IN THE SUPREME COURT OF NIGERIA

Suit No: SC401/2001

Petitioner: Xtoudos Services Nigeria Limited Christopher Udeogwu
And
Respondent: Taisei (W.A.) Limited Ahmed D.H. Yassin

Date Delivered: 2006-06-30

Judge(s): Salihu Modibbo Alfa Belgore Chief Justice of Nigeria , Umaru Atu Kalgo , George Adesola Oguntade , Mahmud Mo

Judgment Delivered

The dispute between the parties in this appeal started in the Delta State High Court of Justice Effurum where the Plaintiffs took out a Writ of Summons against the Defendants claiming, the following reliefs:-

'1. A Declaration that the Plaintiffs are the bonafide purchasers for value of all that disused unserviceable scrap properties, vehicles and equipment now lying and being at the Defendants' premises behind Ogheneovo Estate, off P.T.I. Road Effurum within the jurisdiction of this Honourable Court and described below:-

1. One scrap Mistsubishi Electric Generator set yellow in colour.

2. Two scrap Mistsubishi tipper Lorries without gear box or injection pump and with only six each out of their normal 10 tyres, and another scrap Isuzu tipper lorry that has neither an injector pump nor an air compressor.

3. 7 bus Seats meant for vehicle No BD 6450 HA.

4. 1 Scrap crane with Deutche engine

5. 1 Scrap boom or crane handle that has two pieces

6. 1 Scrap gear box for an Isuzu Pump Truck.

7. 1 Yellow forklift with its name written in Arabic or other non-English alphabets.

2. An Order Of Mandatory Injunction Commanding and Compelling the Defendants herein, whether by themselves their servants, agents and/or privies however to deliver to the Plaintiff's (sic) or allow the Plaintiffs take delivery of the said properties, vehicles and equipment.

IN THE ALTERNATIVE TO THE ABOVE

'The sum of 5 Million (N5, 000, 000.00) only being special and general damages for breach of contract in that some time in April, 1994 at Effurum, the Plaintiffs contracted with the Defendants to purchase the said properties, vehicles and equipment amongst others but the Defendants have despite repeated and sustained demands refused and or still refuses to deliver to the Plaintiff (sic)."

Pleadings were duly filed, exchanged, amended and further amended before the matter proceeded to trial in the course of which the Plaintiffs called two witnesses in support of their claims while two witnesses were called by the Defendants.

The case as made out by the Plaintiffs from their pleadings and the evidence adduced by them reveals that by oral agreement, the Defendants sold unserviceable scrap properties comprising vehicles and equipment at a price of N740,

000.00. The Plaintiffs paid for the items by paying the sum of N l00, 000.00 in cash to the 2nd Defendant while the balance of N640, 000.00 was paid in a bank draft drawn on the first Bank of Nigeria Effurum. After effecting the payment, the Plaintiffs were allowed to collect the items purchased from the premises of the 1st Defendant on various dates shown on the way Bills issued by the 1st Defendant. The Plaintiffs' complaint in their action is that they were not allowed by the Defendants to remove all the items purchased from the premises of the lst Defendant, the items the Plaintiffs could not remove from the premises of the 1st Defendant were listed in paragraph 13 of their Statement of Claim.

From the side of the Defendants however, they asserted that the Plaintiffs had removed all the items purchased from their premises. The Defendants denied the list of the items purchased as given by the Plaintiffs and gave their own list in evidence at the trial and the cost at N640, 000.00 as against N740, 000.00 given by the Plaintiffs. At the conclusion of the hearing, the learned trial judgment on 22-1-1997 identified the bone of contention between the parties in the case as being: -

'Whereas it is the case for the Plaintiff that he did not remove all the items purchased, the Defendants are very stern in their posture that all the items purchased were removed.'

In proceeding to resolve this issue from the evidence, the learned trial Judge found that the Plaintiffs had abandoned their claim for mandatory injunction compelling the Defendants to deliver the scrap materials that were purchased but not delivered or removed from their premises and fell back to the alternative relief for special and general damages for breach of contract. After considering the alternative relief for special and general damages for breach of contract, the learned trial Judge came to the conclusion that the Plaintiffs were entitled to N1, 000.000.00 and made the award accordingly. Part of this judgment reads: -

'Consequently, judgment is hereby entered for the Plaintiffs against the Defendants jointly in the sum of Nl million naira being special and general damages for breach of contract in that the Defendant (sic) failed to supply all the items bought by the Plaintiffs.'

Dissatisfied with this judgment against them, the Defendants appealed against it to the Court of Appeal raising mainly the issue of whether the sum of N l million Naira awarded by the trial Court against them as special and general damages for breach of contract was instilled, having regard to the proceedings, evidence led and the state of the law. The Court of Appeal after hearing the parties on their respective briefs of argument came to the conclusion that the Defendants' appeal had merit and consequently allowed it.

The award of special and general damages of Nl Million Naira was set aside and the claim of the Plaintiffs was dismissed.

The Plaintiffs who were not happy with the decision of the Court of Appeal against them have now appealed to this Court upon six grounds of appeal from which five issues for the determination of the appeal were distilled. These five issues were adopted in the Respondents' brief of argument filed by the Defendants who are now the Respondents in this Court while the Plaintiffs are the Appellants. The five issues in the Appellants' brief are: -

'Issue I

Whether or not the Court of Appeal sitting in Benin was right in holding as it did on 30/4/2001 that the learned trial Judge did not make any specific finding of fact on the issues submitted for adjudication, particularly on the number of items purchased by the Appellants but not delivered by the Respondents, In other words, what in law amounts to a finding of fact by a trial Court. This issue arises from ground 1 of the grounds of Appeal.

Issue II

Whether or not the Court of Appeal, Benin was right in holding that the damages of N1 Million awarded the Appellant (sic) by the trial Court were in law excessive and or without any basis. This issue arises from ground 2 of the grounds of

Plaintiffs appeal.

Issue III

Whether or not Exhibits B, B1 & B2 carried the evidential value placed on them by the learned trial Judge or were wrongly relied upon as decided by the Court of Appeal
Benin. This issue arises from grounds 3 & 6 of the grounds of Appeal.

Issue IV

Whether or not an order of dismissal of the Plaintiffs' case is the proper order that ought to have been made by a Court of Appeal in this case upon the Court of Appeal holding that the trial Court made no findings of fact on the issues submitted for trial or whether the proper order in such circumstances ought not to have been one of a retrial. This issue arises from ground 4 of the grounds of Appeal.

Issue V

Whether or not additional issues formulated by the Respondents can be decided upon only where the Respondents file a cross Appeal or Respondents' notice even where such additional issues arise from the Appellant (sic) grounds of Appeal as in this case. In other words, when and under what circumstances can additional issues formulated by the Respondents to an appeal be considered at all for whatever they are worth by the Appeal Court. This issue arises from ground 5 of the grounds of Appeal.'

Taking into consideration that the Appellants' right at the trial High Court in the course of the proceedings decided and did in fact abandon the 1st and 2nd relief's claimed in their Writ of Summons, the details of which I have earlier quoted in this judgment, the only relief which remained alive between the parties up to the point of judgment is the alternative relief. I shall quote again this alternative relief even at the expense of repetition. It reads: -

'IN THE ALTERNATIVE TO THE ABOVE

The sum of 5 Million (N5, 000,000.00) only being special and general damages for the breach of contract in that sometime in April 1994 at Effurum, the Plaintiffs contracted with the Defendants to purchase the said properties, vehicles and equipment amongst others but the Defendants have despite repeated and sustained demands refused and or still refused to deliver to the Plaintiff (sic).'

Furthermore, it is this same alternative relief that was granted to the Plaintiffs /Appellants by the trial Court in its judgment that went on appeal to the Court of Appeal and now on final appeal to this Court. It is therefore necessary to point out that although the live issues raised by the Appellants and agreed by the Respondents in this appeal are rather inelegantly drafted, the issues must be considered only as they relate to the judgment of the trial Court on the alternative claim of the Plaintiffs/Appellants alone being the only relief granted by the trial Court. Although the trial Court did not pronounce on reliefs 1 and 2 abandoned by the Appellants in the course of the proceedings at the trial Court apart from acknowledging in its judgment that the relief have been abandoned, there being no appeal to the Court of Appeal nor to this Court on the matter, the complaint on the matter of the abandoned reliefs cannot be raked up in this appeal arising from the judgment on the alternative relief. It is undoubtedly settled law that an appeal is usually against a ratio and not against an obiter except in cases where the obiter is so closely linked with the ratio as to be deemed to have radically influenced the ratio. But even there the appeal is principally against the ratio. See Saude v. Abdullahi (1989) 7 NWLR (Pt. 116) 384; Ogunbiyi v. Ishola (1996) 6 NWLR (Pt. 152) 12 and (Coker v. U.B.A. Plc. (1997) 2 NWLR (Pt. 490) 641. What is being emphasised here is that any issue arising for determination in this appeal must be traced and linked to the judgment of the trial Court on the alternative relief in the absence of any appeal against the failure of the trial Court to pronounce on the other reliefs abandoned by the Appellants.

On the first issue for determination in this appeal, the Appellants have argued that the Court below was wrong in saying that the trial Court did not make specific findings of fact on the issues submitted for adjudication, particularly the number

of items purchased by the Appellants but not delivered by the Respondents. Learned Counsel referred to the finding of the trial Court that the Defendants did not supply to the Plaintiffs all the items which the Plaintiffs contracted to buy from the Defendants as being one of such specific findings which the trial Court made from the evidence, particularly Exhibits B, B1 and B2, that the trial Court having made specific findings of fact on the items purchased and the items that were not delivered out of the items purchased, the Court of Appeal should not have ignored those findings.

On the part of the Respondents, their learned Counsel submitted that on the pleadings and the evidence led by the parties, the list of the items purchased and the list of the items the Plaintiffs/Appellants were not allowed to remove from the premises of the Respondents were not the same which calls for specific finding of the trial Court but which the trial Court failed to resolve. Learned Counsel therefore agreed with the Court below that the trial Court had failed to make specific findings on the issues submitted to it for adjudication.

This issue relates principally to the declaratory and mandatory injunctive reliefs 1 and 2 abandoned by the Appellants. From the manner these claims were framed having regard to the way the scrap items were sold to the Appellants and removed from the premises of the Respondents without any agreed list of the items bought confirmed in writing by both parties, the claims were bound to fail. Since the parties could not agree even on the list of the items sold not to talk of even the prices of the items and the mode of payment, there was no basis to determine even the very existence of the contract of sale upon which the Appellants tried to base their claims. It would appear that the transaction in the sale of the scrap items was carried out between the parties on purely personal understanding and confidence not expecting any disagreement to arise out of it. In the absence of a written agreement containing the list of scrap items to be sold with their prices and the mode of payment, the list of the items given by the Appellants and those given by the Respondents which are poles apart being not from an agreed source other than what each of the parties bought were the items, cannot provide any basis of making a finding on the correct list and prices of the items sold. This is particularly so when the scrap items were partly removed on Way Bills Exhibits B, B1 and B2 and partly removed without any document from the premises of the Respondents before the dispute in this case arose between the parties. The observation of the Court below that no specific findings were made on the existence of a valid contract of purchase between the parties and its terms on the items purchased by the Appellants by the trial Court is obvious because there were no credible material evidence from which such findings could have been made. This position is particularly obvious when viewed from the aspect of the Appellants alternative relief for special and general damages for breach of contract, the facts in support of which were neither specifically pleaded nor strictly proved by credible evidence as required by law.

The next issue is whether the Court below was right in holding that the damages of N l Million Naira awarded to the Appellants by the trial Court was excessive and without any basis. I think this is the main and real issue for determination in this appeal having regard to the judgment of the trial Court which came to the Court below on appeal and which is on further appeal to this Court. In support, of this issue, the Appellants have relied on the evidence contained in Exhibits B, B1 and B2 showing the list of the items removed from the premises of the Respondents from which the items not removed with their prices came to N 260,000.00 or N300, 000.00 or N310, 000.00 which the appellants on preponderance of evidence had proved.
Learned Counsel referred to paragraph 13 of the Statement of Claim relating to undelivered items which he urged the Court to regard as pleading special damages and that anything above that may be regarded as averment for general damages claimed by the appellants. Counsel explained that the basis of the special damages is the amount paid for the items calculated on the basis of the evidence while the support for the general damages can be found from the excess amount pleaded in paragraph 13 being loss of profit from expected refurbishment and sale as given in the evidence of the Appellants. On what amounts to special and general damages, Counsel relied on Badmus v. Abegunde (1999) 11 NWLR (Pt. 627) 493 at 502.

The stand of the Respondents on this issue is that the alternative relief for special and general damages of N5, 000,000.00 only for breach of contract is contained in the Writ of Summons of the Appellants filed at the trial Court, that throughout the Statement of Claim, the Appellants did not plead specific facts in support of the claim for special and general damages. Counsel therefore argued that the Court below was right in setting aside the award of N1 000,000.00 as special and general damages by the trial Court to the Appellants.

It was explained that the claims of the Appellants having been rooted in contract, the measure of damages is as stated

in Hadley v. Baxendale (1854) 9 Ex. CH. 34 and Ijebu Ode L.G. v. Adedeji Balogun (1991) 1 NWLR (Pt. 166) 136 are damages which may fairly and reasonably be considered either as arising naturally from the breach itself or which may reasonably be supposed to be in the contemplation of the parties as at the time they were making the contract, that as special damages were not specifically pleaded and the damages suffered strictly proved by evidence with particular reference to loss of profit alleged by the Appellants, the Court below was right in selling aside the award.

The relief claimed by the Appellants for special and general damages for breach of contract was claimed in the alternative to their main declaratory and injunctive reliefs in the event of the failure of those reliefs. In effect, all the Appellants are saying, is that on the facts alleged in their Statement of Claim, they are entitled to the principal claim but if on those facts they are not entitled to it, those facts will entitle them to the alternative relief. The law regarding claim in the alternative is that where the main claim of a party succeeds and is granted by the Court, there will be no need to consider any alternative claim thereto. See M.V. Caroline Maersk v. Nokoy Investment Ltd. (2002) 12 NWLR (Pt. 782) 472 at 507-508. Thus in the present case the main claim of the Appellants having been abandoned, only the alternative claim remained on the ground for valid adjudication.

The learned Counsel to the Appellants by lumping the relief for special damages together with that for general damages, appeared to have created problem for the Appellants' right from the on set. This is because there is a distinction between special damages and general damages. This distinction was explained by several decisions of this Court particularly in Ijebu Ode Local Government v. Adedeji Balogun & Co. (1991) 1 NWLR (Pt. 166) 136 at 158, Eseigbe v. Agbolor (1993) 9 NWLR (Pt. 316) 218 at 145. It is usually a question of pleading, and proof and the mode of assessment. One is specifically pleaded and strictly proved because it is exceptional in its nature such as the law will not infer from the nature of the act which gave rise to the claim. Hence, the claim is known as special damages. The other is general damages which when averred as having been suffered, the law will presume to be the direct natural or probable consequences of the act complained of but the quantification thereof is at the discretion of the Court. Therefore in no circumstances can general damages be properly substituted for special damages, which a Plaintiff has failed to specifically plead and prove. See West African Shipping Agency v. Kalla (1978) 3 SC. 21 at 32.

With regard to how to plead and prove special damages the law is quite clear that special damages must be specifically pleaded and proved strictly. See B.E.O.O. Industries (Nig.) Ltd v. Maduakor (1975) 12 SC. 91 at 108. In this respect, a Plaintiff claiming special damages has an obligation to plead and particularise any item of damage. The obligation to particularise arises not because the nature of the loss is necessarily unusual, but because the Plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible.

In the present case, throughout the Appellants' Statement of Claim, in the last paragraph of which the Appellants as Plaintiffs claimed reliefs as per the Writ of Summons, there is no single paragraph thereof where the Appellants specifically pleaded facts with particulars in support of their claim for special damages. In the same vein, there is no paragraph of that Statement of Claim containing facts pleaded in support of the relief for general damages.

Paragraph 13 of the Statement of Claim which the learned Counsel to the Appellants wants this Court to regard as containing the relevant facts in support of the Appellants' alternative relief for special and general damages for breach of contract, has nothing, to do with that relief. What was pleaded in that paragraph is the list of the items which the Appellants claimed were not delivered in support of their claim for the delivery of the items, which claim they later abandoned in the course of the trial. For the avoidance of doubt, the content of that paragraph is as below: -

'13. The items that the Plaintiffs could not take delivery of are as follows: -

(i) One scrap Mitsubishi electric generator yellow in colour for the price of N 40, 000.00.

(ii) Two scrap Mitsubishi Tipper Lorries without gear box or injector pump, and with only six each out of their 10 tyres, and another scrap Isuzu tipper lorry that has neither an injector pump nor an air compressor (3 scrap Lorries) for the price of N120, 000.00.

(iii) One scrap crane with Deutche engine for the price of N100, 000.00.

(iv) One scrap boom or crane handle that forms part of item (iii) above.

(v) One scrap gearbox that forms part of the Isuzu truck in item (ii) above which was severed or being lifted (sic) into the trailer by a crane as it was not affixed to the Isuzu truck but just under it

(vi) 7 bus seats meant for the Luxurious bus.

(vii) One Yellow forklift with its name written in Arabic or other non-English alphabets, priced for N 40, 000.00'

The paragraph is quite plain. It does not contain any plea for special or general damages for breach of contract. As a result of this situation, the subject matter of the Appellants' alternative relief for special and general damages for breach of contract was neither pleaded nor proved by evidence to justify its being awarded by the trial Court. The Court below on appeal by the Respondents against the award, acted in accordance with the law in setting aside the judgment of the trial Court. This is because the loss of profit which the Appellants want this Court to infer from the alternative relief claimed by them is specie of special damages which the law requires that it must be specifically pleaded and proved strictly by evidence of particular losses which are known and accurately measured before the trial. See Agunwa v. Onukwe (1962) 2 SCN1,R 275; Oladehin v. C.T.M.L. (1978) 2 SC 23; Imana v. Robinson (1979) 3-1 SC. 1 at 23 and Kurubo v. Zach Motison Nigeria Ltd. (1992) 5 NWLR (Pt.. 239) 102. The Court below was therefore right in holding that the One Million Naira damages awarded to the Appellants was indeed without any basis and rightly set aside.

With the conclusion I have reached in the determination of the main issue in this appeal that the award of the sum of One Million Naira as special and general damages was rightly set aside by the Court below in its judgment now on appeal on the clear ground that the claim was neither specifically pleaded nor proved by evidence, the remaining issues being peddled by the Appellants on failure of the Court below to resolve the 2 issues formulated by the Appellants as Respondents in that Court or whether Exhibits B, B1 and B2 carried the evidential value placed on them by the trial Judge or were wrongly relied upon as decided by the Court below or whether or not a retrial of the Appellants' claim which was neither properly pleaded nor proved by evidence, is quite an unnecessary exercise. An order of retrial usually affords the Plaintiff in a case a second chance to put his house in order and return to the Court with his repaired case to fight the Defendant. Where a Plaintiff woefully fails to prove his case, the proper order the law requires the Court to make is that of dismissal of the Plaintiff's case. In other words, although where a trial Court or a Court below fails to make findings on the issues duly joined by the parties in their pleadings and submitted for adjudication, an appellate Court will order a retrial when the evidence on record is such that it cannot make its own findings not having seen or heard the witnesses, an order of retrial is not appropriate where a Plaintiff failed completely to prove his case and no irregularity of substantial nature apparent on the record to justify the making of such order.

In the instant case, where in the course of the hearing of the action the Plaintiffs/Appellants abandoned their main claims for declaratory and mandatory injunctive reliefs to compel the Defendants/Respondents to release the items not collected from their premises, and further woefully failed to properly plead and strictly prove the special and general damages claimed in the alternative relief, the Appellants are clearly in law not entitled to any order of retrial. See Okpiri v. Jonah (1961) SCNLR 174; Armels Transport Ltd v. Martins (1970) All NLR 27; Okeowo v. Migliore (1979) II SC. 138; Abibu v. Binutu (1988) 1 NWLR (Pt. 68) 57; Adeyemo v. Arokepo (1988) 2 NWLR (Pt. 79) 703 and the recent decision of Chief Maxwell Dakipiri Odi & Ors v. Chief Harrison Iyala & Ors (2004) 8 NWLR (Pt. 875) 232 at 313. The complaint of the Appellants that the Court below having found that the trial Court had failed to make specific findings on the issues submitted to it for adjudication ought to have stepped into the shoes of the trial Court to make the appropriate findings or make an order of retrial, having regard to the circumstances of this case the order of dismissal of the Appellants' case was indeed properly made and it is hereby affirmed by me.

In the result, I am of the firm view that there is no merit at all in this appeal. The appeal is accordingly and hereby dismissed and the decision of the Court below dismissing the Plaintiffs/Appellants' action is hereby affirmed.

The Respondents are entitled to costs which I assess at N10, 000.00 against the Appellants.

Judgment delivered by
Salihu Modibbo Alfa Belgore. J.S.C.

I agree entirely with the judgment of my learned brother, Mahmud Mohammed, JSC that this appeal has no merit. I also dismiss it with the same order as to costs.

Judgment delivered by
Umaru Atu Kalgo, J.S.C

I have read in draft the judgment just delivered by my learned brother Mohammed JSC in this appeal. I entirely agree with him that there is no merit in the appeal and I adopt his reasoning and conclusions reached in the said judgment. I have nothing useful to add. I accordingly also dismiss the appeal with N 10,000.00 costs to the respondent and affirm the decision of the Court of Appeal.

Judgment delivered by
George Adesola Oguntade, J.S.C.

I have had the advantage of reading in draft a copy of the judgment just delivered by my learned brother Mohammed JSC. He has shown in the said judgment reasons why this appeal must fail. I entirely agree with him. I would also dismiss the appeal as unmeritorious. I abide by the order made on costs by my learned brother.

Judgment delivered by
Francis Ikechi Ogbuagu, J.S.C.

I have had the advantage of reading in draft, the lead Judgment of my learned brother, Mohammed, J.S.C., just delivered. I agree that this appeal lacks substance and that the Court below, was right and justified in setting aside the award made by the trial Court in favour of the Appellants. I will however, make my own contribution just by way of emphasis.

I note that Chief Giwa ' the learned Counsel for the Appellants, in his oral submissions at the hearing of this appeal on 4th April 2006, stated that the parties agree that there was an agreement between the parties, for the supply of enumerated items of scrap materials. That the issue in controversy, is/was, whether or not, all the said materials or goods, were actually supplied. I agree.

It is also noted by me, that the Appellants, in their Statement of Claim in paragraph 7 thereof, itemized the goods and the total amount is stated to be N740, 000.00 (Seven hundred and forty thousand naira) which amount, the Appellants, assert in paragraph 9 of the Statement of Claim, was paid to the Respondents through the 2nd Respondent. N100, 000.00 (One hundred thousand naira) was said to have been paid in cash, while the sum of N640, 000.00 (Six hundred and forty thousand naira) was said to be paid by Bank cheque. It is however, in evidence, that some of the goods/materials were collected at various dates by Delivery Invoices ' Exhibits 'B', 'Bl', and 'B2' respectively.

Now, the trial Court, at pages 95 and 96 of the Records, identified the issues in controversy, as follows:

'Whereas it is the case for the Plaintiff that he (sic) did not remove all the items purchased, the Defendants are very stern in their posture that all the items purchased were removed. This was not only the (sic) bone of contention.

Whereas the plaintiffs claim that they paid the sum of N 740, 000.00 for the items purchased, the defendants are saying that the purchase price was N 640,000.00. I am however of the view that the crux of the matter is not (sic) so much the purchase sum but the list of items purchased and whether all the items so purchased were collected by the plaintiffs.'

I note that reliefs 1 and 2 of the claim were abandoned by the Appellants and so what was before the trial Court, was or remained the alternative claim. This is borne out of the fact that the trial Court did not and never pronounced on the said reliefs 1 and 2 of the claim of the appellants. It need be stressed, that there is nothing wrong for a party in an action, to include in his pleading, two or more inconsistent sets of material facts and claim reliefs there under in the alternative. It is proper to do so. See S.C.E.I. v Odenewu & Anor. (1965) 2 ANLR 135 and Metal Construction (W.A.) Ltd. v Chfef Aboderin (1998)6 SCNJ. 161@ 170. But once one of them is granted, the other cannot be granted. See Agidigba v. Agidigba & 2 Ors. (1996)NWLR (Pt.454) 303. Thus, where there is a claim in the alternative, the trial Court, will first consider whether or not the principal or main claim, ought to have succeeded. It is only after the Court may have found that it could not for any reason, grant the principal claim, that it would only consider the alternative claim. This is settled law. See Mercantile Bank of Nig. Ltd. v. Adalma Tanker & Bunkering Services Ltd. (1900) 5 NWLR (Pt. 153) 747 and Gaji & 2 Ors. v. Paye (2003) 5 SCNJ. 20. In other words, an alternative award is an award that can also be made instead of another. It is not an additional award. See The M.V. Caroline Maersk etc. & 2 Ors. v Nokoy Investment Ltd. (2002) 6 SCNJ.208 @ 224.

In the instant case leading to this appeal, there was no specific finding by the trial Court, as to the conflicting evidence of the parties as to the actual materials/goods/items supplied by the Appellants and those received by the Respondents. As noted by me above, some of the said materials/goods/items supplied, were backed by documentary evidence - i.e. Way Bills -Exhibits 'B', 'B1' and 'B2' and some others, were supplied without any documentary evidence. See the findings of the trial Court at pages 98, 99 and 100 of the Records.

At page 101 of the Records, the learned trial Judge, stated inter alia, as follows:

'I am satisfied from evidence adduced by both parties to this action that the Defendant (sic) did not supply to the Plaintiffs all the items which the Plaintiffs contracted to buy from the Defendants.

I am also satisfied that after this Court made an order restraining the Defendants from removing the items or causing them to be removed from the premises of the 1st Defendant, the Defendants in defiance of that order permitted other buyers with the aid of mobile police to remove the items.'

(The underlining mine)

It need be noted that the contract or agreement between the parties in respect of the sale and supply of the said items or goods, was oral. Remarkably, the learned trial Judge on the same page 101 of the Records, stated inter alia, as follows:

'..... To order that the Defendants be compelled to deliver to the Plaintiffs all the items not delivered would be an order made in vain as the parties are all agreed that the items have been removed by other customers of the defendants to whom they were sold. It was probably in recognition of this that that the plaintiffs abandoned the claim for injunction.

The claim for the Plaintiff is (sic) therefore the alternative claim for N 5 million. This sum is claimed as special and general damages for breach of contract.'

(The underlining mine)

With respect, it was a misconception, to have stated that 'the parties are all agreed that the items have been removed by other customers of the Defendants to whom they were sold.' Certainly, there was no such agreement and this assertion, is not borne out from the Records. At least, the averment in paragraph 13 of the Statement of Claim as appears at page 36 of the Records, and the contents of Exhibit 'D' of the Defendants/Respondents, clearly and completely, belie the said averment. Both, are in conflict and are at variance with each other. But more importantly, the said averment is rubbished so to speak/say, by paragraph 17 of the said Statement of Claim at page 37 of the Records, where the following appear:

\"WHEREFORE the Plaintiffs claim as per writ of summons in this suit\".

In other words, the Statement of Claim did not supersede the Writ. For in the said writ, what appear are claims for declaration, order for mandatory injunction and the alternative claim for N5 million (Five Million naira). In the face of all these, it will be pertinent to stress that it is now firmly established in a line of decided authorities, that special damages must be specifically pleaded and proved.

Special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specially and proved strictly. While General damages, are such as the law will presume to be the direct natural or probable consequences of the act complained of. See the cases of Stroms Bruks Aktie Belog v. Hutchison (19O5) A.C. 515- 526_' per Lord Machnaghten; Incar Nig. Ltd. & anor. v. Mrs. M.R.. Adcgboye (1985) 2 NWLR (Pt.8) 452 @ 454. and Badimus & anor. v. Abegunde (1999) 11 NWLR (Pt.627) 493 @ 5O2; (1999) 7 SCNJ._96 - per Uwaifo, J.S.C, citing the cases of Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd.(1991) 1 NWLR (Pt.166) 136 @ 158; (1991) 1 SCNJ. 1 and Eseigbe. v. Agholor & anor (1993)9 NWLR (Pt.316) 128 @145;(1993) 12 SCNJ.82 just to mention but a few. It need be stressed that in a claim for damages for breach of contract, the Court is concerned only with damages which are natural and probable consequences of the breach or damages within the contemplation of the parties at the time of the contract. See, Mobil Oil Nig. Ltd, v. Akinfosile (1969) (1) NMLR_227. But where a Plaintiff decides or goes further to claim special damages, such must be specifically pleaded and proved.

In the instant case, the award of special and general damages, not having been pleaded and particularized, the Appellants, were out so to say and failed, to prove their said claim as required by law. This is more so, as there was no proof of any loss of profit. There is/was no itemized or particularized sums of money for any of the items even in the alternative claim, since reliefs 1 and 2 were abandoned by the Appellants. The Court below, was, in my respectful view, right and justified, in setting aside the said award by the trial Court.

Before concluding this Judgment, I note that; the Court below - per Ba\'aba, JCA, at pages 188, 190, 191 and 192 of the Records, made specific findings to the effect, that the learned trial Judge, did not make any specific findings on fact, as to whether or not, there was a valid contract between the parties, the terms of the contract, the items purchased and the amount actually paid for the items purchased. That it is the duty of trial Courts, to pronounce on all issues raised or brought to their notice by the parties, and not to restrict themselves, to one or more issues which in their opinion, disposes the case. That,

\"I am however in great difficulty in this case where there is a total absence of evaluation of evidence and findings of fact which invariably depend on the credibility of the evidence of the witnesses. As there are 110 specific findings of fact on the issues submitted to the trial Court including that of the items purchased or delivered to the Respondents by the Appellants.....\"

Again,at page 4 paragraph 3 of the Respondents\' Brief and Issue No.5, there is an admission by them, and the Appellants, in their paragraph 1.10 of their Brief, sought for a retrial. It is now firmly settled, that where a Court of trial, fails to advert its mind to and treat all issues in controversy fully and there is insufficient material before the Appeal Court for the resolution of the matter, the proper order to make, is one of retrial. See the cases of Awote v. Owodunmi (1987) 2 NWLR (Pt.57) 366 and Harrison Okonkwo & anor. v. Godwin Udoh & anor. (1997) 7 SCNJ. 357 @ 359 - per Mohammed,JSC. In other words, a retrial may be ordered, in. an appropriate case, even if the parties, do not ask for it. See the cases of lyaji v. Eyigebe (1987) 3 NWLR (Pt.61) 523; (1987) 7 SCNJ.148 and A.K. Faddallah v. Arewa Textiles Ltd. (1997) 7 SCNJ. 2O2. Finally, where an appeal is allowed because of the failure of the trial Court to make finding\'s on material issues and the determination of such material issues, depends on the credibility of witnesses, the proper order to make, is that of a retrial. See Karibo & ors. v. Grand & anor. (1992) 3 NWLR (Pt.23O)426;(1992) 4 SCNJ.12 and Musa Sha (Jnr.) & anor. v. DA Rap Kwan & 4 ors.(2OOO) 5 SCNJ.1O1@12O. It must be stressed that the decision to order a retrial, is definitely, at the discretion of an Appeal Court. See University of Lagos & ors. v. Qlaniyan & ors. (1985) NWLR (Pt.1) 143 ; Imonikha & ors. v. Attorney-General Bendel State & ors. (1992) NWLR (Pt.248) 396 @ 408 and National Bank of Nigeria Ltd. V. P.B. Olatunde & Co. Nig. Ltd. (1994) 4 SCNJ. (Pt.1) 65 @ 76 - per Ogwuegbu,

JSC.

However, in view of the fact that; there was no evidence of cash payment by or of receipt of N 100,000.00 (One hundred thousand naira) and the inconsistencies and contradictions in the said items and their prices and the document that; was rejected, and the Court below having found as a fact, that the award of Nl million (One Million naira) was excessive, this appeal is bound to collapse. It fails and it is also accordingly dismissed by me. I hereby, also, affirm the decision of the Court; below. I abide by the consequential order in respect; of costs in the said Judgment of my learned brother, Mohammed, JSC.