NATIONAL MILLING COMPANY OF LIBERIA, by and thru its Managing Director, WILLIAM A. WOMACK, Appellant, v. **BRIDGEWAY CORPORATION**, by and thru its Managing Director, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: October 25, 1989. Decided: January 9, 1990.

1. When a challenge is raised to the jurisdiction of the court, the court must first determine if it has the requisite jurisdiction to decide the matter.

2. The Supreme Court will hear and dispose of only those issues which are contained in the bill of exceptions.

3. Where the legislature has chosen to accord to a party the right to an appeal and the right to file a motion to rescind judgment, the court cannot impose a limitation on that right by asserting that a party choosing to file a motion to rescind judgment thereby abandons the right to an appeal already announced and granted.

4. An appeal announced and granted could only be abandoned where the appellant fails to file a bill of exceptions and to meet the other statutory requirements.

5. The filing of a motion to rescind after the rendition of final judgment does not constitute abandonment of the right of appeal to the Supreme Court.

6. Formation of a binding contract by the offeree's acceptance of terms communicated to him by the offeror may be inferred from a course of previous usage of the parties and from a subsequent act of the offeree in the contract of similar circumstances.

7. Where there is no clear meeting of the minds regarding draft agreements submitted by the parties to a transaction, the Supreme Court cannot legally or in any way accept such draft agreements as the operating basis of the parties or as the governing document.

8. An oral commercial transaction, such as a sale agency contract, for an indefinite duration is terminable upon reasonable notice; and the period of reasonable notice can be discerned from the expectations of the parties.

9. Where general damages are demanded, it is insufficient for the plaintiff to merely allege damages; he must prove entitlement to general damages; and where he fails in such proof, the jury cannot make such award.

10. Where the evidence supports damages less than that awarded by the jury and confirmed by the trial judge, the Supreme Court shall modify such damages and award the damages supported by the evidence.

Plaintiff/appellee instituted an action of damages for wrong against the defendant/appellant in the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, arising out of a sales agency relationship between defendant/appellant (the manufacturer of flour) and plaintiff/appellee (the distributor of consumer goods). The jury returned a verdict in favor of the appellee, awarding it the amount of $593,927.48 as special damages and $2.5 million as general damages. A motion for a new trial was filed by appellant, heard by the trial judge and denied. The trial judge then rendered final judgment, confirming and affirming the verdict of the jury. Appellant excepted to the final judgment and announced an appeal to the Supreme Court. Appellant also filed a motion to rescind judgment, but same was denied.

On appeal, the Supreme Court held that the award of the jury should not have gone beyond three months compensation, the rate alleged by appellee and supported by calculation; and that the special damages should therefore have been reasonably calculated at $36,678.77 x 3 = $113,036.31 plus other elements of damages proved at the trial. The Court also held that there was insufficient evidence to prove plaintiff's claim of suffering to warrant general damages of $2.5 million. The Supreme Court therefore awarded appellee $573,927.48 as special damages and $1,000,000.00 as general damages. The judgment was *affirmed with modification.*

Philip J. L. Brumskine, M Fahnbulleh Jones, Seward Montgomery Cooper, Philip A. Z Banks, III, and *Joseph A. Dennis* appeared for the appellant. *Joseph Findley, Julia Gibson* and *H. Varney G. Sherman* appeared for the appellee.

MR. JUSTICE JUNIUS delivered the opinion of the Court.

This case comes up to us on appeal from a jury's verdict awarding the plaintiff/appellee the amount of $593,927.48 as special damages and $2.5 million dollars as general damages. A judgment of the trial court was entered confirming the said verdict. In challenging the verdict and judgment, the defendant/ appellant asserts

two basic points: (a) that the verdict and judgment did not conform to the evidence adduced at the trial, and (b) that the verdict and judgment were excessive. Although other issues were raised and argued before this Honourable Court, the two mentioned above are the most important. The other issues center primarily around the trial judge's sustaining of objections to questions propounded by appellant's counsel to appellee's witnesses. We have carefully studied those points and do not believe that they were prejudicial to the appellant's case in any meaningful way. We do not deem them to be sufficiently critical to warrant addressing them in this opinion. We believe this to be in conformity with the most recent trend of this Court in deciding cases on the merits rather than on technical points which do not decide the basic and substantial rights of the parties.

The facts of the case as curled from the records are as follows:

On the 7thday of July, A. D. 1987, Bridgeway Corporation, by and thru its managing director, filed in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, an action of damages against the National Milling Company. The appellant filed an answer to said complaint. Thereafter the complaint was withdrawn and substituted with an amended complaint. The relevant counts of the amended complaint set out that the appellee and appellant had entered into a contract under the terms of which the appellant had engaged the appellee as an agent to distribute flour manufactured by appellant; that the appellant had agreed to compensate appellee in the amount of $1.60 per 100-pound bag of flour; that appellee had accordingly proceeded to lease a warehouse at an annual rental of $25,000.00; that although the contract had provided for a notice period of three months prior to termination of said contract, the defendant had given only one month notice to plaintiff and proceeded to cancel the contract. It must here be mentioned that the contract to which the appellee has referred is an unsigned and undated document with alterations thereon, alleged to have been made by the appellant's managing director. In addition, although the parties commenced their transactions in late September to early October 1983, the appellee alleged that the contract relied upon by it was not presented by its manager to appellant until early 1984. The appellee therefore demanded special damages of $573,927.48 broken down as follows; (a) average income of $110,036.31 on sales from March 9, 1986 to June 8, 1986 at the rate of $36,678.77 per month; (b) $403,466.48 representing expected payment from June 9, 1986 to May 8, 1987 at the rate of $86,678.77 per month, the period it was said that the contract was to have remained in existence; and (c) $80,424.68 which constitutes interest on the amounts stated in (a) and (b) above calculated at the rate of 13% per annum. In addition, the appellee prayed for general damages.

In its subsequent amended answer following appellee's amendment of its complaint, the appellant denied that the document proffered by the appellee constituted the operating contract between the parties. Rather, the appellant alleged that parties operated under a draft telex agreement which was sent to the plaintiff on October 19, 1983. The appellant alleged further that the appellee having accepted the said agreement with a slight modification of the compensation from $2.00 per one hundred pound bag of flour to $1.60 per hundred pound bag of flour and the payment of the cost of transportation incurred by the appellant rather than the appellee, the parties commenced their transactions under the said modified agreement. The appellant alleged that appellee was entitled to only one month notice of termination. This notice defendant asserts was given to the appellee.

In addition to denying that it had committed any breach, the appellant characterized the damages claimed by appellee to be speculative and uncertain in that appellee had perfected no documents with the complaint to substantiate the amount of the claim. It therefore prayed for the dismissal of the action.

A reply was filed, basically reiterating the allegations set forth in the complaint. Issues having thus been joined, the issues of laws were disposed of and the case submitted to the jury for a determination of the factual issues. Trial of the case by jury commenced at the September, A. D. 1988 Term of the Civil Law Court, presided over by assignment by His Honour J. Henric Pearson.

Following the presentation of evidence by both sides, the trial judge on September 30, 1988 returned a verdict in favour of the appellee, awarding it $592,972.48 as special damages and $2.5 million as general damages. The appellant excepted to the verdict and thereafter filed a motion for new trial, followed by a bill of information which reiterated and expanded upon the accusation made in the motion for new trial to the effect that a lady juror had posed as and carried the name of a person whom she was not. The trial judge ruled that he would ignore passing upon the information and proceeded thereafter to deny the motion for new trial and entered final judgment confirming the verdict of the empaneled jury. Exceptions were taken thereto and an appeal announced and granted. Prior to filing its bill of exceptions, however, the appellant filed a motion before the trial court requesting the trial judge to rescind his judgment. This motion too was resisted, argued and decided by the trial court. Thereafter, but within the ten days allowed by statute, the defendant filed its bill of exceptions and proceeded with the other steps requisite to the perfection of its appeal to this Honourable Court.

A motion to dismiss the appeal, filed before this Honourable Court, was disposed of in a previous opinion handed down at the March, A. D. 1989 Term of this Honourable Court. In the said opinion, we decided to permit the appeal and denied the motion, the reason therefore has been fully addressed in said opinion.

The issue of the jurisdiction of this Court has been raised again by the appellee, although this time from a different perspective. Previously, the appellee asserted by motion that the amount in the defendant's appeal bond was insufficient and had not been fixed by the trial judge, and now, the new challenge to the jurisdiction of this Court centers around what the plaintiff has asserted was an abandonment by appellant of the appeal announced by it. According to appellee's contention, the appellant abandoned the alleged appeal process when it elected to file a motion before the trial court to rescind its judgment after the appeal announced by it had been granted. Therefore, this Court has not the jurisdiction to decide this case on the merits.

This Court has held consistently that when a challenge is raised to the jurisdiction of the Court, the Court must first determine if it has the requisite jurisdiction to decide the matter. In the instant case, the contention was raised by the plaintiff (appellee before this Court) in its brief and strongly argued before the Court. Appellee argued that once the appellant (defendant in the trial court) decided to file a motion to rescind judgment in the trial court rather than sticking to the appeal earlier announced and granted by the trial court, the appellant had decided to pursue a course inconsistent with the appeal and had effectively abandoned the said appeal.

We are not persuaded by this argument for the question as to whether this Court has jurisdiction over a case goes to the failure by the appellant to fulfil the requirements necessary for the hearing of the appeal on its merits. The fulfilment of these requirements are not here in issue. What is in issue is whether the filing by the appellant of a motion to rescind constituted an abandonment which deprived this Court of its jurisdiction to hear the appeal. We hold that it did not, as the jurisdiction of this Court is not dependent upon such failure. All that could be prayed for from this Court is a dismissal of the appeal on the grounds of abandonment and not on the theory that the Court lacks jurisdiction, as was wrongly asserted by the appellee.

The question then is, was there an abandonment? The appellant has contended that we should not deal on with this issue since it was not part of the bill of exceptions, and since we are limited to the hearing and disposition of only those issues which are

contained in the bill of exceptions. We have determined, however, to dispose of it because the appellant has treated the filing of the motion to rescind as an error and the appellee has characterized its filing in the first instance as an abandonment. Moreover, we believe the issue to be sufficiently important to speak about.

The relevant provisions of our Civil Procedure Law states the following regarding a motion to rescind:

"That a party against whom a decision has been rendered, for or against whom a judgment has been entered, has the right to motion the court to rescind its decision or judgment."

Nowhere in the provisions of that statute does it give the impression that a party who decides to exercise the right afforded him thereby automatically abandons his appeal. We do not believe that this was intended by the Legislature and whilst we may interpret the law, we may not go outside of the plain wording of the law and legislate. This point was made quite clear by us in the last term of this Court when we recalled the principle in the case *Firestone Plantations Company v. Berry,* 30 LLR 702 (1982). In our recent Opinion, the *Management of BAO v. Mulbah and Sikeley,* 35 LLR 584 (1988), we held that we were not in the business of legislating and that we could not substitute our opinions for those of the Legislature. Accordingly, where the legislature has chosen to accord to a party the right of an appeal and the right to file a motion to rescind the judgment, we cannot impose a limitation on that right by asserting that a party choosing to file a motion to rescind thereby abandons the right to an appeal already announced and granted. We held that the appellant could only have abandoned the appeal announced by it and granted by the court by failing to file its bill of exceptions and meeting the other statutory prerequisites. This not having been done, we cannot sustain the contention raised by the appellee in that regard. We therefore proceed to the merits of the case and the two primary issues presented therein, viz: (a) whether the verdict of the empaneled jury and the judgment confirming same are consistent with the weight of the evidence adduced at the trial and (b) whether the award is excessive.

The jury awarded the appellee $573,927.48 as special damages and $2.5 million as general damages. The appellant contends that these are not supported by the weight of the evidence adduced at the trial. The appellant also asserted, on the one hand, that the appellee set its own interest rate of 13%, a rate far in excess of that laid in the statute. The appellee asserted, on the other hand, that the verdict of the empaneled jury conformed to evidence presented by the appellee, and that relationship between

parties was that of a principal and agent rather than that of an independent contractor. It asserts that for a breach of an agency contract, the measure of special damages is the unexpired term of the contract, the basis for part of the calculations made by the appellee. The appellee argued also that the interest rate charged by appellee is permissible since it was below the maximum rate allowed by the National Bank of Liberia. The appellee asserts therefore that since the governing contract was the 1984 draft management agreement which was breached, and that since its allegations were not denied by the appellant and therefore deemed admitted, the verdict and judgment should be sustained.

The appellant's position, which is contrary to that of the appellee, is basically that the governing contract is that of October 19, 1983, as modified and accepted by the parties; that under the said contract there was not a breach in giving the appellee one month's notice of cancellation; that the appellee's one-page self-prepared statement without proof of the basis for the figure stated therein by appellee in the said statement did not meet the standard of proof required by the law; and that the mere allegations by the appellee, without proof could not form the basis for the award made by the jury.

The parties have agreed rather strangely. They argued that the first determination in deciding the measure of damages is whether the contract was one which consisted of an agency relationship or a relationship of an independent contractor. We hardly believe that this presents an important issue for both draft agreements upon which the parties have relied are unsigned and do not contain the full content of the relationship formed by and between the parties. Indeed, there is a disagreement between the parties as to when their relationship began. But more than that, the evidence presented by the parties seems to reveal one critical thing. That is, there was no meeting of the minds between the parties regarding the formation of a contract. The appellant had presented to the appellee a draft agreement which, according to the appellee, was rejected. This, we are told, was followed several months later by a draft contract offer (or another draft agreement) presented to the appellant by the appellee. This, the appellant asserts, was rejected. None of the reactions were placed in writing although both draft agreements were in writing and although each party asserted that it rejected the agreement submitted by the other party, yet the parties continued to transact business with each other as they had done from the first day the services of the appellee were engaged by the appellant.

Moreover, the terms under which the parties operated varied in some respects from the terms contained in both draft agreements; for in the draft telex agreement of

October 19, 1983, the compensation to be paid the appellee was set at $2.00 per each 100 pound bag of flour and transportation was to be borne by the appellee, but the actual arrangement under which the parties operated was the appellant paid compensation to the appellee of $1.60 per every 100 pound bag of flour and the appellant was responsible to transport the flour. As for the draft sales management agreement, the compensation figure of $2.60 per every 100 pound bag of flour was crossed out and $1.60 written above it and the name carried as managing director of the appellant was also crossed out and another name inserted in ink. Yet this agreement was never put into its final form and actually signed by the parties. Even though the appellee relied upon the said agreement, yet he did not sign it. But more importantly is the fact that the appellant's own evidence reveal that the compensation of $1.60 per every 100 pound bag of flour was commenced and mailed to appellee several months before the draft sales management agreement was even prepared; that is to say, whilst payment was commenced between September/ October 1983, the sales management agreement was not prepared until 1984.

Under the foregoing circumstances, where there was clearly no meeting of the minds regarding each of the draft agreements submitted by the parties, this court could not legally or in any way accept either instrument as the operating basis of the parties or as the governing document.

We agree that formation of a binding contract by the offeree's acceptance of terms communicated to him by the offeror may be inferred from a course of previous usage of the parties, and from subsequent acts of the offeree in the contract of awarding circumstances. *"Naoura Brothers v. Curti,* 15 LLR 628 (1964). This rule is applicable where the parties have each submitted draft agreements of conflicting terms and the parties have acted outside of the confines of those terms.

From the evidence adduced at the trial, the arrangement between the parties was no more than an oral one; its term of duration was indefinite and it was therefore terminable on reasonable notice. Reasonable notice, in the mind of the Court, given what may have been the expectations of the parties, would not be in excess of three months. The award which the jury should have made therefrom should not have been beyond three months compensation at the monthly rate alleged by the appellee and supported by calculation. Special damages should therefore have been reasonably calculated at $36,678.77 X 3 = $110,036.31 plus others.

On the question of the general damages, we fail also to see the basis upon which the jury awarded the appellee $2.5 million. While it is true that a jury, as determinants of

the facts in a case, has the perspective of deciding what the general damages should be, that determination will be set aside where it is clearly evident that the award does not conform to the weight of the evidence. This Court has said that even where general damages are demanded, it is insufficient for the plaintiff to merely allege general damages. He must prove entitlement to general damages, especially as to the amount awarded by the jury; and where he fails in such proof, the jury cannot make such award. Moreover, where the award far exceeds proof presented, the Court will regard that the damages awarded is excessive. 22 AM. JUR. 2d, *Damages, §* 296; *Rouhana v. Hall,* 21 LLR 247 (1972).

In the instant case, the evidence was insufficient to prove appellee's claim of suffering of general damages. The only statements made in that connection were those of appellee's general manager. The appellee did not show how it arrived at the 13% interest charged by it, nor the extent of the damages as would have aided the jury in its award of general damages. Yet and in spite of these, the jury still returned a verdict awarding the appellee $2.5 million. Clearly, there was no substantial proof to warrant the $2.5 million award. Therefore, the mere statement by the appellee's general manager that his overdraft facility of $2 million was canceled by Citibank without any evidence attributing this to the appellant, that it suffered an annual loss of $104,238.99 without showing what portion was attributable to appellant, that it lost $150,000.00 without documentary proof, that it suffered a foreign exchange loss of $772,000.00 without any evidence thereof, and that the volume of its business had dropped from $12 million to $6 million were insufficient to sustain the burden of proof required under our law for the magnitude of the award given by the jury. In the absence of ample evidence, we hold that the jury was without any basis to make such an award, and we conclude that from the evidence adduced by the appellee, an award of general damages of $1 million, in addition to the special damages awarded, would have been sufficient to cover any inconvenience which may have been experienced by the appellee.

In view of what we have observed from the records and the briefs of the contending parties in this case, including arguments; and in consideration of the facts, circumstances and the law as are applicable herein, which we have not overlooked, it is our considered opinion that the verdict and judgment of the lower court be and same is hereby modified and confirmed; that is, $573,927048 in special damages plus $1 million in general damages.

The Clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment with instruction that it will resume jurisdiction over the

cause of action and enforce the judgment as modified. Costs are hereby ruled against appellant. And it is hereby so ordered.

Judgment affirmed with modification.

MR. JUSTICE KPOMAKPOR *dissents.*

It has been said that this Tribunal is one of *dernier resort,* the tabernacle of ultimate justice and, therefore, we must look carefully at the end results of justice and not solely at the vehicle or instrumentality through which it is dispensed.

Once again I have decided to file a dissent and withhold my signature from the judgment of my distinguished colleagues in the majority. Actually, this document was initially prepared as the Court's decision but when I submitted the draft to my colleagues for their review and comments, they decided to change their position. We then agreed that my draft would be treated as a dissent. Of course, this is not an unusual occurrence for the Bench. However, when the majority would not furnish me with a copy of their draft, although I requested it, I found myself in an awkward position. Now, with that explanation, I hope our readers will know how this dissent came about and why it is silent on the contents of the Court's judgment. One cannot dissent from that which one has not seen or known about, but this is exactly the plight in which I find myself.

In July 1987, appellee filed a seventeen-count complaint in an action of damages against appellant, and representing the appellee were the law firms of Gibson & Gibson and Findley & Associates. In response to this complaint, Counsellor Victoria Sherman-Lang filed an answer for and on behalf of the appellant containing twenty-one counts. For reasons not relevant to this opinion, appellee withdrew the complaint on July 24, 1987 and filed an amended complaint. On August 5, 1987, appellant withdrew its answer and on the same day filed a twenty-one count amended answer. Appellee then filed a twelve-count reply on August 17, 1987. It is the amended complaint, the amended answer and the reply which are before us for review.

At the disposition of law issues during the September term A.D. 1987 of the Civil Law Court, the trial judge rendered a one half page ruling adjudging, as most of them do, that the pleadings consist mostly of mixed issues of law and facts; ruled the entire amended complaint to trial, struck out counts 17 and 20 of the amended answer, and struck out count 8 of the reply. Both appellee and appellant excepted and the matter

found itself in the Chambers of our distinguished colleague, Mr. Justice Belleh, by way of a petition for a writ of certiorari. The matter was remanded to the trial court by the Chambers Justice to commence with disposition of the law issues. Following the disposition of law issued by His Honour Jessie Banks, a jury trial was held under the gavel of His Honour J. Henric Pearson. The jury returned a verdict in the amount of $593,927.48 as special damages plus the amount of $2,500,000.00 as general damages, or a total of $3,093,927.48. It is from the judgment affirming and confirming this verdict of the empaneled jury that appellant appealed to this Court praying for a reversal of said judgment.

The record certified to us indicates that at the trial the parties decided to shift gears: the appellee retained the services of Counsellor H. Varney G. Sherman, then of the Maxwell & Maxwell Law Offices, to associate with the firms of Gibson & Gibson and Findley & Associates. The services of the Brumskine Law Chambers and Jones & Jones were retained by appellant to associate with Counsellor Victoria Sherman-Lang. Another interesting phase is that after the verdict, but before the rendition of final judgment, appellant yet retained the services of the Tubman Law Firm through Counsellor Seward M. Cooper and Phillip A. Z. Banks, III, as well as the Peter Amos George Law Firm, through Counsellor Peter Amos George, now deceased, to join forces with lawyers that appellant already had in the case.

What strikes me is, why didn't the parties retain all the lawyers they desire initially so that they could ensure that the pleadings in the case were precise, sufficient and scientifically tailored and presented? We pose this question because in the very exhaustive and brilliant appellate briefs presented by both sides, we find material statements of complaint and defenses, which were not properly and clearly presented in the pleadings or which were omitted in general. We find in the appellate briefs, for instance, principles of law never pleaded specially or even generally, or were never relied upon during the disposition of law issues. The evidence itself, as presented at the trial, contains materials, species of facts, which should have been pleaded but were never pleaded and testified to. To further aggravate the situation, the appellee's counsel and appellant's counsel could not answer certain specific questions from this Court because they were unaware of the facts constituting the answer to these questions - facts which should have formed a part of the claim or defense. A typical example is the form and manner in which appellant allegedly paid commissions to the appellee for services, the amount(s)of commission, when it was paid, and for what said payments were made. Both parties could not answer several questions put to them to enable this Court to get a fair and clear understanding of the facts in order to

apply the proper law and render a fair and impartial judgment. Indeed it is incredible; but it happened.

Our statutes provides that a civil action is commenced by the filing of a complaint or petition with the clerk. Civil Procedure Law. Rev. Code 1:3.31. It further requires that only three pleadings are required in the form of the complaint, answer and reply. *Ibid,* 1:9.1(1).

The fundamental principle of pleading is to give notice of what is intended to be proved, and to crystalize the issues before trial. *Shaheen v. CFAO,* 13 LLR 278, 290 (1958). This means that facts on which the plaintiff predicates his cause of action and the defendant, his grounds of defense, must be alleged and these are to be so stated as fair and squarely to appraise the court and the adverse party of the cause and nature of the action or the nature and scope of defense. *Bailey v. Sancea,* 22 LLR 59, 62-63 (1973). For every cause of action, there must be set forth in the complaint, clearly and concisely, the facts constituting the cause of action, or essential to the right of recovery or relief, or every fact which the plaintiff would be required to prove in order to recover. 71 C.J.S. *Pleadings, ∫* 69. This can be done by stating the facts depended on to show the liability sought to be enforced, the elements constituting the right owing to the plaintiff by defendant, and sufficient facts to show on what the obligation of defendant rests. *Ibid.*

In this case appellee filed an amended complaint, entitled an action of damages. From the averments contained in the amended complaint, it is clear that the damages prayed for is for the alleged wrongful termination of a contract by the appellant. Regrettably, however, no where did appellee state the terms or provisions of the contract allegedly terminated or show how appellant had not complied with the terms and provisions thereof. The law is that for damages growing out of or related to a contract, the complaint should state the relevant terms or provisions of the contract and then state the non-compliance, default or wrong. 17A C.J.S. *Contracts, ∫* 535 (b). All appellee pleaded, as I see it, is that notwithstanding appellee's performance under the alleged contract, appellant unilaterally terminated said contract.

Appellee then states as its special damages, the amount of $539,927.48. The relevant count reads as follows:

"That due to the abrupt termination of the sales agreement mentioned above, plaintiff has suffered damages in the amount of five hundred ninety-three thousand

nine hundred twenty-seven dollars forty eight cents ($593,927.48) as more fully appears from copy of Exhibit "L" attached hereto to form a part of this complaint."

This exhibit "L" is a statement of commissions allegedly paid by the appellant to the appellee over a period of time, together with certain calculations. However, no receipts or other documentary evidence was attached to support the statement, and no such receipts or any other documents were presented into evidence. There was no explanation in the pleadings or at the trial on how the amounts on exhibit "L" were arrived at to constitute special damages.

The appellant on the other hand did not specifically traverse the contents of exhibit "L" as required by law. At most, appellant stated, as most of such lawyers will do, that exhibit "L" was uncertain and speculative but there was no actual denial of appellee's right to the commission allegedly claimed. Had appellant been aware that for a breach of an agency contract by the principal, the agent may get as damages commission which would have been earned had there not been a breach, 3 C.J.S., *Agency* ∫ 557 (b), then, perhaps, the appellant would have specifically traversed the claims for commission. Under these circumstances, an order to re-plead is the most equitable solution, if transparent justice is our goal.

Still another point of importance to me is the basis of the claim and the basis of the defense. For instance, appellee's claim is based on what is referred to as a draft sales management agreement and appellant's defense is based on what it termed draft telex agreement. Again, regrettably, neither the appellant nor appellee, in my opinion, pleaded sufficient facts and law to show why one agreement and not the other should be considered as the instrument governing the relationship between the parties. In my opinion, this is a material defect in both the claim and the defense, which this Court cannot cure without violating the many, many settled principles of law heretofore tenaciously observed.

There is an adage hoary with age, indeed a cardinal rule in administering justice, that courts generally do not do for litigants that which they ought to do for themselves. *Alpha v. Tucker,* 20 LLR 120, 126 (1970). One does not have to be a lawyer for one to agree that this principle is relevant and applicable to the circumstances of this case.

Furthermore, while Liberian law provides that defenses may be cumulative and/or in the alternative (Civil Procedure Law, Rev. Code 1:9.3(3), 1:9.6), yet, appellant basically stated a defense based only on its position that the agreement between the parties was the draft telex agreement. The special damages claimed was never specifically

challenged in terms of the amount, the nature, or the cause from which they arose notwithstanding the law that such damages, to be recoverable, must be certain, both in their nature and with respect to the cause from which they arose. *Brant, Willig and Company (BRAWICO) v. Captan,* 23 LLR 98 (1974).

Special damages are the actual result of the injury complained of and which in fact follows as a natural and proximate consequence in the particular case. BLACK'S LAW DICTION-ARY 354 (5th ed. 1979). The statute requires that when items of special damages are claimed, they must be specifically stated. Civil Procedure Law, Rev. Code 1:9.5. This Court has also held that in addition to specifically pleading special damages, they must be proven at the trial. *Nigerian National Shipping Lines, Ltd v. Tip-Top-Tools, Inc.* 22 LLR 279 (1973). The reason for requiring that special damages be specifically stated in the pleading is simple; to advise the defendant of the proof he is expected to meet or oppose and thus, to prevent a surprise at the trial. That is to say, unless the facts giving rise to special damages are set forth, the pleading will not fairly inform the defendant of the plaintiffs demand, and hence will place him in the position where he might not be forewarned of the admissible proofs at the trial. 22 AM JUR 2d., *Damages* ∫ 272. General damages on the other hand are those which are the natural necessary result of the wrongful act or omission asserted as the foundation of liability. *Levin v. Juvico Supermarket,* 24 LLR 187 (1975). General damages need not be specifically pleaded and the reason for the rule is that the defendant should not be surprised by a proffer of proof of the item of damages, since it is the natural and necessary consequence of the compensable injury alleged; it is those damages which directly and naturally flow from the compensable injury or breach complained of. 22 AM JUR 2d., *Damages* ∫ 271.

The general damages awarded appellee by the trial jury is $2.5 million and in its brief argued before us, appellee brilliantly attempted to show how the evidence produced at the trial supports an award of more than $2.5 million. Perhaps my colleagues are convinced that the appellee did establish its claim and award. I am not.

The first element of general damages, according to appellee's brief, is the $28,122.00 for the use of the warehouse facilities as evidenced by a lease agreement. This is clearly an item of special damages, which should have been specifically pleaded and proven. Besides, it is doubtful that rent paid is a necessary and natural consequence of a breach of an agency agreement which should yield general damages. Demand for rent paid is instead the actual result of the breach of the agency agreement. Another item of general damages prayed for in appellee's brief is the alleged $60,000.00 redundancy payment to employees. This amount, in my opinion, should have also

been specifically pleaded and proven, but it was not. In fact, in response to questions put to the legal counsel of appellee, they could not say whether the $60,000.00 had already been paid or whether appellee had only entered into an irrevocable commitment to pay. Finally, even where an item qualifies as general damages, as in the case of the alleged loss of $2.3 million credit facilities from Citibank and $772,000.00 loss of foreign exchange, a general plead of the facts and circumstances ought to have been made. Of course, without showing the specific amount involved. For the appellee to merely plead general damages and then at the trial or in his brief prove the items of damages and the cause from where it arises is indeed an attempt to take the appellant by surprise, an act which this Court has always frowned upon.

It is doubtful as to whether the lawyers who drafted the pleadings for the appellant and appellee did justify the confidence reposed in them by their clients. As much as I would have been pleased to pass on the merits of the evidence presented at the trial, I cannot do so when the pleadings do not sufficiently present the facts and the principles of law upon which either the claims or the defenses are based. I must reiterate that in every case, the first and most important phase is the pleadings. It is the pleading (the complaint in this case) which contain the facts on which the plaintiff predicates his case and it is the pleading (the answer) which contain the facts on which the defendant mounts his defense. The pleadings do not only appraise the parties of the claims and defenses, but they also give the court the opportunity to pass upon the issues of fact and law intelligently. This Court has held on several occasions that where, as here, the pleadings and issues are not clearly presented to court, the judgment will be reversed and the case remanded with instructions to replead in a manner that clearly and precisely presents the issues, *Lamco J. V Operating Company v. Rogers,* 24 LLR 314 (1975); *George v. George,* 9 LLR 33 (1945).

One last thing that strikes me, which I must mention before closing this dissenting opinion, is the fact that many giant corporations, the parties herein being excellent examples, will seek legal advise only when they have found themselves in a vise or when they have made some palpable mistakes. Also, when they finally decide to call on attorneys for advice, they will first avoid the best of them and will only bring them in when they are sinking fast. Is there any reason or reasons why these two important companies came to court with the plaintiff claiming rights under a document he characterized as a draft management sale agreement, which had not been signed by anyone; and the defendant relying upon the contents of a telex for recovery, which he received from his overseas office? I also ponder over the question, why should companies of the status and experience of Bridgeway Corporation and National Milling Company retain these experienced lawyers not as early as during the

negotiations and before drafting the contracts or agreements? The answer to these questions is not difficult to see: to cut cost of legal services. This act of the litigants in the instant case reminds me of the old British adage to the effect that one should never be "shilling wise and pound foolish."

During the argument before us, the lawyers on both sides were quick to point out: "I did not get in this case until after the pleadings had rested"; "I got in the case after the jury had brought in its verdict;" and still others informed us that, "I was retained only at this level, the Supreme Court." The message from these lawyers was clear and unambiguous. In other words, they were saying, "we would have handled this case differently and more efficiently, had we been retained sooner ." While this answer seems plausible, perhaps, the question for these top law firms is, did they convey their true feelings and opinions to their clients when they were retained and given a clear picture of the case at that level? Most lawyers will tell their clients under such circumstances what they want to hear: "All is not lost; we can still win this case." Actually, they give this kind of legal advice, hoping that the adversary will slip somewhere and fall; or simply, that a miracle will come by. Indeed this is a disservice to the client and the judicial system, to say the least. In such cases the lawyers retained in the middle or at the end of the hearing should be sincere to himself, his client and the court and say, "Get another lawyer", if he feels that victory is unlikely.

My comments on the lawyers who participated in this case have not been intended to impugn their integrity and competence, not even those who represented the parties during the negotiations and commencement of the suit.

Usually, the writer for the Court and the dissent exchange drafts so that each side can react to the comments and conclusions of the other. This process, unquestionably enhances the arguments or both sides. However, I am precluded from commenting on the opinion of the Court because I have not been served with a copy of its draft, despite the fact that I duly furnished them with a copy of my draft.

In view of the reasons and authorities cited herein I have withheld my signature from the Court's judgment and voted to remand the case for the parties to replead, beginning with the complaint.