar SPA & Anor (1974) All NLR 945 at 955 that the said law was not intended by the legislature to apply to contracts. The learned Senior Advocate referred also to the case of the Midland Railway Co. v. The Local Board for the District of Withington (1882-3) II OBD 788 at 794 and the case of Salako v. L.E.D. & Anor, 20 NLR. 169. I have looked into those cases and I agree that the Supreme Court considered the applicability of Public Officers Protection Ordinances to action founded upon cases of breach of contract. In Nigerian Ports Authority v. Construction Supra, this court, per Ibekwe, JSC held,**

***"We shall now deal with the other point which to our minds, does not seem to be well-settled, namely, whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether S.97 of the Ports Act applies to cases of con-***

*tract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the*  
*B section does not apply to cases of contract.”*

*The appellants have again failed in this issue and I resolve it in favour of the respondent. (pp. 3189 E/3191 C)*

*C PLEADINGS - Counter affidavits - Refusal of - Propriety*

*5. On the adjourned date, and before learned counsel for the appellants opened his address, he told the court that he had filed a counter-affidavit. Mr. Akpamgbo SAN, objected to the consideration of the counter-affidavit because, according to*  
*D him, he had just been served with it in the court. The learned trial Judge ruled thus*

*“Court:- The ruling of this Court is that the counsel had ample time to file his counter-affidavit, when he did not since 4/8/99. He allowed the plaintiff to state his case and thereafter*  
*E filed this counter affidavit, when he has not even served the Plaintiff. There has to be an end to litigation. Originating Summons usually concerns questions of law and since he did not file any counter affidavit with a reasonable time, he can*  
*F only address the court on points of law.”*

*There are the proceedings which the court of Appeal referred to in its judgment. Musdapher JCA., quite rightly, in my view, held that the decision reached by the learned trial Judge was not in conflict with the facts contained in the*  
*G counter-affidavit. I too have gone through the counter-affidavit and, with respect to the submission of the learned counsel for the appellants, I have failed to decipher what the learned counsel is fretting about on the question of fair hearing in this issue. I have earlier in this judgment reproduced all the facts*  
*H and documents connected with this dispute. The facts are not disputed. What is there in these proceedings to show that the appellants were denied fair hearing? The counter-affidavit was filed in court after the counsel for the respondent concluded his address. The arguments for and against this action are all*

**based on law. At the stage the counter-affidavit was filed the court was familiar with all the facts and the learned trial Judge had discretion whether to consider or reject it. I am satisfied that the learned trial Judge exercised his discretion judiciously and judicially in this matter. The Court of Appeal is right to hold that the refusal to permit the appellants use the counter-affidavit had not occasioned any miscarriage of justice.** B  
(p. 3191 H)

*STATUTES - Performance of duty - Regulated by statute - Method* C  
**6. It is instructive that paragraphs 23-27 of the 1st schedule to the Petroleum Act, Cap. 350, LFN, 1990, which stipulate the procedure for revocation of a licence were applicable to this case. Earlier in his submission, learned counsel for the appellants submitted that a licence in the form contained in form B of the schedule to the Petroleum (Drilling and Production) Regulations will be issued to the respondent whenever he fulfilled all the conditions of the offer of an Oil Prospecting Licence. The provision of the statute is clear and unambiguous. I agree that the court should give the statute its ordinary and natural meaning. See Railegh Ind. (Nig) Ltd. v. Nwaiwu (1994) NWLR (Pt.341) 760 at 771. The ordinary and natural meaning of the provisions of paragraphs 23-27 of the 1st Schedule to the Petroleum Act is that it regulates the procedure for revocation of an Oil Prospecting Licence. But the appellants revoked the licence of the respondent following a recommendation of the Kolade Panel. When a matter is clearly spelt out in a statute and the procedure for carrying out such duty is laid down, a party has no choice but to comply fully with the provisions of the statute. The fourth issue is therefore resolved against the appellants.** D E F G  
(p. 3193 B)

*CONTRACTS - Oil Prospecting Licence - Revocation - Reasons for* H  
**7. It is trite that motive, rationale or reason for the decision to terminate a contract is generally irrelevant in law. A contract is an agreement freely entered by the parties and may be terminated by any of the contracting parties with good or bad or no reason at all. The appellants entered into the agreement**

**to allocate OPL 248 on payment of fees. Before the agreed time for payment expired the appellants revoked the contract. The procedure for the termination, withdrawal and revocation of the licence has been specifically provided in the Petroleum Act and the Regulations enacted as schedules to the Act.**

**B Whether Kolade Panel had adhered to the rule of law during its proceedings or not, once the revocation of the licence was not done as is provided in the statute the appellants' action would be a breach of the agreement entered with the respondent. (p. 3194 A)**

*COURTS - Consequential order - Correctness of*

**8. It is settled law that the learned trial Judge having found that the appellants were in error to revoke the contract can order for damages or direct the parties to complete their obligation under the contract. There was no claim for damages and it is left to the discretion of the Court to make a consequential order. The Court of Appeal is therefore right to affirm the consequential order made by the High Court. The High Court can exercise such power under the provisions of Order 7 Rule 3 of the Federal High Court Rules, 2000, there will be no difficulty in carrying out the order made by the High Court because the appellant have been restrained from any interference with the legal and equitable interest of the respondent in OPL 248 through an injunctive order granted before the commencement of the proceedings. (p. 3195 F)**

## NOTABLE POINTS OF INTEREST

### **G BELGORE JSC**

#### ***1. The word 'condition' in the letter of offer means terms***

**H** What the appellants seem to emphasize is the use of the term "condition" which in the light of the dealings between the parties are in fact "terms". This is because since the offer was validly accepted the other payments having been deferred to a later date shows clearly those so called "conditions" are in fact "terms". The word "condition" as used in the letter of offer, can have no other meaning than non-technical one as the dealings between the parties after acceptance of



the offer render those conditions to mean “terms”. The offer, having been accepted on 22nd March, 1999, has created a binding contract between the parties and can only be revoked in accordance with the terms of the contract and the binding law. It is the duty of the Court not to look at a contract in a narrow manner for its interpretation; the entire documents must be looked into and in conjunction with the dealings of the parties to know what they mean. The contract between the parties was formed once the offer was accepted and vital payments were made. The terms are ancillary to the conditions and cannot by any shred of the imagination be deemed to vitiate the contract already in existence. The conduct of the respondent with regard to the terms as to some payments, that is to say, in extending time to make some other payments, and response of the appellants acceding to such request, manifest the contract was firmly in existence. (p. 3196 D)

## ***2. Propriety of procedure is immaterial once there is no miscarriage of justice***

Procedure is a guide to smoothen passage of suit, to direct the parties what to do and to guide the court to arrive at the justice of a case. The question of initiating the proceedings by originating summons was never a big issue at the trial court; neither was it at Court of Appeal and in this Court. This Court shall never be shackled by procedure; case is not made for procedure, it is the other way round. Once the procedure employed has brought into focus the issues the parties contest and there is no miscarriage of justice it will not matter that the procedure is not the correct one. Getting to the destination is what is important; it does not matter the means used. This Court will certainly not disturb a clear case of justice between the parties by suo motu raising for the parties procedural abnormalities in courts below when the parties never seriously raised exception to that procedure. It is my view that it does not matter whether by writ of summons or by originating summons a writ was initiated. What is relevant in a case of this nature is the question of justice of the case. (p. 3197 C)

## ***AYOOLA JSC***

### ***3. Acceptance of offer containing prospective terms creates a contract***

The true nature and purport of the letter of 8th March, 1999, is the

key to the question whether there was a contract or not. Was it an offer subject to condition or was it an offer spelling out the terms of the contract to be entered into? If it was the former, a contract would not be formed until the condition was fulfilled. If it was the latter two questions arise: was the contract a conditional contract? Or, was it one in which the liability of the Government was conditional on payment to be made by the respondent?

Different principles and consequences apply to each of them. Where an offer is subject to condition the formation of the contract is postponed until the happening of the event on which the offer is conditioned. If the condition of the offer is that unless something is done within a stipulated time the offer is determined, such an offer cannot be accepted after the happening of the event.

However, it is not unusual for an offer to contain the terms of a prospective contract. Sometimes these terms are described as conditions. The acceptance of an offer which contains terms or conditions of the prospective contract bring into existence a binding contract on those terms, although the liability of a party may be suspended until the condition is fulfilled. (p. 3203 D)

***4. Parties' continued negotiation after conclusion of contract does not affect that contract***

It suffices to support this conclusion by quotation of the statement of the relevant law from Chitty on Contracts (28th Edition) para 2-026 as follows:-

*"The court will... look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement, If it did, the fact that the parties continued negotiations after this point does not affect the existence of the contract between them, unless the continued correspondence can be construed as an agreement to rescind the contract."*

Further, it was stated in para 2 - 029 of the same work:

*"... statements which are not intended to vary the terms of the offer, or to add new terms, do not vitiate the acceptance even when they do not precisely match the words of the offer... Nor will it have this effect if it is merely a declaration by the acceptor that he is prepared to grant some indulgence to the offer or, e.g., to condone late payment in return for specified interest. Simply, it is submitted that an*

*acceptance which asks for some indulgence to the offeree is, nevertheless, effective, so long as he is prepared to perform even if the indulgence is not granted: e.g., to buy for cash if his request for credit is refused.”*

That these clearly stated principles fit the facts of the case seems to me beyond dispute. (p. 3205 F) B

***EJIWUNMI JSC*** (Dissenting)

***5. Originating summons – Not applicable in the circumstance***

Having referred to the principles governing the commencement of proceedings by originating summons, I must now advert to the instant case. I have earlier in this judgment set down the claims before the court. It is clear even from the questions raised before the trial Court by the respondent that the issues raised thereon deal with very serious questions as to whether there was a contract between the parties. The learned trial Judge when granting the application for an order of injunction in favour of the respondent did admit in the ruling that there are indeed serious questions that would have to be determined between the parties. However, the question that whether such determination could be properly determined by the procedure of originating summons. I think not. It must be noted that the trial court, while recognizing that there are serious issues for determination between the parties, felt able to refuse to allow the appellants to file their counter-affidavit to present their own position in respect of the matters in contention. C D E F

It is my humble view that the very essence of a trial is to allow both sides to a dispute to present whatever facts they have before the Courts so as to enable the Court to arrive at a fair and just decision. This is why the authorities to which I have referred earlier in this part of my judgment have arrived at the conclusion that the procedure of originating summons is not appropriate where the facts are likely to be in dispute as in this case. In this context, I am not inclined to agree with the views expressed by the Court below that the facts disclosed in the counter-affidavit of the appellants are not direct from those disclosed in the affidavit of the respondent. With due respect to the court that view cannot be properly expressed by the court below. I think that the trial Court ought to have allowed the counter-affidavit to have been admitted, and then a conclusion be reached upon the G H

facts so disclosed in the said counter-affidavit. (p. 3220 E)

### ***6. Fair hearing – Denial of***

This leads me to the other aspect of this appeal. This is with regard to the contention that the appellants were in the circumstances denied  
 B fair hearing. I think that the complaint is well taken. Having commenced this action by originating summons, and though the appellants sought to present their own side of the case, the refusal of the trial Judge to allow their counter-affidavit and to present their case  
 C before the court, amounted in my respectful view to a denial of the right to fair hearing. (p. 3221 C)

### **REPRESENTATION**

Prince A. A. Kayode, SAN with Maryam L. Gbado, for the Appellants  
 D C. O. Akpamgbo, Esq, SAN with Chris Uche, Uche Nwokedi, J. Eramen, C. Chuks-Nnadi, E. Unigwe, A. Akpamgbo for Respondent

### **CASES REFERRED TO**

Luxor (Eastbourne) Ltd. v. Cooper (1941) AC 108  
 E Okugbule v. Oyagbola (1990) 4 NWLR (Pt. 147) 732  
 Orient Bank Plc v. Bilante Intrn'l Ltd (1997) 8 NWLR (Pt. 515) 37  
 Abbott v. Lance (1860) Legge 1283 NSW FC  
 Union Bank of Nig. Ltd. v. Ozigi (1991) 2 NWLR (Pt. 176) 677  
 F Railegh Ind. Nig Ltd. v. Nwaiwu (1994) NWLR (Pt. 341) 760  
 Fawehinmi v. I.G.P. (2000) 7 NWLR (Pt. 665) 481  
 Akinbobola v. Plisson Fisko (1991) 1 NWLR (Pt. 167) 270  
 Wickman Ltd. v. Schuler A. G. (1974) AC 235  
 Alfotrin v. A-G of the Federation (1996) 9 NWLR (Pt. 476) 656  
 G Johnstone v. Milling (1886) 16 GBD 460  
 National Bank of Nigeria v. Ayodele Alakija (1978) 9-10 SC 59  
 Ibrahim v. Judicial Serv. Comm. Kaduna State (1998) 14 NWLR (Pt. 584) 1

### **H STATUTES & RULES REFERRED TO**

Decree No 23 of 1999  
 Federal High Court Rules 2000, O. 7, r. 3  
 Petroleum Act Cap 350 LFN 1990  
 Ports Act, s. 97

Public Health Act 1875 (38 & Vict. C. 55), s. 264

Public Officers Protection Act Cap 379 LFN 1990

Tribunals of Inquiry Act Cap 447 LFN 1990

### **BOOK REFERRED TO**

Chitty on Contracts 28th Ed para. 2-026

B

### **LEAD JUDGMENT BY MOHAMMED JSC**

The respondent, who was plaintiff at the trial High Court, wrote an application on 24th November, 1988, to the Head of State for the allocation of Offshore Oil Blocks Nos. 248, 249 and 250. The application was made in accordance with the indigenous Exploration Programme initiated by the Federal Government in 1991 by virtue of the Petroleum Act, Cap 350, Laws of the Federation of Nigeria, 1990.

C

D

On 8th of March, 1999, the application for the allocation of OPL 248 was approved by the Head of State in the following letter:

*“Ref., No. PI/BAL/371/S.442/VI/*

*Date: 8th March, 1999*

*The Chairman,*

*Zebra Energy (Nig.) Limited*

*Plot 6B Park View Estate,*

*Ikoyi,*

*Lagos.*

*Dear Sir,*

E

F

### **APPLICATION FOR DISCRETIONARY ALLOCATION OF OPL 248**

*I wish to refer to your application for the allocation of OPL 248 and to convey the approval of the Head of State, Commander-in-Chief of the said block to your organization, Zebra Energy (Nig.) Limited. This offer is subject to the following conditions:*

*(i) that you pay the application and bidding fees Fifty Thousand Naira (N50,000.00) and United States Ten Thousand Dollars (US\$10,000.00), respectively;*

H

*(ii) that you pay the signature bonus and reserved value of US\$20 million;*

*(iii) that the allocated block would be operated on a ‘Sole Risk’ basis but with the understanding that the Government reserves the*

*right to a participating interest at any time in the life of any subsequent Oil Mining Lease when it so wishes;*

*(iv) that, in addition to the terms of Petroleum (Drilling and Production) Regulations 1969, (As amended) the following guidelines will govern the operations of the lease:-*

B *(a) Your company must be a fully registered Nigerian company;*  
*(b) Foreign participation interest in the block shall not exceed 40% (i.e. 60/40 indigenous to foreign.).*

C *(c) The Managing Director of your operating company, who could be an expatriate or Nigerian, must be an employee of the Company*

*(d) Your company is free to enter into any joint venture agreement with any foreign company which is currently engaged in exploration and production activities in the country.*

D *(v) that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within thirty (30) days of the date of this letter; (if the amount due is not paid by that date, i.e., 7th April, 1999, the acreage may be re-allocated without further reference to you.)*

E *(vi) that you make payments in favour of "Federal Government of Nigeria, P.T.D.F Account", giving also the details of the reason(s) for the payment; and*

*(vii) that you advise us of the details after the payment has been made.*

F *For further enquires on the allocation, please contact the Director of Petroleum Resources.*

*Yours faithfully,*

*M. A. Awesu*

G *For: Director of Petroleum Resources*  
*For Permanent Secretary."*

In a reply to the letter quoted above, the respondent accepted the offer in a letter written on 22nd March, 1999.

The letter reads:

H *"March 22, 1999*

*The Director of Petroleum Resources*

*Ministry of Petroleum Resources*

*Eric Moore*

*Surulere,*

*Lagos*

*Dear Sir,*

*RE: DISCRETIONARY ALLOCATION OF OPL 248 -  
REF. NO PI/BAL/3717/S.442/V.1 /DATED 8TH MARCH, 1999.*

*We write to accept the concessionary award of OPL 248 to  
Zebra Energy Ltd.* B

*We are forwarding herewith two Diamond Bank Drafts in the  
sums of N50,000.00 (Fifty Thousand Naira), and N860.000 (Eight  
Hundred and Sixty Thousand Naira). Being payments for the Appli-  
cation and bid fees, respectively.*

*The signature bonus and reserve value of \$20 million will be  
paid in due course.* C

*Please clarify how much of this amount represents the signature  
bonus and how much is for the reserve value.*

*We would like to reiterate our resolve in commencing relevant D  
business activities in this block*

*Thank you once again for the award.*

*Yours faithfully,*

*For: ZEBRA ENERGY LTD.*

*A. B. C. Orjiako* E

*Managing Director/Chief Executive Officer"*

The respondent thereafter made the initial payments of  
N50,000.00 and \$10,000.00 (Ten Thousand Dollars). In a letter dated  
13th April, 1999, the respondent sought further clarification on the  
breakdown of the payment of the Signature Bonus and the reserved  
value of \$20 Million US Dollars. On the 15th of April, 1999, the 4th  
appellant wrote a letter clarifying the signature bonus and reserved  
value matter. He stated in the letter that the payment of the sum of  
\$20 million U.S. Dollars for signature bonus and reserved value could  
be paid in two installments within a period of three months from the  
date of the award. This means that the time allowed of payment had  
been extended to three months. F G

On 28th May, 1999, the respondent wrote a letter to the 5th  
appellant, Dr. W.F. Dublin Green, reporting to him that the company  
had paid \$1 million U.S. Dollars being part payment for the signature  
bonus and reserved value. In the same letter the respondent requested  
for further extension of time for the payment of the second instalment.  
The letter is very relevant to this appeal. It reads: H

*"May 28, 1999  
The Director  
Department of Petroleum Resources (DPR)  
Victoria Island, Lagos.  
Attention: Dr. Dublin Green*

B *Dear Sir,  
RE: OPL 248*

*Reference is made to your letter of April 15, 1999, of Reference  
No. PI/BAL/2717/T/, regarding the payment of the Signature Bonus/  
C Reserve Value.*

*We are happy to inform you that we have paid the sum of  
US\$1m (One million US Dollars). However, we are constrained to  
request for further time within which to complete the balance. This is  
to allow our bankers to conclude documentation for transfer of funds,  
D as well as to allow time for a thorough technical analysis and  
comprehensive data interpretation.*

*As a result of the foregoing reasons, we hereby request for a 3-  
month extension, effective from the 7th of June, 1999, within which  
to pay the balance.*

E *We do hope our application will be granted.  
Thank you.  
Yours faithfully,  
For: Zebra Energy Limited.*

F *A. B. C. Orjiako  
MD/CEO."*

*On the 31st of May, 1999, the 5th appellant wrote the following  
letter to the respondent.*

*"Ref. No. PI/BAL3717/S.443/T/4.  
G Date: May 31, 1999  
The Chairman*

*Zebra Energy Limited  
Plot 1034B, Ologun Abaje Street  
Victoria Island*

H *Lagos.  
Dear Sir,  
RE: OPL 248*

*Your letter of May 28, 1999, on the above subject matter refers.  
2. I am directed to inform you that you have been granted a*



*grace period of forty-five (45) days with effect from June 1, 1999, to effect the payment of the outstanding signature bonus/reserved value on OPL 248.*

*Yours faithfully,*

*W. F. Dublin Green, MFR, fnape, fnmgs*

*Director of Petroleum Resources.”*

B

It is clear from the wording of the letter, reproduced above, that the request by the respondent for extension of time to pay the outstanding signature bonus/reserved value on OPL 248 had been granted. The time for payment was extended to a period of 45 days effective from the 1st of June, 1999. In other words, the time for payment was extended to 15th July, 1999. On the 8th of July, the 5th appellant wrote the following letter to the respondent:

*“Ref. No. PAPL/PR/0017*

*Date: 8th July, 1999*

D

*The Chairman/Managing Director*

*Zebra Energy (Nig) Limited*

*Plot 6B, Park View Estate*

*Ikoyi*

*Lagos*

E

*Dear Sir,*

***WITHDRAWAL OF ALLOCATION OF OPL 248***

*I have been directed to inform you of the cancellation of the allocation of OPL 248, recently allocated to your company.*

F

*2. This is in accordance with the recommendation of the Panel appointed by the President, Commander-In-Chief of the Armed forces of the Federal Republic of Nigeria, to review all contracts, licences and appointments made between the 1st January and 28th of May, 1999.*

G

*3. Any further information you may require on this matter should be addressed to the Director, Petroleum Resources, 7, Kofo Abayomi Street, Victoria Island, Lagos.*

*Yours faithfully,*

***W.F. DUBLIN-GREEN***

H

*Director, Petroleum Resources.”*

Aggrieved by the new development, the respondent petitioned both the 2nd and 6th appellants in this appeal. When no response was received the respondent commenced action by way of originat-

ing summons at the Federal High Court, Abuja. The Federal High Court, per Auta, J., considered the arguments of counsel for both parties and, in a considered ruling, found that there was a valid contract between the parties. The learned Judge ordered the parties to go and conclude the contract. The appellants lodged an appeal to the Court of Appeal. They were not successful. They have now finally reached the Supreme Court. Six issues were identified by the learned counsel for the appellants for the determination of this appeal. The issues read as follows:

1. *Does the trial court possess jurisdiction to entertain this suit in view of the Public Officers Protection Act, Cap. 379, LFN, 1990?*

2. *Was the Court of Appeal right in affirming the refusal to allow the appellant to use the counter affidavit and did this not amount to a violation of the appellants' right to fair hearing?*

3. *Was there an existing contract between the parties as at 8th July, 1999?*

4. *Was the Court of Appeal right in affirming the trial court's holding that the provisions of the Petroleum Acts Cap 350, LFN, 1990, applied in the circumstances of this case?*

5. *Did the 6th appellant's panel violate the principles of natural justice and the rules of fair hearing in this matter?*

6. *Was the Court of Appeal right in affirming the judgment of the trial court which granted reliefs not sought or claimed or which were inappropriate in the circumstance?"*

The respondent formulated six issues for the determination of the appeal. The issues are basically similar to the issues identified by the Appellants.

The main question for the determination of the appeal, in my view, is whether there was an existing and legally binding contract between the parties as at 8th July, 1999, when the Appellants withdrew and cancelled the allocation of OPL 248? I have reproduced above all the communication, through letters, between the Appellants and the Respondent. The letters are very clear and do not need any further explanation.

There was an offer on the 8th of March, 1999, from the Appellants to the Respondent. Three of the conditions of the offer are important (1) Payment of application and bidding fees of N50,000.00 and \$10,000 U.S Dollars respectively. (2) Payment of

signature bonus and reserved value of \$20 million U.S. Dollars. (3) and confirmation of acceptance of the offer within 30 days from the 8th of March, 1999.

**The respondent accepted the offer by the letter dated 22nd March, 1999, and paid N50,000.00 and \$10,000.00 U.S. Dollars. However, the company did not pay the 20 million U.S. Dollars for signature bonus and reserved value within the stipulated 30 days. Learned counsel for the Appellants, Adetokunbo Kayode, SAN, submitted in his brief that the offer had lapsed. I do not think that the offer had lapsed. The offer can lapse only where the offeree requests exclusively that acceptance can only be made by performance of the requested act, so that the offer can be revoked at any time before the performance is completed. See Luxor (Eastbourne) Ltd. v. Cooper (1941) AC. 108. It is pertinent to reproduce condition (v) of the conditions which the Appellants stipulated for the allocation of OPL 248. Condition (v) reads”**

**“(v) that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within 30 days of the date of this letter, (if the amount due is not paid by that date, i.e., 7th April, 1990, the acreage may be re-allocated without further reference to you);”**

**Two issues are involved in this condition. The first requirement is acceptance of the offer within 30 days, and the second is payment of statutory fees also within 30 days of the offer. Next, the appellants emphasised that if the statutory fees are not paid within 30 days the acreage may be reallocated without further reference to the respondents. What is clear in this additional condition is that even if the Respondent communicated its acceptance of the offer within 30 days, if the statutory fees are not paid, the appellants are at liberty to revoke the offer. However, it is settled law that the offer to enter into a unilateral contract is accepted on commencement of performance, even though completion of performance is a condition precedent to the offeror’s liability to perform his promise. See Halsbury’s Laws of England, 4th Edition, vol. 9(1) paragraph 657. In Errington v. Errington & Woods (1952) 1 All ER 149 the facts support the above statement of the law. A father bought**

a house for his son and daughter-in-law on mortgage, taking the house in his own name, and paying the deposit. He asked the daughter-in-law to pay the installments, saying that the house would be her property when the mortgage was paid. Before she had completely paid off the mortgage, the father's successor-in-title sought possession. It was held that the daughter-in-law had a contractual license to remain and a right to the house on completion of the payments?

***Coming back to the case in hand, the respondent had paid N50,000.00 and \$10,000.00 U.S. Dollars before the expiration of 30 days. It is therefore clear that the respondent had commenced performance of the conditions laid down by the Appellants. The offer could not therefore be held to have lapsed after the expiration of 30 days.***

Be that as it may, on 13th April, 1999, the respondent wrote to the 4th Appellant requesting clarification of the breakdown of the payment of signature bonus and reserved value. In response, the 4th appellant wrote a letter, (reproduced above in this judgment), clarifying that the \$20 million U.S. Dollars for signature bonus and reserved value can be paid in two installments, within a period of 3 months. The letter was written on 15th April, 1999. On 28th May, 1999, the Respondent paid \$1 million U.S. Dollars. In the same letter the respondent requested an extension of time to pay the balance of \$19 million U.S. Dollars. The Company requested for the extension to be made effective from the 7th of June, 1999.

The 4th Appellant granted an extension of 45 days and made it effective from 1st of June 1999. By this gesture the respondent was to pay the balance of \$19 million signature bonus/reserved value on OPL 248 by the 15th of July. On the 8th of July, 1999, the appellants withdrew the allocation granted to the respondent of OPL 248.

Learned counsel for the appellants submitted that the offer of 45 days extension was a counter-offer and up to the time the appellants withdrew the allocation the respondent had not accepted the counter-offer. He said that silence cannot constitute acceptance, since acceptance must be communicated to the offeror. He referred to the cases of *Okugbule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 732 at 741 and *Orient Bank (Nig) PLC v. Bilante International Ltd.* (1997) 8 NWLR (Pt. 515) 37 at 77.

Mr. Akpamgbo, learned Senior Advocate for the Respondent, submitted, quite correctly, that the revocation was done not for any reason but “in accordance with the recommendation of the 6th Appellant’s Commission”. He also referred to the case of *Stevenson v. Maclean* (1880) 5 QBD 346 at 350 where it was held that mere request for information or a mere inquiry which should be answered by an offeror does not destroy or cancel the original offer and is not to be treated as a rejection of the offer so as to amount to a counter-offer. ***I have indicated earlier in this judgment that the respondent had accepted the offer and had made part-payment of the signature bonus/reserved value of \$1 million U.S. Dollars. By this token the appellants have no alternative but to keep the offer open since the offeree has commenced performance.*** See *Abbott v. Lance* (1860) Legge 1283 NSW FC.) ***In a decision of this court it was held that acceptance of an offer may be demonstrated by the conduct of the parties as well as by their words or by documents that have passed between them.*** See *Union Bank of Nigeria Ltd. v. Ozigi* (1991) 2 NWLR (Pt.176) 677. ***I therefore agree that on the 8th of July, 1989, when the appellants withdrew the allocation of OPL 248 from the respondent there was a validly existing and legally binding contract between the appellants and the respondent.*** This issue is therefore resolved in favour of the respondent.

I will now consider whether the trial court had jurisdiction to entertain this suit in view of the Public Officers Protection Act, Cap. 379, Laws of the Federation of Nigeria, 1990. The appellants raised this issue basing their reason for doing so on the fact that the letter written to the respondent withdrawing the allocation of OPL 248 was dated 8th July, 1999, and the respondent commenced this action by originating summons, dated 26th October, 1999. The respondent, therefore, commenced this action outside the three months limitation period provided in Section 2(a) of the Public Officers Protection Act.

Learned counsel for the appellants argued that all the appellants are public officers within the meaning of Public Officers Protection Act. He referred in particular to a recent decision of this court, to wit, *Alhaji Aliyu Ibrahim v. Judicial Service Committee, Kaduna State & Anor*, (1998) 14 NWLR (Pt. 584) 1. He also supported the submission by reference to the case of *Dr. Mathias Offorboche v. Ogoja Local*

Government & Anor. (2001) 16 NWLR (Pt.739) 458. ***I think the argument whether the appellants are public officers or not has been settled by my Lord Iguh, JSC, who wrote the lead judgment in Ibrahim’s case, supra. In that case, Iguh, JSC., interpreted the meaning of “Public Officers” or “any person”***  
 B ***used in the Public Officers (Protection) Law, Cap 111 of Northern Nigeria 1963 thus,***

***“...I did hold that the words public officer or “any person in public office as stipulated in Section 2 of the Public Officers (Protection) Law, 1963, not only refer to natural persons or***  
 C ***persons sued in their personal names but that they extend to public bodies, artificial persons, institutions or persons sued by their official names or titles.”***

***All the appellants are therefore public Officers within***  
 D ***the meaning of the Public officers Protection Act.*** See also the case of Permanent Secretary Ministry of Works E.T.C. & Anor. v. (1975) NSCC 292.

The next point in this issue is whether leave was sought and obtained to raise the issue (as a new issue), i.e., the relevance of the  
 E provision of Public Officers Protection Act before the Court of Appeal. Musdapha, JCA., said that no leave was sought and obtained. With respect to the learned Justice, he was in error. In a motion dated 9th April, 2001, and argued on 10th April, the appellants applied for  
 F leave to raise new issue not raised in the trial High Court. It was quite clear that the new issue is the ground of appeal that the High Court had no jurisdiction to entertain the action filed by the respondent in view of the provisions of the Public Officers Protection Act. Learned counsel, Tolorunse, moved the motion for the appellants. Mr. Nwokedi,  
 G learned counsel for the respondent, raised no objection to the application and it was granted.

The strongest point, in my view, for the respondent in this issue is whether the Public Officers Protection Act applies to matters concerning breach of contracts. The Court of Appeal agreed with the  
 H submissions of the respondent that the Act does not apply to cases of contract. Learned counsel for the appellants argued that Ibrahim’s case concerned contract of service. He also referred to Sanda v. Kukawa LGA (1991) 2 NWLR (Pt.174) 379 at 388-9. With respect to the learned counsel the issues considered in the two cases did not

touch the pertinent argument on whether the privilege in the Act is applicable to an action founded upon a contract. In Ibrahim's case the issues considered in the lead judgment written by Iguh, JSC., are as follows:

*"1. Whether the respondents in this matter, i.e., the Judicial Service Committee of Kaduna State and the Attorney-General of Kaduna State, howsoever defined, fall within the contemplation of the protection afforded public officers by the Public Officers (Protection) Law, Cap. 111, Laws of Northern Nigeria, 1963 as applicable to Kaduna State?"*

*"2. Whether it is proper for the Court of Appeal to decide on an important issue raised by it suo motu without inviting the parties or their counsel to address the court on same particularly when that issue had in an earlier decision between the parties been finally determined by the Court of Appeal?"*

It is abundantly clear that this court, in Ibrahim's case, did not consider whether the Act applies to cases of contract. I am not unmindful of the judgment of Ogundare, JSC., in Ibrahim's case wherein he considered the applicability of contract cases to the privilege provided in the Act. But that is a dissenting judgment, and although well founded, it is not the binding decision on the issue.

***Mr. Akpamgbo, SAN, submitted, quite rightly, that this court, while interpreting the provisions of Section 97 of the Ports Act, which is in pari materia with Section 2 of the Public Officers Protection Ordinance, held in the case of Nigerian Ports Authority v. Construction Generali Farsura Cogefar SPA & Anor (1974) All NLR 945 at 955 that the said law was not intended by the legislature to apply to contracts. The learned Senior Advocate referred also to the case of the Midland Railway Co. v. The Local Board for the District of Withington (1882-3) 11 OBD 788 at 794 and the case of Salako v. L.E.D. & Anor, 20 NLR. 169. I have looked into those cases and I agree that the Supreme Court considered the applicability of Public Officers Protection Ordinances to action founded upon cases of breach of contract. In Nigerian Ports Authority v. Construction Supra, this court, per Ibekwe, JSC held,***

***"We shall now deal with the other point which to our minds, does not seem to be well-settled, namely, whether the***

**kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether S.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything**

**B done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.** The learned Chief Justice, in deciding this point, made reference to the case of

**C Salako v. L.E.D.B. & Anor. 20 NLR. 169 where de Commarmond, SPJ, as he then was, construed the provision of S.2 of the Public Officers Protection Ordinance which is almost identical with S. 97 of the Ports Act, and thereafter stated the law as follows:-**

**D “I am of the opinion that Section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done, etc”.**

We too are of the opinion that de Commarmond, SPJ had quite rightly stated the law in the passage of his Judgment cited above.

**E** It seems to us that an enactment of this kind, i.e., S. 97 of the Ports Act is not intended by legislature to apply to specific contracts. It is pertinent to point out that the view which we have just expressed seems to be in consonance with the trend of similar judgments pronounced in English cases dealing with similar provisions in certain

**F** English Statutes. We shall refer only to one case as an example. In *Midland Railway Company v. The Local Board for the District of Withington* (1882 - 3) II QBD, 788 the Court of Appeal construed S. 264 of the Public Health Act, 1875 (38 & 39 Vict. C. 55) which,

**G** more or less, falls in line with S.97 of the Ports Act, the subject-matter of this appeal. We think that it is desirable that we should here set out the provision of S.264 of the Public Health Act, 1875, as follows:-

**H “Sec. 264. A writ or process shall not be issued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this act, until the expiration of one month after notice in writing has been served on such local authority, member, officer or person.....”**

Delivering the judgment of the court at p.794, Brett, MR., made



the following illuminating observation:-

*“It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contract. Again, when goods have been sold, the section will not apply to an action upon a quantum meruit, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute.”*

**The appellants have again failed in this issue and I resolve it in favour of the respondent.**

I now move to issue 2. The question there is whether the Court of Appeal is right in affirming the refusal to allow the appellant to use the counter affidavit and whether such act did not amount to a violation of the appellant's right to fair hearing? In looking for an answer to this question it is relevant to look into the record and find out how the trial High Court handled the respondent's claim which was filed by an Originating Summons. The proceedings are clear from the records. The Originating Summons with an affidavit-in-support was filed on 26th October, 1999, by the Respondent as plaintiff. On 2nd November, of the same year, the respondent filed a motion applying for interim injunction restraining the appellants from interference with the legal and equitable interest of the respondent in respect to the concession granted to the company concerning OPL 248. The motion for the interlocutory injunction was adjourned to 19/1/2000. A counter-affidavit was filed by the appellants on 17/1/2000. There were further affidavits and further counter-affidavits filed. However, on 18th May, 2000, the learned trial Judge granted the motion for interlocutory injunction. The hearing of the originating summons was adjourned to 8th and 9th of June 2000. On the 8th of June the hearing had to be adjourned to 26th of June because counsel for the appellants was not in court. The case was adjourned to 26th of June and on that day Learned counsel for the respondent moved the application for the originating summons. The appellants were well represented, but were not ready to give in their reply. The matter was adjourned to 6th of July, 2000. **On the adjourned date, and**

before learned counsel for the appellants opened his address, he told the court that he had filed a counter-affidavit. Mr. Akpangbo SAN, objected to the consideration of the counter-affidavit because, according to him, he had just been served with it in the court. The learned trial Judge ruled thus

B “Court:- The ruling of this Court is that the counsel had ample time to file his counter-affidavit, when he did not since 4/8/99. He allowed the plaintiff to state his case and thereafter filed this counter affidavit, when he has not even served the Plaintiff. There has to be an end to litigation. Originating Summons usually concerns questions of law and since he did not file any counter affidavit with a reasonable time, he can only address the court on points of law.”

D There are the proceedings which the court of Appeal referred to in its judgment. Musdapha JCA., quite rightly, in my view, held that the decision reached by the learned trial Judge was not in conflict with the facts contained in the counter-affidavit. I too have gone through the counter-affidavit and, with respect to the submission of the learned counsel for the appellants, I have failed to decipher what the learned counsel is fretting about on the question of fair hearing in this issue. I have earlier in this judgment reproduced all the facts and documents connected with this dispute. The facts are not disputed. What is there in these proceedings to show that the appellants were denied fair hearing? The counter-affidavit was filed in court after the counsel for the respondent concluded his address. The arguments for and against this action are all based on law. At the stage the counter-affidavit was filed the court was familiar with all the facts and the learned trial Judge had discretion whether to consider or reject it. I am satisfied that the learned trial Judge exercised his discretion judiciously and judicially in this matter. The Court of Appeal is right to hold that the refusal to permit the appellants use the counter-affidavit had not occasioned any miscarriage of justice.

The question raised in issue 4 is so obvious that its considerations raised no difficulty. The Court of Appeal, in considering this issue held as follows:-

“There is no doubt that the granting of an OPL by the

*Government is governed by statute; the Petroleum Act Cap.350, LFN, 1990.....there is therefore no doubt that the contractual relation created by the parties herein are statutory and the appellants are bound to comply with the statutory provisions which apply to govern the contract.”*

***It is instructive that paragraphs 23-27 of the 1st schedule to the Petroleum Act, Cap. 350, LFN, 1990, which stipulate the procedure for revocation of a licence were applicable to this case. Earlier in his submission, learned counsel for the appellants submitted that a licence in the form contained in form B of the schedule to the Petroleum (Drilling and Production) Regulations will be issued to the respondent whenever he fulfilled all the conditions of the offer of an Oil Prospecting Licence. The provision of the statute is clear and unambiguous. I agree that the court should give the statute its ordinary and natural meaning. See Railegh Ind. (Nig) Ltd. v. Nwaiwu (1994) NWLR (Pt.341) 760 at 771. The ordinary and natural meaning of the provisions of paragraphs 23-27 of the 1st Schedule to the Petroleum Act is that it regulates the procedure for revocation of an Oil Prospecting Licence. But the appellants revoked the licence of the respondent following a recommendation of the Kolade Panel. When a matter is clearly spelt out in a statute and the procedure for carrying out such duty is laid down, a party has no choice but to comply fully with the provisions of the statute. The fourth issue is therefore resolved against the appellants.***

I really do not see the relevance of the fifth issue to this appeal. The 1st appellant established the 6th appellant's panel under the Tribunals of Inquiry Act, Cap. 447, Laws of the Federation, 1990 G and by Government Notice No. 125 in No. 56 Volume 86 (S.19 of 1999). According to learned counsel of the respondent there was no publication of the term of reference of the tribunal of Kolade Panel. But being appraised of the tribunal's sittings the respondent sent in a memorandum. The memorandum is an exhibit in this suit. The respondent was not invited to make any submission in respect of its memorandum. The next action was the revocation of the respondent's allocation of OPL 248 which was said to have been made following a recommendation from Kolade Panel appointed by the President. H

***It is trite that motive, rationale or reason for the decision to terminate a contract is generally irrelevant in law. A contract is an agreement freely entered by the parties and may be terminated by any of the contracting parties with good or bad or no reason at all. The appellants entered into the agreement to allocate OPL 248 on payment of fees. Before the agreed time for payment expired the appellants revoked the contract. The procedure for the termination, withdrawal and revocation of the licence has been specifically provided in the Petroleum Act and the Regulations enacted as schedules to the Act. Whether Kolade Panel had adhered to the rule of law during its proceedings or not, once the revocation of the licence was not done as is provided in the statute the appellants' action would be a breach of the agreement entered with the respondent.***

In the last issue the appellants questioned whether the Court of Appeal was right to confirm the trial court's judgment asking the parties to fulfil the condition of the contract. At the trial the respondent claimed as per the originating summons. Altogether the respondent applied for 5 reliefs. At the end of the hearing the learned trial Judge concluded his ruling with the pronouncement of the following order:

*"I find that the proper orders to make in this type of situation is not to award damages. I therefore direct the parties to complete their obligations under the contract. The other relieves (sic) are also granted. This is the ruling of the Court and Order."*

Learned counsel for the appellants, Kayode, SAN, argued that the relief for damages was not claimed and that therefore the learned trial Judge was in error to mention it. But with respect to the learned counsel, since the learned trial Judge did not consider or award damages, the complaint about damages is of no consequence. Learned Senior Advocate for the appellants further submitted that the trial court did not consider each of the declaratory reliefs sought by the respondent. He argued that declaratory relief in the instance of this case would impose a duty on the court to see that each of the contracting parties carry out its own contractual obligation. This is contrary to the procedure that a court should not make orders that would require its supervision. He referred to *Fawehinmi v. Inspector General of Police* (2000) 7 NWLR (Pt. 665) 481 at 523. Learned

counsel thereafter submitted that the Court of Appeal was in error to affirm the decision of the trial court in view of the imperfections of the orders made by that court.

I would like to point out that before the trial started, the High Court granted an order, inter alia, of injunction restraining the appellants by themselves, their servants, agents and privies from further interference with the respondent's legal and equitable interests in OPL 248. In addition, four declaratory reliefs were asked for and at the end of the hearing the court directed the parties to complete their obligations under the contract. Mr. Akpamgbo, SAN, submitted that the directive given by the court is incidental, ancillary and consequential on the judgment that there is a valid contract between the parties. Learned counsel referred to the case of Akinbobola v. Plisson Fisko (1991) 1 NWLR (Pt. 167) 270 at 288 in which Nnaemeka-Agu, JSC, explained as follows:

"A consequential order is not merely incidental to a decision but one necessarily flowing directly and naturally from and inevitably consequent upon it. It must be giving effect to the judgment already given not by granting a fresh and unclaimed or unproven relief ..... A proffer consequential order need not be claimed but a substantive order must be claimed and sustained from the facts before the court. See also Henry Awoniyi & Ors. v. The Registered Trustees of the Rosicrucian Order AMORC Nigeria (2000) 6 S.C. (Pt.1) 103; (2000) 10 NWLR (Pt. 676) 522 at 540 (Underlining mine.)"

***It is settled law that the learned trial Judge having found that the appellants were in error to revoke the contract can order for damages or direct the parties to complete their obligation under the contract. There was no claim for damages and it is left to the discretion of the Court to make a consequential order. The Court of Appeal is therefore right to affirm the consequential order made by the High Court. The High Court can exercise such power under the provisions of Order 7 Rule 3 of the Federal High Court Rules, 2000, there will be no difficulty in carrying out the order made by the High Court because the appellant have been restrained from any interference with the legal and equitable interest of the respondent in OPL 248 through an injunctive order granted before the commencement of the proceedings.***

In the result this appeal has failed and it is dismissed. The judgment of the Court of Appeal affirming the decision of the High Court is hereby confirmed. The respondent is entitled to the costs of this appeal which I assess at N10,000.00.

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### ***BELGORE JSC***

I agree with my learned brother, Mohammed, JSC., that this appeal is without any merit. The procedure for revocation of a Petroleum Prospecting Licence is clear in paragraphs 23-27 of the First Schedule in the Petroleum Act (Cap. 350, Laws of the Federation of Nigeria, 1990). There is certainly a subsisting contract as evidenced by the licence and dealing between the parties and nowhere is Kolade's Report a part of the conditions. There is no compliance with the law and procedure for revocation of Oil Prospecting Licence. Assuming the words "Cancellation" as used in the purported revocation means "revocation" it has meant that respondent's licence is revoked; this is not correct in law.

What the appellants seem to emphasize is the use of the term "condition" which in the light of the dealings between the parties are in fact "terms". This is because since the offer was validly accepted the other payments having been deferred to a later date shows clearly those so called "conditions" are in fact "terms". *Alfortrin v. Attorney-General of the Federation* (1996) 9 NWLR (Pt. 476) 634, 656, 657. The word "condition" as used in the letter of offer, can have no other meaning than non-technical one as the dealings between the parties after acceptance of the offer render those conditions to mean "terms". The offer, having been accepted on 22nd March, 1999, has created a binding contract between the parties and can only be revoked in accordance with the terms of the contract and the binding law. It is the duty of the Court not to look at a contract in a narrow manner for its interpretation; the entire documents must be looked into and in conjunction with the dealings of the parties to know what they mean. The contract between the parties was formed once the offer was accepted and vital payments were made. The terms are ancillary to the conditions and cannot by any shred of the imagination be deemed to vitiate the contract already in existence. The conduct of the respondent with regard to the terms as to some payments, that is

to say, in extending time to make some other payments, and response of the appellants acceding to such request, manifest the contract was firmly in existence.

What the trial Judge granted may look like specific performance, a remedy not asked for. But on closer look, it is not the remedy granted. By ordering the parties to do what they ought to do under a valid contract, the court was referring to the obvious, that is to say the contract subsists and each party should perform its obligations under it.

Looking at the issues in the case right from Court of Appeal to this Court, I cannot understand by any shred of imagination, how the issue of what method was used to initiate the proceedings in trial court arose. Procedure is a guide to smoothen passage of suit, to direct the parties what to do and to guide the court to arrive at the justice of a case. The question of initiating the proceedings by originating summons was never a big issue at the trial court; neither was it at Court of Appeal and in this Court. This Court shall never be shackled by procedure; case is not made for procedure, it is the other way round. Once the procedure employed has brought into focus the issues the parties contest and there is no miscarriage of justice it will not matter that the procedure is not the correct one. Getting to the destination is what is important; it does not matter the means used. This Court will certainly not disturb a clear case of justice between the parties by suo motu raising for the parties procedural abnormalities in courts below when the parties never seriously raised exception to that procedure. It is my view that it does not matter whether by writ of summons or by originating summons a writ was initiated. What is relevant in a case of this nature is the question of justice of the case.

I therefore dismiss this appeal for the fuller reasons in the judgment of Mohammed, JSC., which I adopt as mine with N10,000.00 costs to the respondent.

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### **KUTIGI JSC**

I read before now the judgment just rendered by my learned brother, Mohammed, JSC. I agree with the conclusion to dismiss the appeal. The appellants in their letter dated May 31st, 1999, unmistakably gave the respondent 45 days extension of time with

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effect from June 1, 1999, to effect the payment of outstanding signature bonus/reserved value on OPL 248. In other words time for compliance or payment was extended up to July 15, 1999. The appellants were therefore clearly in breach when on July 8 the 1999, they wrote another letter to the Respondent canceling the allocation of OPL 248 allocated to it -

“...in accordance with the commendation of Panel appointed by the President, Commander-In-Chief of the Armed Forces of the Federal Republic of Nigeria, to review all contracts, licenses and appointments made between the 1st January, and 28th May, 1999.”

If this did not amount to breach of contract, I do not know what would! The contract between the parties had been completed when the Appellants made the offer and the Respondent accepted same. The Respondent was performing when suddenly and for reasons clearly unconnected with the terms of the contract (thee Kolade Panel) the Appellants purported to cancel the contract. They are clearly in breach. The appeal must therefore be dismissed and it is hereby dismissed. The judgments of the lower courts are confirmed. I also award to the Plaintiff/Respondent costs of this appeal assessed at N10,000.00.

### AYOOLA JSC

The main questions that have arisen in this appeal are whether there was a contract between the respondent and the Federal Government of Nigeria and the extent to which that government is liable to fulfill obligations of that contract.

By an originating summons, the respondent, Zebra Energy Ltd., sought the following reliefs.

“(a) A declaration that the purported cancellation and/or revocation or withdrawal of the allocation of concession acreage - OPL 248 is valid, ineffectual and contrary to the rules of natural justice.

(b) A declaration that the said letter of allocation creates legal and equitable rights in the plaintiff.

(c) A declaration that the plaintiff had a right and interest in OPL 248.

(d) A declaration that there is a valid and existing contract between the plaintiff and the 1st - 5th defendants in respect of alloca-



tion of OPL 248.

*(e) An order of injunction restraining the defendants by themselves, their servants, agents and privies from further interfering with the plaintiff's legal and equitable interests in OPL 248 to any other person, individual or corporate."*

The matter came before the Federal High Court which gave judgment for the respondent on 2nd August, 2000, against the defendants who are the appellants in this appeal. The learned trial Judge did not couch his judgment in precise enough terms when he concluded thus:

*"I find that the proper order to make in this type of situation is not to award damages. I therefore direct the parties to complete their obligations under the contract. The other relieves (sic) are also granted. This is the ruling of the Court and Order."*

However, the Court of Appeal affirmed the decision of the trial court. What the trial court granted can be understood from the material findings he made as follows:

(1) There was a binding contract between the parties there being an offer by the appellants to the respondent and an acceptance by the latter.

(2) There was no evidence to the effect that the allocation to the respondent was vitiated by fraud or irregularity

(3) The revocation of the licence by the Ministry before the grace period of 45 days was not done in good faith.

(4) The respondent was not given a fair hearing by a panel set up by the Government before the allocation to it was revoked.

The Court of Appeal agreed with these findings and dismissed the appellant's appeal. Of the six issues raised by counsel on behalf of the appellants two of them which I consider weighty are as follows:

### **"ISSUES NO.3**

*Was there an existing contract between the parties as at 8th July, 1999.*

### **ISSUES NO. 6**

*Was the Court of Appeal right in affirming the judgment of the trial court which granted reliefs either not sought or claimed which were inappropriate in the circumstance."*

The background facts relevant to my judgment I now state briefly. On 8th March, 1999, the Ministry of Petroleum Resources

(the Ministry) wrote to the respondent as follows:

*“APPLICATION FOR DISCRETIONARY ALLOCATION OF OPL 248*

*I wish to refer to your application for the allocation of OPL 248 and to convey the approval of the Head of State, Commander-in-Chief of the said block to your organization, Zebra Energy (Nig.) Limited. This offer is subject to the following conditions:*

*(1) that you pay the application and bidding fees of Fifty Thousand Naira (=N=50,000.00) and United States Ten Thousand Dollars (US\$10,000.00), respectively;*

*(2) that you pay the signature bonus and reserved value of US\$20 million;*

*(3) that the allocated block would be operated on a ‘Sole Risk’ basis but with the understanding that the Government reserves the right to a participating interest at any time in the life of any subsequent Oil Mining Lease when it so wishes;*

*(4) that, in addition to the terms of Petroleum (Drilling and Production) Regulations, 1969, (as amended) the following guidelines will govern the operations of the lease:-*

*(a) Your company must be a fully registered Nigerian company;*

*(b) Foreign participation interest in the block shall not exceed 40% (i.e. 60/40 indigenous to foreign.);*

*(c) The Managing Director of your operating company, who could be an expatriate or Nigerian, must be an employee of the Company;*

*(d) Your company is free to enter into any joint venture agreement with any foreign company which is currently engaged in exploration and production activities in the country.*

*(5) that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within thirty (30) days of the date of this letter, (if the amount due is not paid by that date, i.e., 7th April, 1999, the acreage may be re-allocated without further reference to you).*

*(6) that you make payments in favour of “Federal Government of Nigeria, P.T.D.F Account”, giving also the details of the reason(s) for the payment; and*

*(7) that you advise us of the details after the payment has been made.*

*For further enquires on the allocation contact the Director of Petroleum Resources.”*

In response to this letter the respondent wrote as follows on 22nd March, 1999:

*“RE: DISCRETIONARY ALLOCATION OF OPL 248-REF NO PI/BAL/3717/S.442/V.1/DATED 8TH MARCH, 1999* B

*We write to accept the concessionary award of OPL 248 to Zebra Energy Ltd.*

*We are forwarding herewith two Diamond Bank Drafts in the sums of N50,000.00 (Fifty Thousand Naira) and N860.000 (Eight Hundred and Sixty Thousand Naira) being payments for the Appli- C cation and Bid fees, respectively.*

*The signature bonus and reserve value of \$20 million will be paid in due course.*

*Please clarify how much of this amount represents the signature D bonus and how much is for the reserve value.*

*We would like to reiterate our resolve in commencing relevant business activities in the block*

*Thank you once again for the award.*

*After making part-payment of Signature Bonus/Reserve Value E Fees, on May 28,1999, the respondent wrote to The Director, Department of Petroleum Resources (DPR) as follows: RE: OPL 248*

*Reference is made to your letter of April 15, 1999, of Reference No. PI/BAL/3717/T/, regarding the payment of the Signature Bonus F Reserve Value.*

*We are happy to inform you that we have paid the sum of US\$1M (One Million US Dollars). However, we are constrained to request for further time within which to complete the balance. This is to allow our bankers to conclude documentation for transfer of funds, G as well as to allow time for a thorough technical analysis and comprehensive data interpretation.*

*As a result of the foregoing reasons, we hereby request for a 3-month extension, effective from the 7th of June, 1999, within which H to pay the balance.*

*We do hope our application will be granted.*

*Thank you.”*

The Director of Petroleum Resources responded by his letter of May 31, 1999, as follows:

*“RE: OPL 248*

*Your letter of May 28, 1999, on the above subject matter refers.*

*2. I am directed to inform you that you have been granted a grace period of forty-five (45) days with effect from June 1, 1999, to effect the payment of the outstanding signature bonus/reserved value*  
B *on OPL 248.”*

Thus matters stood until 8th July, 1999, when, before the expiration of the period of grace granted to the respondent the Ministry wrote to the respondent withdrawing the allocation. The letter was as follows:

C *“Dear Sir,*

*I have been directed to inform you of the cancellation of the allocation of OPL 248, recently allocated to your company.*

*2. This is in accordance with the recommendation of Panel*  
D *appointed by the President, Commander-In-Chief of the Armed Forces of the Federal Republic of Nigeria, to review all contracts, Licences and appointments made between the 1st January and 28th of May, 1999.*

*3. Any further information you may require on this matter*  
E *should be addressed to the Director, Petroleum Resources 7, Kofo Abayomi Street, Victoria Island, Lagos.”*

From this exchange of correspondence the facts that emerged are not difficult to recap. The Government through its agency, the Ministry, granted the application of the respondent for allocation of  
F oil block described as OPL 248 on certain terms some of which were to be performed within thirty days. The respondent fulfilled part of the conditions within the period specified but sought period of grace to fulfill the rest relating to payment of the balance of the signature  
G bonus and reserved value. On May 23, 1999, the Government granted a grace period of 45 days from that date for payment to be paid. On 8th July, 1999, before the expiration of that period, the government withdrew the allocation.

Contrary to the opinion of the trial court and the court below  
H that on these facts there was a contract, counsel on behalf of the appellants argued on this appeal that there was no contract between the parties, His argument, put in a nutshell, is that the letter whereby the respondent asked for period of grace to make payment of the signature bonus and reserve value fees amounted to a counter-offer.

The argument proceeded on the footing that the two conditions being:

(1) that N50,000 and \$10,000 application and bidding fees be paid and,

(ii) that US \$20,000,000.00 signature bonus and reserved value be paid, B

and both conditions to be fulfilled within one month, the offer was conditional so as to delay the formation of a contract until the conditions were performed.

Learned counsel for the respondent for his part argued that there was a valid and legally enforceable contract as at 8th July, 1999, when the Government withdrew and cancelled the allocation of OPL 248. In his submission, the letters which the appellants' counsel regarded as counter offers were mere requests for information, the offer having been accepted by the respondent by its letter 22nd March, 1999. C D

The true nature and purport of the letter of 8th March, 1999, is the key to the question whether there was a contract or not. Was it an offer subject to condition or was it an offer spelling out the terms of the contract to be entered into? If it was the former, a contract would not be formed until the condition was fulfilled. If it was the latter two questions arise: was the contract a conditional contract? Or, was it one in which the liability of the Government was conditional on payment to be made by the respondent? E F

Different principles and consequences apply to each of them. Where an offer is subject to condition the formation of the contract is postponed until the happening of the event on which the offer is conditioned. If the condition of the offer is that unless something is done within a stipulated time the offer is determined, such an offer cannot be accepted after the happening of the event. G

However, it is not unusual for an offer to contain the terms of a prospective contract. Sometimes these terms are described as conditions. The acceptance of an offer which contains terms or conditions of the prospective contract bring into existence a binding contract on those terms, although the liability of a party may be suspended until the condition is fulfilled. H

In the present case the appellants' counsel's submission seems to have been built round the statement in the letter of offer dated 8th

March, 1999, that” “This offer is subject to the following conditions.” Although four “conditions” were prescribed, counsel for the appellant fastened on just the first two of these “conditions”, namely:

“(i) that you pay the application and bidding fees of Fifty Thousand Naira (=N=50,000.00) and United States Ten Thousand Dollars (US\$10,000.00), respectively;

(ii) that you pay the signature bonus and reserved value of US\$20 million.”

However, there were several other “conditions” which could only be performed when the contract is operational. For instance ‘Condition’ (iii) stated the allocation block would be operated on a Sole Risk basis and reserved to the government “a participation right in the life of any subsequent Oil Mining lease when it so wishes.”

“Condition” (iv) dealt with guidelines which will govern the operations of the lease. “Condition” (v) which, read with “Condition” (ii), would seem to have given some sort of impetus to the argument of counsel for the appellants read as follows:

“that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within thirty (30) days of the date of this letter (if the amount is not paid by that date, i.e., 7th April, 1999, the acreage may be re-allocated without further reference to you.)”

Reading the “conditions”, it seems clear to me that apart from the condition as to confirmation of acceptance of the offer within 30 days the rest of the “conditions” were terms of the prospective contract which, on acceptance of the offer, became terms of the contract so as to make the respondent come under a contractual obligation to perform the term as to payment of money within 30 days.

The use of the word “condition” in the letter of 8th March, 1999, needed not mislead, but seems to have misled counsel for the appellant in the substance of his argument on the issue under consideration. In *Skips A/S Nordheim v. Petrofina S. A. (The Varenna)* (1984) QB 599, 618 condition was described as “a chameleon-like word which takes its meaning from its surroundings”. Read in the context in which the word was used, “condition” was used in a non-technical sense to mean a term. That the word “condition” in a contract may be used in a technical or non-technical sense is illustrated by the case of *Wickman Ltd. v. Schuler A. G.* (1974) AC 235. In that case it was a “condition” of a four-year distributorship agreement that the

distributor should visit six named customers, once a week. The House of Lords held the contract could not be rescinded merely because this term had been broken. It was said that the parties could not have intended the agreement to mean that a failure to make only one of an obligatory total of some 1,400 visits should have such drastic results, and that more probably they have used “condition” in a non-technical sense to mean simply a term, (as in the phrase “Conditions of sale”). In *Alfotrin v. Attorney-General of the Federation* (1996) 9 NWLR (Pt. 476) at 656-7 the court used “condition” and “term” interchangeably. I hold that, read in context, the word “condition” used in the letter of offer was used in a non-technical sense to mean the terms of the contract. Viewed that way, it was not a condition which affected the formation of a contract but one which was a term, the breach of which may entitle a party to the contract to rescind the contract. Whether a term of contract is a condition in the technical sense that may entitle a party to rescind the contract depends on the intention of the parties as gathered from the agreement, but that question does not arise in this case, in which the question was whether or not there was a contract at all.

The offer having been accepted by the respondent by its letter of March 22, 1999, a binding contract had come into being on that date and no question of counter-offer arose. Although the respondent wrote to ask for indulgence as to time to pay the Signature Bonus and Reserved Value, this did not affect the unqualified acceptance in which the respondent had stated that: “The signature bonus and reserve value of US\$20 million will be paid in due course.” It suffices to support this conclusion by quotation of the statement of the relevant law from Chitty on Contracts (28th Edition) para 2-026 as follows:-

*“The court will... look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement, If it did, the fact that the parties continued negotiations after this point does not affect the existence of the contract between them, unless the continued correspondence can be construed as an agreement to rescind the contract.”*

Further, it was stated in para 2 - 029 of the same work:

*“...statements which are not intended to vary the terms of the offer, or to add new terms, do not vitiate the acceptance even when they do not precisely match the words of the offer... Nor will it have*

*this effect if it is merely a declaration by the acceptor that he is prepared to grant some indulgence to the offer or, e.g., to condone late payment in return for specified interest. Simply, it is submitted that an acceptance which asks for some indulgence to the offeree is, nevertheless, effective, so long as he is prepared to perform even if the indulgence is not granted: e.g., to buy for cash if his request for credit is refused.”*

That these clearly stated principles fit the facts of the case seems to me beyond dispute. The appellants, who were prepared to grant an indulgence as to time within which the respondent, could pay the signature bonus and reserve value, can neither be said to have evinced an intention to withdraw from the transaction, nor to have made time of the essence of the contract as regard payment within 3 days as originally prescribed. If anything, by the indulgence granted they affirmed the contract. The respondent who had committed considerable funds to the contract cannot be said to have evinced a lack of preparedness to perform its obligations.

In my judgment, the argument that the respondent made a counter-offer is misconceived, and diversionary. Nor, do I think that any question of acceptance by conduct, contended by counsel for the respondent, arose, the respondent having confirmed the acceptance of the offer expressly and in writing by its letter of 22nd March, 1999. Where there is an express acceptance of an offer no question of acceptance by conduct should arise.

Enough, I believe, has been said to show that there was a binding agreement to allocate OPL 248 to the respondent which was formed on 22 March, 1999, when the respondent accepted the appellants offer.

I now turn to the second question I set out earlier in this judgment which, predicated on the finding of the trial court that there was a binding contract, arose from the order of the trial Judge directing “*the parties to complete their respective obligations under the contract.*” Although the learned Judge also said: “*The other relieves (sic: reliefs) are also granted.*” It is evident that the trial Judge limited himself to the issue whether there was a binding contract or not. His directive that the parties should complete their obligations under the contract flowed from his finding that a contractual relationship subsisted between the parties and the fact that the main issue was



whether there was a contract or not. The only clear relief granted was the “*declaration that there was a valid and existing contract between the Plaintiff and the 1st -5th Defendants in respect of allocation of OPL 248.*”

It is against the background of the declaration of binding contract granted that the sixth issue raised by the appellants falls to be considered. The substance of the appellant’s counsel’s argument, apart from the submissions on the question of the other reliefs granted, is that by directing the parties to complete their obligation under the contract, the trial Judge had granted a relief not sought by the respondent; and, the court below in confirming the directive had erred in holding that it was a consequential relief. B  
C

It is clear from the judgment of the court below that the directive of the trial court was not an order of specific performance. The court below was right in so holding. But, what was the significance of the directive? Counsel for the respondent argued that it was to give effect to the judgment and cited in support an opinion of Nnaemeka-Agu, JSC., in *Akinbobola v. Plisson Fisko* (1991) 1 NWLR (Pt. 167) 270, 278 where it was said:

“*A consequential order is not merely incidental to a decision but one necessarily flowing directly and naturally from and inevitably consequent upon it. It must be giving effect to the judgment already given, not granting a fresh and unclaimed or unproven relief.....*” E

Counsel for the respondent further submitted that the directive was “in the nature of declaratory order than an executory one, that is, suspending the withdrawal of the licence and urging both parties to conclude the contract between them.” It is obvious that counsel for the appellants was, at great pains to explain the purport of the directive. Much trouble could have been saved by a quick recourse to obvious principles of the law of contract. F  
G

This was a case, in my opinion, in which the liability to perform the contract could not arise until the respondent paid the signature bonus and reserve value. However, before the respondent could do so the appellants rescinded the contract. It was thus, at best, a case of anticipatory breach which would arise where before the time at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part. (See *Chitty on* H

Contracts (op. cit) para 25 - 02). The options open to the innocent part in a case of anticipatory breach is to accept the breach completely and unequivocally and bring an action for damages or, not to accept the breach and retain the right to enforce the other party's primary obligation. Where the innocent party accepts the breach he too treats  
 B the contract as at an end except for the purpose of bringing an action for damages (see *Hochester v. De la Tour* 1852; *Johnstone v. Milling* (1886) 16 GBD 460). The consequence of not accepting the breach is well described in *Johnstone v. Milling* (1886) 16 QBD 460 as follows  
 C by Cotton, LJ., at p. 470:

“The promisee, if he pleases, may treat the notice of intention, (i.e., not to perform the contract), as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that  
 D case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation to it, but also to take advantage of any supervening circumstance which would  
 E justify him in declining to complete it...”

It is manifest that the respondent has not accepted the breach and holds the appellants to performance of the contract.

However, the time for the respondent to seek a remedy for non-performance of the contract had not accrued. The liability of the  
 F appellants being conditional on payment of the signature bonus and reserve value, the time for the appellants to perform the contract must await the fulfillment by the respondent of its payment obligations.

It is after that, if the appellants persist in non-performance, that the  
 G respondent can invoke the consequences of non-performance. That is how I understand the directive of the trial Judge that the parties should complete their respective obligations under the contract. Even without that directive the same legal consequences as stated would still have followed.

H Enough, I think has been said to show the lack of substance in the argument that the trial Judge granted a relief not claimed. But let me add, for avoidance of doubt, that the Government by extending the time within which to pay, had by affirmation of the contract after the respondent had missed the 30 days prescribed for payment, lost

any right to terminate the contract on the ground of failure of the appellant to perform within that stipulated time. Where time is of the essence of a contract the innocent party who has set a new time within which the contract can be performed is deemed to have affirmed the contract and set a fresh period of performance. For a useful elucidation of the relevant principles of law see Chitty on Contract (op cit) para 22-015, 22-016 and 25-002). B

From what I have said it seems clear to me that the appellant is entitled to demand the issue of a licence under the Petroleum Act upon his performing its own side of the bargain. The introduction of administrative law principles, such as the breach of the principles of natural justice in withdrawing an allocation or the validity of the revocation predicated on the provisions of the Petroleum Act was premature when the matter was still at the contractual stage. Similarly, in a purely contractual situation, it is irrelevant on whose advice or opinion a party to the contract decided to resile from the agreement. The question whether he was entitled to do so or not will not at all depend on the advice or opinion of a third party unless the parties have agreed to make it so. It is for this reason that I consider the attack on the recommendations of the Kolade Panel irrelevant. C D E

For the reasons I have given, I agree with my learned brother, Mohammed, JSC., that this appeal should be dismissed. I too would dismiss the appeal with costs as ordered by my learned brother, Mohammed, JSC. F

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***EJIWUNMI JSC (DISSENTING)***

By an originating summons dated 26/10/99, the plaintiff, now respondent, commenced this action against the defendants, now G appellants, before the Federal High Court for the determination of the following questions.

(1) "Whether the letter of allocation of oil concession acreage - OPL 248 - dated the 8th of March 1999, of reference No.PI/BAL/3717/S.442/V.1 duly signed by 4th defendant to the plaintiff and its acceptance by the plaintiff by fulfilling substantially the conditions of the grant constitute a valid contract between the plaintiff and the 1st H - 5th defendants, and enforceable by the applicant;

(ii) Whether the said allocation is in accordance with the

provisions of the Petroleum Act, 1969, (as amended), and the prevailing practice within the oil and gas industry in Nigeria;

(iii) Whether the said letter of allocation contained conditions which were intended to create a legally binding relationship between the parties in question, and which were represented to the plaintiff  
B by the 1st defendant to be relied upon in determining the relationship between the parties;

(iv) Whether the 6th defendant complied with the provisions of the relevant laws and the principles of natural justice, equity and fair hearing in making its recommendations.  
C

If the answers to the 1st, 2nd, 3rd questions are in the affirmative,

“(v) *Whether the defendants have the right under any law in force in Nigeria to unilaterally and arbitrarily, by letter dated 8th July, D 1999, of reference PAPE/PR/001 cancel and or revoke, or interfere with the legal and equitable rights that have accrued to the plaintiff.*

(vi) *Whether the defendants can act on the recommendation of the 6th defendant in cancelling and or revoking the said allocation without hearing the applicant, contrary to Section 36 of the 1999 E Constitution and Section 18 of the Tribunals of Inquiry Act.”*

If the answer to prayers (iv), (v) & (vi) are in the negative, to grant the following reliefs;

“(a) *A declaration that the purported cancellation and/or F revocation or withdrawal of the allocation of concession acreage - OPL 248 is invalid, ineffectual and contrary to the rules of natural justice.*

(b) *A declaration that the said letter of allocation creates legal and equitable rights in the plaintiff,*

(c) *A declaration that the plaintiff had a right and interest in G OPL 248.*

(d) *A declaration that there is a valid and existing contract between the plaintiff and the 1st - 5th defendants in respect of allocation of OPL 248.*

(e) *An order of injunction restraining the defendants by H themselves, their servants, agents and privies from further interfering with the plaintiff’s legal and equitable interests in OPL 248 and/or allocating the said interest in OPL 248 to any other person, individual or corporate.”*

In support of this motion, the respondent attached a 41 paragraphed affidavit to which was also attached several documentary exhibits bearing on the dispute that led to the commencement of this proceedings. I will later in this judgment refer to some of these exhibits as deemed appropriate.

Subsequent to the commencement of the proceedings, the respondent filed an ex-parte motion for an order of interim injunction against the appellant, their servants and agents from further interference with the legal and equitable interests of the plaintiff in the concession acreage OPL 248, and or allocating the same to any other person, individual or corporate entity pending the determination of the motion on notice dated 2/11/99. To this motion was filed a 35 paragraph affidavit and to which was also attached several documentary exhibits, that are not dissimilar from those attached to the affidavit filed in support of the originating summons earlier filed to commence the action. The motion on notice in similar terms as the ex-parte motion was filed accordingly. In addition, the respondent also filed a further affidavit in which in paragraphs 3, 4, & 6 of the said affidavit, one Zimako O. Zimako, a legal practitioner, deposed this:-

*“3. On the 25th of October, 1999, the widely circulated newspaper, “This Day”, carried the following headline; “Revoked Oil Blocks for Fresh Tender, says Lukman.”*

*4. The thrust of the article is that the oil concession acreages which were allocated within the last 12 months and were canceled on the recommendation of this Commission of inquiry would now be reassigned without further reference to the original recipients of the allocated concessions.*

*5. The subject of this action, concession block OPL 248, is affected by this statement.”*

In order to appreciate the purport of the ruling given, pursuant to the suit commenced by the respondent against the appellants, a brief resume of the facts leading to the action will now be given. Some of the documentary exhibits will also be copied into the judgment. The Respondent, it would appear from the affidavit filed in support of its originating summons, took advantage of the decision of Government in 1990 to open to indigenous participation in the exploration of the upstream sector of the oil industry. As a result of

the application it made, it was in 1998 awarded concession block OPL 248 by a letter dated the 8th of March 1999, reference PI/BA/37V7/S.442/V.1. The letter reads thus:-

The Chairman,  
Zebra Energy (Nig.) Limited  
Plot 6B, Park View Estate,  
Ikoyi,  
Lagos.

Dear Sir,

APPLICATION FOR DISCRETIONARY ALLOCATION OF OPL

248

I wish to refer to your application for the allocation of OPL 248 and to convey the approval of the Head of State, Commander-in-Chief of the said block to your organization, Zebra Energy (Nig.) Limited. This offer is subject to the following conditions:

(i) that you pay the application and bidding fees Fifty Thousand Naira (N50,000.00) and United States Ten Thousand Dollars (US\$10,000.00), respectively;

(ii) that you pay the signature bonus and reserved value of US\$20 million;

(iii) that the allocated block would be operated on a 'Sole Risk' basis but with the understanding that the Government reserves the right to a participating interest at any time in the life of any subsequent Oil Mining Lease when it so wishes;

(iv) that, in addition to the terms of Petroleum (Drilling and Production) Regulations, 1969, (as amended) the following guidelines will govern the operations of the lease:-

(a) Your company must be a fully registered Nigerian company;

(b) Foreign participation interest in the block shall not exceed 40% (i.e. 60/40 indigenous to foreign);

(c) The Managing Director of your operating company, who could be an expatriate or Nigerian, must be an employee of the Company

(d) Your company is free to enter into any joint venture agreement with any foreign company which is currently engaged in exploration and production activities in the country.

(v) that you pay the statutory fees listed in (i) and (ii) and confirm the acceptance of this offer within thirty (30) days of the date

of this letter, (if the amount due is not paid by that date, i.e., 7th April, 1999, the acreage may be re-allocated without further reference to you;)

(vi) that you make payments in favour of “Federal Government of Nigeria P.T.D.F Account”, giving also the details of the reason(s) for the payment; and

(vii) that you advise us of the details after the payment has been made.

For further enquires on the allocation contact the Director of Petroleum Resources.

Pursuant to the representation made by the respondent to the Director in the Department of Petroleum Resources (DPR), Dr. Dublin-Green, a letter dated 15th April 1999, Ref, No. PI/BAL/3717/T/ was written to the Chairman/Marketing Director of the respondent. That letter reads thus:-

**“RE: RESERVED VALUE/SIGNATURE BONUS**

*Following your representations on the payment of signature bonus/reserved value in respect of the allocation of Oil Prospecting Licence(s), to your company, we hereby inform you that the subject of signature bonus/reserved value cannot be treated separately as envisaged by you since the reserved value is not a flat rate affair, but heavily dependent on the prospectivity of the respective block in a given sedimentary basin in Nigeria, while the Signature bonus is the statutory signing fees.*

*However, you are advised that payments could be made in two installments within a period of three (3) months from the date of the award.”*

With the receipt of the above letter, the respondent caused a letter dated 24th May, 1999, to be written to the Director, Department of Petroleum Resources, Dr. Dublin-Green in the following terms:-

**“RE: OPL 248: APPLICATION FOR EXTENSION OF TIME**

*Reference is made, to your letter of April 15, 1999 of Defence No.PI. BAL.3717/TI, regarding the payment of the signature bonus/reserve value.*

*Further to your letter, we are constrained to request for further time within which to make payment. This is to allow our bankers to conclude documentation for transfer of funds, as well as to allow time for a thorough technical analysis and comprehensive data*

interpretation.

*As a result of the foregoing reasons, we hereby request, for a 3-month extension effective from the 7th June, 1999, within which to pay the sum.*

*We do hope our application will be granted.”*

B And by a letter dated May 28, 1999, the respondent wrote to Mr. Dublin-Green of the Department of Petroleum Resources as follows:

*“RE: OPL 248: APPLICATION FOR EXTENSION OF TIME*

C *Reference is made to your letter of April 15, 1999 of Reference No.PI.BAL/3717/T/. regarding the payment of the Signature Bonus/ Reserve value.*

*We are happy to inform you that we have paid the sum of US\$1m (One Million US Dollars). However, we are constrained to*  
D *request for further time within which to complete the balance. This is to allow our bankers to conclude documentation of transfer of funds, as well as to allow time for a thorough technical analysis and comprehensive data interpretation.*

*As a result of the foregoing reasons, we hereby request for a 3-*  
E *month extension, effective from the 7th of June, 1999, within which to pay the balance.*

*We do hope our application will be granted.”*

To the above letter, Dr. Dublin-Green of the Department of  
F Petroleum Resources, wrote a letter No. PI.BAL/3717/S.443/T/4 dated May 31, 1999, and which reads:-

The Chairman  
Zebra Energy Limited  
Plot 6B, Park View Estate,  
G Ikoyi,  
Lagos.  
Dear Sir,

RE: OPL 248

Your letter of May 28th, 1999, on the above subject matter  
H refers.

2. I am directed to inform you that you have been granted a grace period of forty-five (45) days with effect from June 1, 1999 to effect the payment of the outstanding signature bonus/reserved value on OPL 248.



Then by virtue of a letter, reference PAPL/PR001 dated 8th July, 1999, Dr. Dublin-Green wrote as follows to the respondent. It reads:-

The Chairman/Managing Director  
Zebra Energy (Nig) Limited  
Plot 6B, Park View Estate  
Ikoyi,  
Lagos  
Dear Sir,

B

WITHDRAWAL OF ALLOCATION OF OPL 248

C

I have been directed to inform you of the cancellation of the allocation of OPL 248, recently allocated to your company.

2. This is in accordance with the recommendation of the Panel appointed by the President, Commander-In-Chief of the Armed forces of the Federal Republic of Nigeria, to review all contracts, licences and appointments made between the 1st January and 28th of May, 1999.

3. Any further information you may require on this matter should be addressed to the Director, Petroleum Resources, 7, Kofo Abayomi Street, Victoria Island, Lagos.

E

Though other documents were exhibited with the affidavit filed in support of the originating summons, which the respondent took out against the appellants, I do not consider it necessary to reproduce them for the purpose of this judgment. It is however sufficient to remark that the action was commenced as stated earlier in this judgment to resolve what were considered to be the consequences of the letter dated 6th July, 1999, withdrawing the allocation of OPL 248, or its cancellation as stated in the body of the letter.

F

Pursuant to the interim order of injunction granted by Auta, J., on the 5th day of November, 1999, the appellant gave an undertaking as to damages on the same date. Sequel to that, Auta, J., of the Federal High Court heard the application in respect for the motion on notice filed by the respondent and delivered a considered ruling in which he made an order of interlocutory injunction in favour of the respondent in the course of that ruling, the learned judge held thus:-

H

*“There was no doubt there was an offer and withdrawal of license in this case which the applicant is questioning. From the affidavit*

*evidence before the court, there are serious issues to be determined in this case. Most of the issues raised by the defendants in their submission, e.g., whether there is a contract between the parties, or that the contract had lapsed, are issues to be determined at the hearing of the substantive suit.”*

B Between the delivery of the above ruling and the ruling in respect of the originating summons, the appellant filed motion on notice, praying for two reliefs, namely:-

“(1). *An order arresting the ruling of this Court fixed for the originating summons filed by the plaintiff.*

C *(2) An order permitting the defendants to use and adduce arguments in support of the counter affidavit filed on the 29/6/2000 and already in the courts file(d) sic.”*

In support of this application is the Joint Counter-Affidavit filed D for the appellants. And reproduced herein are pertinent paras. 9, 17 (a), (b), (c), (d), 18, 19, 21 & 22 of the said affidavit:

“9. That it is untrue that the recipients of OPL were allowed up to two years before the signature bonus of \$1 million dollars was paid. The grace period usually granted them has never been more E than three (3) months.

17(a) That I was informed by DR. ABOKI ZHAWA, Permanent Secretary, Ministry of Petroleum Resources and I verily believe him that:-

F (a) The plaintiff as at the 8th day of July, 1999, had failed to fulfil the fundamental terms of the approval of its application for ACREAGE ALLOCATION as conveyed by the Ministry’s letter dated 8th March, 1999.

G (b) There is no Deed of Contract executed between the plaintiff and the Ministry, since the plaintiff did not fulfil the fundamental terms of the offer.

(c) That full payment of US20 million dollars is one of the conditions which must be fulfilled by an applicant before the ministry can execute a deed of Contract for ACREAGE ALLOCATION.

H (d) That the Ministry letter dated the 8th day of July, 1999 was necessitated and informed by the failure on the part of the plaintiff to fully fulfil a fundamental term of the offer made to it. A copy of the said letter is hereby attached and marked Exhibit FGN ‘H’.

18. That I know as of fact that the plaintiff’s inability of fully

pay the sum of US 20 million dollars was on account of her poor financial state and base as conveyed by her own letter dated 24th May, 1999.

19. That I know as of fact that after a review by the Ministry of the plaintiff's application processes for acreage allocation, the defendant found that the plaintiff could only pay US\$1 million out of the US\$20 million signature bonus/ reserve value within a period of four (4) months, owing to her poor financial state. B

21. I know as a fact that Exhibit Z6 mentioned in paragraph 21 of the plaintiff's Affidavit in support is not conducted in reliance on the offer of OPL 248 made to him as it is a preliminary step taken by a prospective application for an OPL in order to determine which oil bloc to bid for. C

22. That there is no joint Venture arrangement between the plaintiff and any Technical Partners. Exhibits Z8, Z9 and Z10 are neither farm-in agreements nor joint-venture agreements between it and Chevron Petroleum Nigeria Limited. D

The learned trial Judge in a considered ruling delivering on 2/8/2000 defused this application in toto. It is interesting to note that the learned trial Judge, Auta, J, in the course of his ruling, stated inter alia, thus:- E

*"The revocation of the license by the Ministry before the grace period of 45 days is not done in good faith to elapse before he can invoke his powers of revocation. It is my opinion that the Ministry revoked the license of the plaintiff, after they have incurred (sic) heavy expenses, while trying to comply fully with the condition set out in the letter of offer, is not fair and not to be encourage (sic). The grant being license, it is irrevocable except in accordance with the terms of the grant and the provisions of the Petroleum Act."* F G

*"The defendant cannot be heard to talk of fair hearing in that since last year up to 26/6/2000 before the plaintiff made his submission, he should have filed his counter affidavit. He refused to take advantage of the time. Therefore he cannot talk about the interest of justice. As from the history of this case, I find that the main purpose was aimed at irritating and annoying the defendants in that after he had given the intention that he will address the Court on point of law he decided to file this application for arrest. It was a mere ploy to delay the determination of the matter."* H

Following this ruling, the learned Judge, delivered his ruling in respect of the originating summons with which the respondent commenced the action. In the said ruling, the trial Court reviewed the arguments of counsel and the documentary exhibits tendered by the respondent with the affidavits filed in support of the case for the respondent.

*“Since the court has found that the recommendation of the Kolade’s Panel with regard to the case of the plaintiff is null and void, it means that the contractual relationship between the parties still subsists. I find that the proper order to make in his (sic) this type of institution is not to award damages. I therefore direct the parties to complete their obligations under the contract. The other relieves (sic) are also granted.”*

As the appellants were not satisfied with ruling and orders of the trial Court, they then appealed to the Court below. In that Court, their appeal was unsuccessful, and they have further appealed to this Court. Pursuant to the Rules of this Court, briefs of arguments were filed and exchanged between the parties.

In the appellants brief, the following are the issues raised for the determination of the appeal:-

*“Issue No. 1*

*Does the trial court possess jurisdiction to entertain this suit in view of the Public Officers Protection Act Cap. 379. LFN 1990?*

*Issue No. 2*

*Was the Court of Appeal right in affirming the refusal to allow the appellant to use the counter affidavit and did this not amount to a violation of the appellants’ right to fair hearing?*

*Issue No. 3*

*Was there an existing contract between the parties as at 8th July, 1999?*

*Issue No. 4*

*Was the Court of Appeal right in affirming the trial court’s holding that the provisions of the Petroleum Act, Cap 350, LFN, 1990, applied in the circumstances of this case?*

*Issue No. 5*

*Did the 6th appellant’s panel violate the principles of natural justice and the rules of fair hearing in this matter?*

*Issue No. 6*

*Was the Court of Appeal right in affirming the judgment of the trial court which granted reliefs not sought or claimed or which were inappropriate in the circumstance?"*

In this judgment, it is my intention to consider issues Nos.2 and 5 together. These issues raise quite clearly whether the appellants had a fair hearing having regard to the procedure adopted in the consideration of this case by the trial Court and the Court below. There can be no doubt that the Federal High Court Law Rules made thereunder permit the commencement of proceedings by origination summons. See Order 6 of the Federal High Court (Civil Procedure Rules) Decree No. 23 of 1999. But there is clear authority, having regard to the decision of this Court that in proceedings where the facts are likely to be in dispute, it is improper to commence such action by originating summons. In *National Bank of Nigeria v. Ayodele Alakija* (1978) 9 & 10 S.C. 59; (1978) 2 LRN 78, this Court, per Kayode Eso, JSC., considered the principles with regard to the commencement of proceedings by originating summons. In the course of his judgment, he considered the earlier decision of this Court in *Theophilus Doherty v. Richard Doherty* (1968) NMLR 241, and also considered other English cases that are relevant in the determination of this question. May I then refer to *National Bank of Nigeria v. Ayodele Alakija* (supra), where Kayode Eso, said inter alia at pages 74-75 thus"

*"In Re Giles Real and Personal Coy v. Michell (1890) 43 Ch. D. 391, Cotton, LJ., believed that originating summons was intended "to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question."*

*"The main difference between a writ of summons and an originating summons being, in the opinion of Chitty, J., (See In Re Busfield Whale v. Busfield (1886) 32 Ch. D 123 at p. 126 -*

*"that in the one case the proceedings are in court, and there are or may be pleadings, whereas in the other case the proceedings are in Chambers and there are no pleadings."*

*Buckler, J., In re Sir Lindy Parkinson and Co. Ltd Trusts Deed Bishop & Ors. v. Smith & Anor (1965) 1 All ER 60, sounded a note of warning -*

*'under that rule, (i.e., RSC Order 5, r.4(2) applicable for the*

purpose of originating summons), it was, I think, open to the plaintiff to institute these proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs, but I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, ought normally to be commenced by writ and not by originating summons, for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them. The appropriate form of proceedings, therefore, in my view, are proceedings by writ in which what is alleged by the parties will be clearly defined in the pleadings in which the parties can, if they wish, seek better and further particular of the matters alleged by their opponents'

And, so far for English authorities. The Nigerian Courts exhibits the same reticence, as the English Court in regard to the procedure by originating summons. This Court, in *Theophilus Adebayo Doherty, Henry Ade Doherty v. Ade Doherty* (1968) NMLR 241 (as per Ademola, CJN.), warned against the use of originating summons in hostile proceedings."

Having referred to the principles governing the commencement of proceedings by originating summons, I must now advert to the instant case. I have earlier in this judgment set down the claims before the court. It is clear even from the questions raised before the trial Court by the respondent that the issues raised thereon deal with very serious questions as to whether there was a contract between the parties. The learned trial Judge when granting the application for an order of injunction in favour of the respondent did admit in the ruling that there are indeed serious questions that would have to be determined between the parties. However, the question that whether such determination could be properly determined by the procedure of originating summons. I think not. It must be noted that the trial court, while recognizing that there are serious issues for determination between the parties, felt able to refuse to allow the appellants to file their counter-affidavit to present their own position in respect of the matters in contention.

It is my humble view that the very essence of a trial is to allow

both sides to a dispute to present whatever facts they have before the Courts so as to enable the Court to arrive at a fair and just decision. This is why the authorities to which I have referred earlier in this part of my judgment have arrived at the conclusion that the procedure of originating summons is not appropriate where the facts are likely to be in dispute as in this case. In this context, I am not inclined to agree with the views expressed by the Court below that the facts disclosed in the counter-affidavit of the appellants are not direct from those disclosed in the affidavit of the respondent. With due respect to the court that view cannot be properly expressed by the court below. I think that the trial Court ought to have allowed the counter-affidavit to have been admitted, and then a conclusion be reached upon the facts so disclosed in the said counter-affidavit.

This leads me to the other aspect of this appeal. This is with regard to the contention that the appellants were in the circumstances denied fair hearing. I think that the complaint is well taken. Having commenced this action by originating summons, and though the appellants sought to present their own side of the case, the refusal of the trial Judge to allow their counter-affidavit and to present their case before the court, amounted in my respectful view to a denial of the right to fair hearing. In this regard, I quote with approval the view of Ogundare, JSC., in *Ekiyor v. Bomor* (1997) 9 NWLR (Pt. 519) 1 where he said at page 11:-

*"It cannot be seriously contended that, where a court decided a case on the evidence of one of the parties alone while ignoring the evidence for the other side, the hearing is not a fair one. Clearly, the defendants were denied a fair hearing. It might be, as is argued in plaintiff's brief, that the counter-affidavit would have made no difference to the decision of the court below. But this is beside the point. The defect complained of is a fundamental one that goes to the root of the whole hearing of the motion. It is fatal to the proceedings and renders same a nullity. And being a nullity, it must be set aside notwithstanding that it might have been well decided - see: Maduka & Ors. v. Nkemdilim (1962) 2 SCNLR 341. (1962) 1 ANLR (Pt. 4) H Pages 587-590."*

And in the same case (*supra*), Ogwuegbu, JSC, in his judgment said in a similar vein at page 11, thus:-

*"The court below peremptorily determined the application and*

*dismissed the appeal without considering the counter-affidavit whose existence had been brought to its attention.*

*This to my mind is a clear breach of the appellants' right to a fair hearing enshrined in our constitution. The right to be heard is a very fundamental principle of the adversary system of administration of justice in this country. See Nwokoro & Ors v. Onwuma & Ors. (1990) 3 NWLR (Pt. 136) 22. Had the court below considered the counter- affidavit, they might have arrived at the same conclusion. The decision of the Court of Appeal is a nullity."*

In the instant case the situation cannot be considered differently. The appellants duly sought leave of Court to file their counter-affidavits. The Court by its ruling considered that too late, and then proceeded to rule upon the claims raised in the originating summons the very same day the prayer of the appellants to file their counter-affidavit was rejected. It is my respectful view that there can be no doubt that the appellants were denied their right to a fair hearing.

It follows from what I have said above that I must hold first, that the entire proceeding being a hostile action was wrongly commenced by originating summons and that secondly, the proceedings was itself marred by the patent denial of fair hearing to the appellants. These defects therefore have in my view rendered the entire proceedings a nullity. It is for the view that I have held as above, that I regret that I cannot subscribe to the view held by my leaned brother, Mohammed, JSC, dismissing the appeal.

As I have held that the proceedings are a nullity, I will allow this appeal, set aside the judgment of the Court below and the trial Court. And as a result order that the case be remitted to the Federal High Court for trial by another Court who shall make orders as to pleadings. As costs were ordered in the Court below, the appellants are awarded the sum of N75,000.00 in trial Court and the sum of N10,000.00 in this Court.

H