



IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA Civil Appeal Nos. 57 of 2014

5 (Being High Court of Malawi (Commercial Division) Blantyre Registry Commercial Cause No. 18 of 2014)

BETWEEN:

MISHAEL KUMALAKWAANTHU t/a ACCURATE TILES & BUILDING CENTRE.....APPELLANT

-and-

10 **MANICA MALAWI LIMITED RESPONDENT**

CORAM : HONOURABLE JUSTICE AC CHIPETA, JA
: HONOURABLE JUSTICE FE KAPANDA, JA
: HONOURABLE JUSTICE DF MWAUNGULU, JA

15 Kambale , Counsel for the Appellant
Katuya , Counsel for the Respondent
Chimtande, Recording Officer/ Official Interpreter
Date of hearing of appeal: 15 May 2015
Date of judgment: 10 September 2015

JUDGMENT

(Justices of Appeal Chipeta and Kapanda JJA concurring and Justice of Appeal Mwaungulu JA dissenting):

Chipeta JA:

My Lords, as has turned out to be the case, we do not have a unanimous decision in this matter. What we have is a majority decision that emanates from the opinion on which His Lordship Kapanda JA and I concur. His Lordship Mwaungulu JA holds dissenting views from ours, and he will accordingly pronounce the minority opinion in this appeal.

My opinion is well imbedded in the opinion Honourable Justice Kapanda JA will immediately read out. Thus, for the reasons his Lordship Kapanda JA succinctly gives in his said opinion, with which I fully agree, I would dismiss this appeal, with costs.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 10 September 2015.

Signed:.....

HONOURABLE JUSTICE A.C. CHIPETA, JA

Kapanda JA:

Introduction

This is an appeal by Mishaal Kumalakwaangthu trading as Accurate Tile and Building Centre (the appellant) against the decision of the High Court Commercial Division sitting at Blantyre. The appellant is a businessman who is into the business of importation of tiles and other building

materials for gain. The respondent is a clearing and forwarding company which operates in Malawi. Its business is, inter alia, to clear and forward imported goods to importers of those goods.

The appellant imported various goods including tiles and contracted the respondent, Manica Malawi Limited, to clear them for him. The goods the subject matter of the contract were damaged whilst in the custody of the respondent. The appellant commenced a legal suit to recover for the damage caused to his goods. It was the respondent's argument in the court a quo and here that it is not liable to compensate the appellant on account of exclusion of liability terms in the contract between the appellant and the respondent.

The court a quo in its judgment dated 27 August 2014 dismissed the appellant's action in which he was claiming the sum of MK 5,610,520/= being the cost/ price of goods damaged whilst in the respondent's custody allegedly due to the latter's negligence in handling them. There was also a claim for interest at the rate of 3% above the bank lending rate and the sum of MK 841,578 as collection costs as well as the costs of the action.

My Lords, for the reasons that that I give below, I am in agreement with the views expressed by Justice of Appeal Chipeta that this appeal be dismissed. Justice of Appeal Chipeta is, inter alia, of the following view regarding the appeal by the appellant:

15 "Let me just say that in an agreement that potentially carried multifarious risks, and where the document the Appellant was given to sign had clear tell tales that a lot of responsibility was being shifted to him, and where the document given to him was referring to more terms being in a document he could ask for, it was very naïve of him to sign it just like that. In doing so he was incorporating the absent document. The term
20 absolving the Respondent from liability for any damage to his goods however caused was as binding on him as if he had read it and consciously accepted it. He cannot genuinely cry foul about not seeing or being shown the additional terms.

I would dismiss the appeal. I have not had time to look at the Consumer Protection Act, which appears to be the main consideration in the opinion of Hon Mwaungulu JA.
25 Should both of your Lordships find it to be fit to be the ratio decidendi in the case, since

it is a piece of law, although we did not hear any arguments on it, do feel free to hold that it overrides my above opinion, should you come to that conclusion.”

As for me, I have had time to read the Consumer Protection Act to see whether it affords any protection to the Appellant. It is not my intention to give an opinion on it as regards whether it affords any protection to the appellant.

I wish to add though that it would be dangerous to determine an appeal on a law on which the parties were not called upon to address this Court. This is notwithstanding the fact that we are entitled to found our decision on a matter not put in the grounds of appeal. I would have thought that the parties should have been called upon to address us on the relevant parts of the Consumer Protection Act if we were to found our decision on our reading of any part/portion of the said Consumer Protection Act. In saying this we must be alive to the following provision of the Supreme Court of Appeal Rules under Order III respecting civil appeals:

“1. Application

This order shall apply to appeals to the Court from the High Court acting either in its original or its appellate jurisdiction in civil cases, and to matters related thereto.

2. Notice and grounds of appeal

(1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the Court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service. Civil Form 1

(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

5 (4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.

10 (5) The appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just.

(6) Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

15 Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

It is for this reason that we find and conclude that in as much as it may appear that the Consumer Protection Act affords protection to the appellant, it would be dangerous to found a
20 decision or determine an appeal on a law which the parties were not called upon to address the Court. This is notwithstanding the fact that the appellate court is entitled to found its decision on a matter not put in the grounds of appeal. Indeed, the order III rule 2(6) cited above enjoins this Court not to allow an appeal and rest its decision on a ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground. We
25 did not give the respondent the opportunity to address us on the apparent protection of the said Consumer Protection Act. Further, and worse still, the appellant did not raise it in skeleton arguments or submissions but rather our learned brother judge has done it in his opinion. As we understand it, our brother judge makes an alternative finding and conclusion that this

appeal should succeed as the agreement between the parties herein offended the Consumer Protection Act. This, we think, represents a departure from what this appeal was all about and what the parties were called upon to address in this appeal as revealed by the Notice of Appeal and the accompanying grounds of appeal. Further, it is well to add that the Consumer Protection Act was not specifically pleaded in the court a quo. Indeed, in addition, the issues about the Consumer Protection Act were not canvassed by any of the parties before this Court. Further, it is well to observe that even in jurisdictional issues raised by any court suo motu, the cardinal rule is that the parties must be given an opportunity to react to the issue. No judge should simply decide to make it an issue when handing down a judgment.

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The appeal

The evidence in the case and the findings of the learned trial judge thereon are fully set out in the judge's reasons and it is unnecessary that we should again fully traverse the facts. But it is desirable that, at least, some of the salient matters should be referred to. Accordingly, as we understand it, this appeal concerns the lower court's decision holding that the respondent's standard terms and conditions were incorporated in the contract between the appellant and the respondent. It was the finding and conclusion of the court a quo that the exclusion clause contained in the said standard trading terms and conditions excluded liability for the damage to the appellants' goods whilst in the respondent's' custody. As it were, the thrust of the appellant's case is that Honourable Justice Katsala was wrong in his finding and conclusion. The appellant also argues that the lower court erred in awarding the costs of the action to the respondent.

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The appellant caused a writ of summons to be issued against the respondent. The appellant stated that he is in the business of supplying building materials and house hold items from abroad to customers within Malawi and that the respondent is a clearing and freight forwarding company. The appellant also alleged that the appellant had entered into the agreement with the respondent whereby the respondent had agreed to clear the appellant's consignment at Beira port in Mozambique and then to transport the same to Blantyre, Malawi. It was alleged

by the appellant that the consignment comprised two containers weighing 53.8 tonnes in which were tiles, doors, cornices. Further, the appellant claimed that the respondent did clear the goods and transported them to Blantyre. But that when the goods arrived in Blantyre and while they were still in the respondent's custody, due to the respondents' servants' negligence
5 by using equipment that was not adequate or appropriate for the safe handling of the goods, one of the containers fell from the respondent's crane. And, that the goods therein were damaged. The appellant therefore claimed for the loss suffered on the market and resale values due to the damage, interest at 3% above the base rate on the loss value amount, collection costs and costs of the action.

10 In its defence, the respondent denied any negligence on their part in the handling of the appellant's goods. However, the respondent admitted that while lifting one of the containers which weighed 27.32 tonnes with the usual due care and attention and using the usual mode of lifting containers and the machinery, a wire broke and the container fell to the ground. The respondent also claimed that all transactions between the appellant and the respondent were
15 subject to the respondent's Standard Trading Conditions which include a clause that all loading and unloading and some other mentioned activities in the handling of the goods by the respondent company on behalf of a customer were to be done at the sole risk of the customer.

The court below found that on the evidence the goods were indeed damaged due to the
20 respondent company's negligence. It concluded thus as it found that the respondent's servants had tried to lift a container weighing 27.32 tonnes using a crane designed to lift a weight not more than 25 tonnes. However, the court proceeded to find that the respondent was not liable to compensate the appellant on account of an exclusion clause.

25 On the exclusion clause, the court held that such clauses are strictly interpreted to the extent that the party that seeks to limit his legal liability must do so with clear language in such clauses such that any ambiguity in the clause was to be construed against the party seeking protection from such a clause. Further, the court held that any party who signs a document which

contains contractual terms at the time he is entering into a contract is bound by the contents of the document. The court a quo continued to hold that, since the contractual form that the appellant signed contained the term that the transactions between the appellant and the respondent were subject to the Standard Trading Conditions (which copy of the conditions was stated in the form that it could be made available upon request), these conditions which were in a separate document formed part of the contract. The court below also found that the language of the particular clause in the stated Standard Trading Conditions was wide enough to exclude the respondent's liability for loss or damage due to negligence on the respondent's part. The court then went on to dismiss the appellant's claim with costs.

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The appellant is now claiming in this appeal that the learned judge erred in law and fact in holding that the respondent's trading conditions were incorporated into the contract. Secondly, the appellant argues that having made a finding that the goods were damaged on account of the respondent's negligence, the court below erred in awarding the costs to the respondent. It is further urged on behalf of the appellant that a fair order maybe should have been that each party pays its own costs. The appellant says that this would have been so in an issue based costs realising that the appellant succeeded on the negligence claim whereas the respondent had judgment on account of the exclusion term which was a contract.

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This appeal is therefore on the question whether or not the court a quo was right in it finding and concluding that the exclusion clause contained in the said standard trading terms and conditions excluded liability for the damage to the appellants' goods whilst in the respondent's custody. Further, as this matter comes for a rehearing, the parties are desirous of wanting the following issues determined on this appeal viz.:

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1. Whether or not the lower court erred in law or in fact in holding that the respondent's trading terms and conditions were incorporated into the contract that the appellant had entered into with the respondent

2. Whether or not having correctly made a finding that the appellant's goods were damaged because of the negligence of the respondent, the learned judge erred in awarding costs to the respondent; alternatively
3. Whether or not the lower court erred in awarding the costs to the respondent.

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As said earlier, this appeal concerns the question the respondent's trading terms and conditions were incorporated into the contract that the appellant had entered into with the respondent. This court is being called upon to determine whether the lower court erred in law or in fact in holding that the respondent's trading terms and conditions were incorporated into the contract
10 that the appellant had entered into with the respondent. Further, the court will have to answer the question whether or not having correctly made a finding that the appellant's goods were damaged because of the negligence of the respondent, Honourable Justice Katsala erred in awarding costs to the respondent.

The judge a quo, on the exclusion clause, held that such clauses are strictly interpreted to the
15 extent that the party that seeks to limit his legal liability must do so with clear language in such clauses such that any ambiguity in the clause was to be construed against the party seeking protection from such a clause. Further, the court a quo held that any party who signs a document which contains contractual terms at the time he is entering into a contract is bound by the contents of the document. It reasoned that since the contractual form that the
20 appellant signed contained the term that the transactions between the appellant and the respondent were subject to the Standard Trading Conditions (which copy of the conditions was stated in the form that it could be made available upon request), the court a quo held, that these conditions which were in a separate document formed part of the contract. The court also found that the language of the particular clause in the stated Standard Trading Conditions
25 was wide enough to exclude the respondent's liability for loss or damage due to negligence on the respondent's part. It accordingly entered a judgment against the appellant. The respondents argue that the court a quo was right in its findings as well as in its conclusions and want this Court to confirm the judgment of the court below.

The Appellants on the other hand are of the view that the judge a quo erred at law and in fact in holding that the respondent's trading terms and conditions were incorporated into the contract that the appellant had entered into with the respondent. Further, it is the view of the appellant that having correctly made a finding that the appellant's goods were damaged because of the negligence of the respondent, the learned judge erred in awarding costs to the respondent.

The long and short of it is that as we understand it, the Appellants have formulated the following issues (the grounds of appeal), which we have paraphrased, for consideration by this Court on this appeal: whether or not the court a quo erred in any way in holding that the respondent's trading terms and conditions were incorporated into the contract the subject of this appeal; whether or not having correctly made a finding that the appellant's goods were damaged as a result of the negligence of the respondent, the judge a quo got it wrong in awarding costs to the respondent; alternatively whether or not the lower court erred in awarding the costs to the respondent.

As we understand it, the issues stated above may be synchronized into essentially one question. The said issue is whether on the evidence the respondent's Standard Trading Conditions (which copy of the conditions was stated in the form that it could be made available upon request) absolved the respondent from liability for any damage to goods however caused was as binding on the appellant as if he had read it and consciously accepted it.

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The Law and Discussion

Meaning of exclusion clause

As we understand it, an exclusion clause is a term in a contract that seeks to restrict the rights of the parties to the contract.

Traditionally, the courts have sought to limit the operation of exclusion clauses. In addition to numerous common law rules limiting their operation, in England and Wales, there are various statutes that apply to all contracts and exemplify the rules that seek to limit the operation of exclusion clauses. However, the Unfair Terms in Consumer Contracts Regulations 1999, unlike

the common law rules, do differentiate between contracts between businesses and contracts between a business and a consumer. So, the law seems to explicitly recognize the greater possibility of exploitation of the consumer by businesses.

Further, it requires no citation of authority to show that negligence in the performance of a contract is not a fundamental departure from the contract which deprives the negligent party of the benefit of an exemption clause which upon its true construction covers liability for negligence. The position would be different if the goods had been intentionally set on fire or given away.

Exclusion and restriction of liability

The courts in Malawi have made various pronouncements on exclusion of liability which are illuminating. In **Phekani v Automotive Products Ltd**¹ where a notice on a repair order at a garage was signed by a client but the attention of the client was not drawn to the document signed by him. It was held that the client was bound by the exclusion terms, unless the garage was proven to be negligent. Justice Tambala, as he then was, said the following which is instructive:

“The defendants sought to rely on a condition of the contract excluding or limiting their liability. Inserted in the repair order, Exhibit P1, and Exhibit D5, was a term which stated: “I hereby agree that Automotive Products Ltd is not responsible for loss or damage to the vehicle herein described and its contents whether from fire, theft or any cause whatsoever beyond the Company’s reasonable powers of control.”

The plaintiff’s reaction to this clause was that it was not drawn to his attention when he left his car with the defendants. This argument would not assist the plaintiff, since he signed the document containing the term which limits or excludes the defendants’ liability. The learned authors of Cheshire and Fifoot, Law of Contract, (9 ed), at 151, state: “If the document is signed it will normally be impossible, or at least difficult, to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant. In the absence of fraud or misrepresentation, a person is bound by a writing

¹ [1993] 16(1) MLR 427

to which he has put his signature, whether he has read its contents or he has chosen to leave them unread.”

The plaintiff’s position is, therefore, untenable. However, upon examination of the clause, I am of the view that it does not exclude negligence liability on the part of the defendants, their servants or agents. If I had held that negligence on the part of the defendants, their servants or agents was proved with the aid of the doctrine of *res ipsa loquitur*, I would have given judgment in favour of the plaintiff notwithstanding the presence of this condition.”²

And, in **Securicor MW Ltd v Central Poultry**³ Justice of Appeal Tambala said the following with regard to the construction of an exclusion clause where there is a fundamental breach of a contract:

“Learned Counsel for the appellants’ second argument is that the case of *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 decided that the view that a fundamental breach of contract or a breach of a fundamental term of a contract brings the contract to an end and the guilty party automatically loses the protection of any clause excluding or limiting liability, is wrong. ...

We agree that to the extent that the learned Judge appears to subscribe to the idea that a fundamental breach of contract or breach of fundamental term of contract will always result in inapplicability of an exclusion clause, he committed an error of law. The correct position of the law is as was stated by Lord Wilberforce in the *Photo Production* case. His Lordship said at 561: “I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.”⁴

² Ibid. 433

³ [1999] (MSCA) MLR 367

⁴ Ibid. 374

In **Ndasowanjira Art Studio v Casalee Cargo Ltd**,⁵ a case where an exemption clause was not contained in a signed document but reference was made to it in an invoice, it was instructively put by Justice Tambala, as he then was, thus:

5 “The plaintiff conceded that he dealt with the defendants several times before he requested them to clear the goods, the subject of this action. He however denied that he was at any time given a copy of the defendant’s Standard Conditions of Business. After carefully listening to the witnesses who gave evidence before me, and watching their demeanour, I was satisfied that the plaintiff told the truth when he said that he had never been given a copy of the Standard Conditions of Business by Mr Njenjema. I
10 thought that Mr Njenjema did not tell the truth on this point.

The invoice which was issued to the plaintiff showed at the bottom, and again, in small print the following words: “All Business transacted subject to the Standard Trading Conditions of the Clearing and Forwarding Agents Association of Malawi.” And immediately below these words were written in bolder letters the words:

15 “TERMS STRICTLY 30 DAYS.”

The question I must decide now is whether the defendant’s Standard Conditions of Business formed an integral part of their contract with the plaintiff. The general rule is that if a party signs a document which contains contractual terms at the time when he enters into a contract he is bound by the contents of the document. At 151 of Cheshire
20 and Fifoot, Law of Contract (9 ed) it is stated: “If the document is signed it will normally be impossible, or at least difficult, to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant. In the absence of fraud or misrepresentation, a person is bound by a writing to which he has put his signature, whether he has read its contents or he has chosen to leave them unread.”

25 The plaintiff in the instant case did not sign the document containing the defendant’s Standard Conditions of Business. He did not also sign the invoice which was issued to him. He told this Court that he only read the invoice to find out what he was required to

⁵ [1991] (HC) 14 MLR 367

pay to the defendants. He did not read the rest. He did not read the defendant's Standard Conditions of Business, he said.

Where a party to the contract has not signed a document which is claimed by the other party to be part of the contract the general rule is that a person will be bound by the contents of the document if the person relying on it has done what "may reasonable be considered sufficient to give notice" of the contents of the document to the effected person. Chitty on Contracts (24 ed), at paragraph 812 states: "The normal rule is that the party affected by the clause will be bound if the party delivering the document has done what may reasonably be considered sufficient to give notice of the clause to persons of the class to which he belongs."

Then the same learned authors of Chitty on Contracts (24 ed), at paragraph 681, write:

"The question whether the party tendering the document has done all that was reasonable sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient."

I must, therefore, consider whether the defendants gave the plaintiff reasonably sufficient notice of their Standard Conditions of Business. The case of Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 may be helpful. The facts of the case are that the plaintiff drove his car into a new automatic car park. He had not been there before. A notice outside gave the charges and stated that all cars were "parked at owner's risk." A traffic light on the entrance lane showed red and the machine produced a ticket when the car had drawn up beside it. He took the ticket and the light having turned green he drove on into the garage where his car was parked. On his return to collect his car, there was an accident and he was severely injured. He claimed damages from the defendant garage. The defendants contended inter alia that the ticket incorporated a condition excepting them from liability.

The ticket stated the car's time of arrival and that it was to be presented when the car was claimed. At the bottom left hand corner in small print it was said to be "issued subject to conditions displayed on the premises." On a pillar opposite the ticket machine a set of eight printed conditions was displayed in a panel.

5 The defendants acknowledged that they were at fault but claimed that they were protected by some exempting conditions. They relied on the ticket which was issued to the plaintiff. They said that it was a contractual document and that it incorporated a condition which exempted them from liability.

10 The plaintiff said he looked at the ticket to see the time on it and put it in his pocket. He could see that there was printing on it but did not read it. He only read the time. He did not read the words which said that the ticket was issued subject to the conditions as displayed on the premises. If the plaintiff had read those words on the ticket and looked round the premises to see where the conditions were displayed, he would have had to drive his car into the garage and walked round. Then he would have found, on a pillar
15 opposite the ticket machine, a set of printed conditions in a panel. The material conditions stated:"2 The customer is deemed to be fully insured at all times against all risks ... and the company shall not be responsible or liable for any loss or misdelivery of or damage of whatever kind to the customer's motor vehicle, or any articles carried therein ... or injury to the customer or any other person occurring when the customer's
20 motor vehicle is in the parking building, howsoever that loss, misdelivery, damage or injury shall be caused: and it is agreed and understood that the customer's motor vehicle is parked and permitted by the company to be parked in the parking building in accordance with this licence entirely at the customer's risk."

25 Lord Denning MR at 169, said: "In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying "at owner's risk" that is, at the risk of the owner so far as damage to the car was concerned. This offer was accepted when Mr Thornton drove up to the entrance and by the movement of his car turned the light from red to green and the ticket was thrust at him. The contract was then concluded and it could not be altered by any words printed on the ticket itself. In

particular, it could not be altered so as to exempt the company from liability from personal injury due to their negligence.”

It was held that the conditions exempting the defendants from liability for the plaintiff's personal injuries did not form an integral part of the contract between the plaintiff and the defendants. It was also part of the court's decision that the defendants failed to give the plaintiff reasonably sufficient notice of the conditions subject to which the ticket was issued. The plaintiff succeeded.

In the present case the invoice was issued after the instructions were given to the defendants to clear the goods. The contract between the parties had already been concluded when the document was handed to the plaintiff. The defendant's Standard Conditions were not printed on the same invoice, either on its face or at its back. The invoice did not, regrettably, indicate where the Conditions could be found or from whom they could be obtained. It was not made clear whether the copy containing the conditions could be obtained free of charge or if it would require some payment before it could be obtained.

I am of the view that the case of Thornton v Shoe Lane Parking Ltd is applicable to this case and I am inclined to hold that the defendant's Standard Conditions of Business were not and (sic) integral part of the contract between the plaintiff and the defendants. I am further of the view that if the defendants intended that such conditions should form part of their contract with the plaintiff, then they failed to give the plaintiff reasonably sufficient notice of such conditions.

As can be gathered from the four conditions set out above the defendant's Standard Conditions gave wide discretionary powers of sale or disposal for value in any manner of goods belonging to their customers. They limited the damages claimable against them to an almost ridiculous figure. The present case provides a clear picture of the extent to which the defendants limited their liability as regards damages. The cost price of the plaintiff's goods is over K13 000-00 and yet, according to condition number 17, the defendant can only pay K11-15 damages for the total loss of such goods. Clearly the consequences of such limiting clause upon an ordinary and unsuspecting customer can

be disastrous; if any customer happens to be a small businessman from a rural area a loss of that magnitude would throw him out of business and at the same time leave him with a heavy debt to settle.

Regarding conditions of this kind, the learned authors of Chitty on Contracts (24 ed), at paragraph 681, state:

“Nevertheless if the particular condition relied on is one which is unusually wide or unusually stringent, or one which involves the abrogation of a right given by statute, attention may have to be drawn to it in the most explicit way.”

Talking about an exemption clause, in the case of Thornton v Shoe Lane Parking Ltd, supra, Denning MR at 170, said:

“All I say is that it is so wide and so destructive of rights that the courts should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in J Spurling Ltd v Bradshaw [1956] 1 WLR 446. In order to give sufficient notice it would need to be printed in red ink with a red hand pointing to it – or something equally startling.”

In the light of the consequences which would naturally flow from the defendant’s Standard Conditions and in view of the plaintiff’s situation, I am satisfied that the defendants failed to give reasonably sufficient notice of the conditions to the plaintiff.

Reasonably sufficient notice of exemption or limiting clauses can be established by a course of previous dealings. In the case of J Spurling Ltd v Bradshaw [1956] 1 WLR 461; [1956] 2 All ER 121, the defendant dealt with the plaintiffs who were warehousemen on several previous occasions; and on each of those occasions he was issued with a document called a “landing account.” The document referred on the face of it to conditions subject to which the contract was entered to. The back of the “landing account” contained a clause exempting the plaintiffs from liability for negligence. The court held that the defendant, by virtue of a course of previous dealings with the plaintiffs, had reasonably sufficient notice of the exemption clause. His counterclaim for negligence on the part of the plaintiffs failed.

In the case of *J Spurling Ltd v Bradshaw*, supra, the exemption clause was written on the back of the “landing account” which also contained a reference to it on its face. The defendant in that case would easily have found the clause and read it if he cared to do so. In the present case it is unknown where and from whom the defendant’s Standard Conditions could be obtained. I am still of the view that the previous occasions on which the plaintiff dealt with the defendants would not have afforded the plaintiff access to the Standard Conditions. The case of *J Spurling Ltd v Bradshaw*, supra, is clearly distinguishable from the present case.”⁶

In ***United Transport (Malawi) Ltd. v. Munthali***⁷ it was held that conditions limiting liability cannot be imposed after the carrier has accepted goods as reasonable steps have to be taken to inform the affected party of exceptions clauses when the contract is made or before display of notice containing terms excluding liability otherwise the term will be deemed insufficient if positioned so that the affected party cannot or need not necessarily see it. And, the case of ***Karim (A.G.A.) & Sons v. Ami Rennie Press (Malawi) Limited***⁸ is for the proposition of law that an exclusion clause made reference to an invoice including reference to a contract terms is not incorporated if presented to the other party after the conclusion of contract but will be deemed as incorporated if the contract is on the same terms as previous contracts between parties and that party knew or ought to have known of the terms.

Types of Exclusion Clause

There are different types of exclusion clauses although some of them are strictly speaking not exclusion clauses. These include the following:

Firstly, there are what are called true exclusion clauses. These types of a clauses recognize a potential breach of contract, and then excuse liability for the breach. Alternatively, the true exclusion clauses are constructed in such a way that they only include reasonable care to perform duties on one of the parties. There is then what is commonly called a limitation clause.

⁶ Ibid. 375 -378

⁷ 7 MLR (H.C) 458

⁸ 12 MLR (H.C) 91

And, the limitation clause places a limit on the amount that can be claimed for a [breach of contract](#). This is regardless of the actual loss suffered. Lastly, the law recognizes what is termed a time limitation clause. As for the time limitation clause, it will usually state that an action for a claim must be commenced within a certain specific period of time. If not instituted within a certain specific period of time then the cause of action becomes extinguished.

It is the first type of clause, the exclusion type in strict sense, which is the subject matter of this appeal. We should now look at how the exclusion clauses or terms operate at law.

How the term must be incorporated

The courts have traditionally held that exclusion clauses only operate if they are actually part of the contract. There seem to be three methods of incorporation of exclusion clauses. These are viz.: incorporation by signature; incorporation by notice; and incorporation by previous course of dealings.

As regards incorporation by signature, the case of **L'Estrange v Graucob**⁹ is enlightening. As we understand it, this case is for the proposition that if the exclusion clause is written on a document which has been signed by all parties, then it is part of the contract. If a document has not been signed, any exception clause which it contains will only be incorporated where the party relying on the clause (the 'proferens') can show that he took reasonable steps to bring it to the attention of the other party before the contract was made.¹⁰ In somewhat of a contradiction, that is not to say that the proferens actually has to show that the other person read the clause or understood it (except where the clause is particularly unusual or onerous). It is not even necessary to show that the attention of that particular person was in point of fact drawn to it. As it were, it is somewhat like the 'reasonable man' test in tort: the party trying to rely on the clause needs to take reasonable steps to bring it to the attention of the reasonable person.¹¹

Respecting incorporation by notice, the general rule, as delivered in **Parker v SE Railway**¹² is that an exclusion clause will have been incorporated into the contract if the person relying on it

⁹ [1934] 2 KB 394

¹⁰ See also *United Transport (Malawi) Ltd. v. Munthali* 7 MLR (H.C) 458

¹¹ See also *United Transport (Malawi) Ltd. v. Munthali* 7 MLR (H.C) 458

¹² (1877) 4 CPD 416

took reasonable steps to draw it to the other parties' attention. And, the case of **Thornton v. Shoe Lane Parking**¹³ seems to indicate that the wider the clause, the more the party relying on it will have had to have done to bring it to the other parties' attention. The notice must be given before formation of the contract as illustrated in **Olley v Marlborough**.¹⁴ In Malawi the case of

5 **Phekani v Automotive Products Ltd**¹⁵ Justice Tambala aptly said:

“The defendants sought to rely on a condition of the contract excluding or limiting their liability. Inserted in the repair order, Exhibit P1, and Exhibit D5, was a term which stated:

“I hereby agree that Automotive Products Ltd is not responsible for loss or damage to the vehicle herein described and its contents whether from fire, theft or any cause
10 whatsoever beyond the Company’s reasonable powers of control.”

The plaintiff’s reaction to this clause was that it was not drawn to his attention when he left his car with the defendants. This argument would not assist the plaintiff, since he signed the document containing the term which limits or excludes the defendants’ liability. The learned authors of Cheshire and Fifoot, Law of Contract, (9 ed), at 151,
15 state:

“If the document is signed it will normally be impossible, or at least difficult, to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant. In the absence of fraud or misrepresentation, a person is bound by a writing to which he has put his signature, whether he has read its contents or he has chosen to leave them
20 unread....”¹⁶

And, in relation to incorporation by previous course of dealings, the case of **McCutcheon v David MacBrayne Ltd**¹⁷ says that terms (including exclusion clauses) may be incorporated into a contract if the course of dealings between the parties were "regular and consistent".¹⁸ What this means usually depends on the facts. However, the courts have indicated that equality of
25 bargaining power between the parties may be taken into account. Further, in Malawi

¹³ [1971] 2 WLR 585

¹⁴ [1949] 1 All ER 127

¹⁵ [1993] 16(1) MLR 427

¹⁶ Ibid. 433

5 ¹⁷ [1964] 1 WLR 125

¹⁸ See also *Karim (A.G.A.) & Sons v. Ami Rennie Press (Malawi) Limited* 12 MLR (H.C) 91

Ndasowanjira Art Studio v Casalee Cargo Ltd¹⁹ it was instructively put thus by Justice Tambala (as he then was) regarding incorporation of terms of contract (including exclusion clauses) by previous course of dealings:

5 “The plaintiff conceded that he dealt with the defendants several times before he requested them to clear the goods, the subject of this action. He however denied that he was at any time given a copy of the defendant’s Standard Conditions of Business...The invoice which was issued to the plaintiff showed at the bottom, and again, in small print the following words: “All Business transacted subject to the Standard Trading Conditions of the Clearing and Forwarding Agents Association of
10 Malawi.” And immediately below these words were written in bolder letters the words: “TERMS STRICTLY 30 DAYS.”

The question I must decide now is whether the defendant’s Standard Conditions of Business formed an integral part of their contract with the plaintiff....

Reasonably sufficient notice of exemption or limiting clauses can be established by a
15 course of previous dealings. In the case of *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461; [1956] 2 All ER 121, the defendant dealt with the plaintiffs who were warehousemen on several previous occasions; and on each of those occasions he was issued with a document called a “landing account.” The document referred on the face of it to conditions subject to which the contract was entered to. The back of the “landing
20 account” contained a clause exempting the plaintiffs from liability for negligence. The court held that the defendant, by virtue of a course of previous dealings with the plaintiffs, had reasonably sufficient notice of the exemption clause. His counterclaim for negligence on the part of the plaintiffs failed.

In the case of *J Spurling Ltd v Bradshaw*, supra, the exemption clause was written on the
25 back of the “landing account” which also contained a reference to it on its face. The defendant in that case would easily have found the clause and read it if he cared to do so. In the present case it is unknown where and from whom the defendant’s Standard Conditions could be obtained. I am still of the view that the previous occasions on which

¹⁹ [1991] (HC) 14 MLR 367

the plaintiff dealt with the defendants would not have afforded the plaintiff access to the Standard Conditions....”²⁰

The above expose is adequate respecting the three methods through which the exclusion terms maybe properly incorporated into a contract. Indeed, the above summarises how the courts
5 have traditionally treated exclusion clauses if they are to operate effectively so that they are actually part of a contract.

Judicial Control of Exclusion Clauses

It is our understanding that the above discussion demonstrates that courts from within and
10 outside the jurisdiction do exercise control of exclusion clauses. This the courts do to exercise control of exclusion clauses as they tend to be so extensive and are so destructive of rights that the courts should not hold any man bound by them unless they are drawn to his attention in the most explicit way. This the courts do through interpretation of them. We shall now see how this is done.

15 Strict Literal Interpretation

It is settled law, therefore there is no need to cite an authority for it, that for an exclusion clause to operate it must cover the breach. As it were, this is assuming there actually is a breach of contract. If there is such a breach of contract then the type of liability arising is also important. As we understand it, largely there are two varieties of liability: strict liability (liability
20 arising due to a state of affairs without the party at breach necessarily being at fault) and liability for negligence (liability arising due to fault).

The courts have a tendency of requiring the party relying on the exclusion clause to have drafted it properly so that it exempts them from the liability arising. And, if any ambiguity is present, the courts usually interpret it strictly against the party relying on the clause. Besides,
25 as advocated in **Darlington Future Ltd v. Delcon Australia Pty Ltd**²¹ the meaning of an exclusion clause is construed in its ordinary and natural meaning in the context. Indeed, even though the courts construe the meaning much like any other ordinary clause in the contract, there is need

²⁰ Ibid. per Justice Tambaia pages 375 -378

²¹ [1986] 161 CLR 500

to examine the clause in light of the contract as a whole. Thus, the judge in **R & B Custom Brokers Co. Ltd. v United Dominions Trust Ltd**²² refused to allow an exemption clause, of which did cover the nature of the implied term, on the grounds that it did not make specific and explicit reference to that term. The term in question was the implied term as to fitness-to-
5 purpose pursuant to section 14 (3) the Sale of Goods Act 1979.²³

The Contra Proferentem rule

The above rule is that if, after attempting to construe an exclusion clause (or indeed any other contractual term) in accord with its ordinary and natural meaning of the words, there is still ambiguity then (if the clause was imposed by one party upon the other without negotiation)
10 the contra proferentem rule applies. For all intents and purposes this means that the clause will be construed against the person who imposed its inclusion, that is to say, *contra* the proferens.²⁴ Put otherwise, it is well to recognize firstly that an "exemption clause" or "exception clause" or "protective clause", all terms are used - is ordinarily construed strictly against the proferens, the party for whose benefit it is inserted.

15 Secondly, it is to be noted that an exclusion clause is not construed as relieving the party for whose benefit it is inserted against liability for the negligence of himself or his servants, unless it expressly or by implication covers such liability. As it were, it will by implication do so if there be no ground of liability other than negligence to which it could refer.²⁵ The effect of this rule was summed up by Dixon J. in a passage in his judgment in **Commissioner for Railways (N.S.W.)**
20 **v. Quinn**²⁶ in a case involving a common carrier. However, as the only obligation of a carrier who is not a common carrier is to take due care of the goods, a general exclusion of liability necessarily extends to a liability arising from breach of that obligation. That is to say that it exempts him from the consequences of negligence. Specific illustrations of this in the case of

²² [1988] 1 All ER 847

²³ This is Sale of Goods Act 1979 of England

²⁴ *Darlington Futures v Delco Australia Pty Ltd* [1986] 161 CLR 500

²⁵ *Alderslade v. Hendon Laundry Ltd.* (1945) 1 KB 189; *Rutter v Palmer* (1922) 2 KB 87; *Producer Meats (North Island) Ltd. v. Thomas Borthwick & Sons (Australia) Ltd.* (1964) N.Z.L.R. 700; *Canada Steamship Lines Ltd. v. The King* (1952) AC 192, at pp 207, 208; and see *The Council of the City of Sydney v. West* (1965) 114 CLR, at pp 493, 494, per Kitto J

²⁶ (1946) 72 CLR 345 at p 371

damage of goods by fire resulting from negligence are to be found in **Turner v. Civil Service Supply Association**²⁷ and **Fagan v. Green and Edwards Ltd.**²⁸

Further, in terms of negligence, the courts have taken the approach that it is unlikely that someone would enter into a contract that allows the other party to evade fault based liability.

5 Accordingly, it is settled law that if a party wishes to exempt his liability for negligence, he must make sure that the other parties understand that. The decision in **Canada SS Lines Ltd v. The King**²⁹ held, inter alia, that: firstly, if the exclusion clauses mention "negligence" explicitly, then liability for negligence is excluded. Secondly, where "negligence" is not mentioned, then liability for negligence is excluded only if the words used in the exclusion clause are wide enough to
10 exclude liability for negligence. If there is any ambiguity, then the contra proferentem rule applies. Lastly, if a claim on another basis can be made other than that of negligence, then it covers that basis instead.

In Australia, the *four corners rule* has been adopted in preference over the idea of a "fundamental breach."³⁰ The court will presume that parties to a contract will not exclude
15 liability for losses arising from acts not authorised under the contract. However, if acts of negligence occur during authorised acts, then the exclusion clauses shall still apply.³¹ As it were, clear words are necessary to exclude liability for negligence. Indeed, it has been repeatedly said that an exempting clause must be construed strictly, and that clear words are necessary to exclude liability for negligence. In **Price & Co. v. Union Lighterage Co.**³² Walton J. instructively
20 said: " The law of England . . . does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants ; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms."

It is well to point out though that the difficulties to which the requirement of "strict construction" has given rise are well illustrated by the differences of judicial opinion which

²⁷ (1926) 1 KB 50

²⁸ (1926) 1 KB 102

²⁹ [1952] AC 192

³⁰ The Council of the City of Sydney v West (1965) 114 CLR 481

5 ³¹ Davis v Pearce Parking Station Pty Ltd [1954] HCA 44 <https://jade.barnet.com.au/Jade.html#!article=65000>

³² <https://jade.barnet.com.au/Jade.html#citable=3070130> last visited 13 July 2015

arose in **Rosin dt Turpentine Import Co. Ltd. v. Jacob (fc) Sons Ltd.**³³ a case in which negligence was expressly mentioned in the exemption clause, and in which the final decision (in the House of Lords) was, with one dissentient, in favour of the bailee. And, by way of an illustration, the learned authors of *Halsbury's Laws of England* (2nd ed., vol. XXX, p. 332) argue that an exemption clause in a contract for the carriage of goods by sea, if it is to protect against the consequences of negligence, "must expressly refer to negligence, since it is always strictly construed against the ship owner." Then the said authors make reference to the cases of **Leuw V. Dudgeon**;³⁴ **Price v. Union Lighterage Co.**³⁵ and **The Pearlmoor.**³⁶

10 However, the above discussion notwithstanding in **Travers & Sons Ltd. v. Cooper**³⁷(a case of a warehouseman) a clause exempting from liability "for any damage however caused which can be covered by insurance" was held by the Court of Appeal to exempt from liability for negligence.³⁸ Both the decisions of **Travers & Sons Ltd. v. Cooper** and **Pyman S.S. Co. v. Hull & Barnsley Railway Co.**³⁹ were based on the words " however caused ", and a distinction was drawn between general references to *kind* of damage and general references to *cause* of damage. A similar view was taken in **Manchester Sheffield & Lincolnshire Railway Co. v. Brown**⁴⁰ where the contract was for the carriage of goods by rail. In that case Lord Blackburn said that when a man says he will not be responsible for damage however caused, that ought not to be "cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."⁴¹

We are alive to the fact that in some cases a distinction is drawn between cases, such as that of a common carrier, in which the responsibility of the bailee, apart from being a special contract,

³³ (1903) 1 K.B. 750

³⁴(1867) L.R. 3 C.P. 17. (12) (1850) 10 C.B. 454

³⁵ (1904) 1 K.B. 412.(1915) 1 K.B., at p. 94

³⁶ (1904) P. 286

5 ³⁷ (1915) 1 K.B. 73

³⁸cf. **Pyman S.S. Co. v. Hull & Barnsley Railway Co.** (1915) 2 K.B. 729 ("damage however caused") came to a different conclusion.

³⁹ (1915) 2 K.B. 729

⁴⁰ (1883) 8 A.C. 703

10 ⁴¹ *Ibid.* 710 cf. **Carr v. Lancashire & Yorkshire Railway Co.** (1852) 7 Ex. 707 [55 E.R. 11]; and cases cited by *Kennedy* L.J. in **Travers v. Cooper** 1915) 1 K.B., at p. 94.

is that of an insurer, and cases, such as that of a warehouseman, in which, apart from special contract, there is no liability in the absence of negligence. It has therefore been said that in the former class of case general words may be apt to exclude the liability of an insurer but not liability for negligence. However, in the latter class of case similar words may be held to exclude liability for negligence on the ground that on any other view they would be entirely without effect. The distinction is logical, and has high authority to support it, though it is possibly open to criticism on the ground that the bailor at any rate is not likely to have had in mind at all the difference between liability for negligence and liability without fault. If we put cases of the carriage of goods by sea on one side, it is only by virtue of a some what artificial analysis that he is taken to be bound by a provision which is, in the typical case, printed on a ticket. On the other hand, if he actually read such a clause as that which came in question in **Brown's Case**⁴² he would most probably think it meant that he could have no claim in any event, though, if he were asked, he would probably say that wilful damage was not within the protection of the clause. Such considerations seem to have been what Lord *Blackburn* had in mind in the passage cited above from **Brown's Case**.⁴³

The present case is a case in which general words are used, and there is no special reference to any manner in which loss or damage may be caused. On the other hand, the case is clearly one in which the bailee would not, apart from special contract, be liable for loss or damage occurring without negligence. And there is, in our opinion, ample authority to justify construing the exemption clause as excluding liability for negligence.

It is our understanding that in Australia as well as Malawi, exclusion clauses have been recognized as valid by the High Court. They do not apply in cases of deliberate breach. Thus, if the contract is for the carriage of goods, if the path is deviated from what was agreed, any exclusion clauses no longer apply.⁴⁴ We are sure that this would also apply with equal force to Malawi.

⁴² (1883) 8 App. Cas. 703

⁴³ *Ibid.* p. 710

⁴⁴ *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd* [1966] HCA 46; (1966) 115 CLR 353 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1966/46.html> last visited 15 July 2015

In **Baldry v Marshall**⁴⁵ the appellant asked the respondents, who were motor dealers, to supply a car that would be suitable for touring purposes. The respondents recommended a Bugatti, which the appellant bought. The written contract excluded the respondent's liability for any "guarantee or warranty, statutory or otherwise". The car turned out to be unsuitable for the appellant's purposes, so he rejected it and sued to recover what he had paid. The Court of Appeal held that the requirement that the car be suitable for touring was a condition. Since the clause did not exclude liability for breach of a condition, the appellant was not bound by it.

The Court of Appeal in **White v John Warwick**⁴⁶ held that where the words of an exclusion clause are unclear the ambiguous wording out of the exclusion clause would effectively protect the respondents from their strict contractual liability, but it would not exempt them from liability in negligence. The appellant hired a trademan's cycle from the respondents. The written agreement stated that "Nothing in this agreement shall render the owners liable for any personal injury". While the appellant was riding the cycle, the saddle tilted forward and he was injured. The respondents might have been liable in tort (for negligence) as well as in contract. And in **Glynn v Margetson**⁴⁷ the House of Lords held that where the words are so eclectic the wide-ranging words of the clause could be ignored.

Finally, in **Evans v Andrea Merzario**⁴⁸ the appellants had imported machines from Italy for many years and for this purpose they used the services of the respondents, who were forwarding agents. The appellants were orally promised by the respondents that their goods would continue to be stowed below deck. On one occasion, the appellant's container was stored on deck and it was lost when it slid overboard. The Court of Appeal held that the respondents could not rely on an exemption clause contained in the standard conditions of the forwarding trade, on which the parties had contracted, because it was repugnant to the oral promise that had been given. The oral assurance that goods would be carried inside the ship was part of the contract and was held to override the written exclusion clause.

⁴⁵ [1925] 1 KB 260

⁴⁶ [1953] 1 WLR 1285

⁴⁷ [1893] AC 351

⁴⁸ [1976] 1 WLR 1078

Statutory Control

It is to be realized that even if terms are incorporated into the contract and so would be effective, there are various statutory controls over the types of terms that may have legal effect. In England, for example, the Unfair Contract Terms Act 1977 renders many exemption
5 clauses ineffective. Further, the Unfair Terms in Consumer Contracts Regulations 1999 provide additional protection for consumers.⁴⁹ But the question that arises and falls to be decided is whether it is all terms that are rendered ineffective due to statutes? That is the question. We have however not been invited to look into that issue. Indeed, we said earlier that although the Consumer Protection Act was read to see whether it affords any protection to the Appellant it
10 was not argued by any of the parties to this appeal. We accordingly found and concluded that it is not our plan to give an opinion on it as regards whether it affords any protection to the appellant. Furthermore, as we understanding it, that is the position at law obtaining in England. Thus, the part of the decision which seeks to rely on what obtains in England should have no relevance to the present case. We so find and conclude as it would be dangerous to determine
15 an appeal on a law on which the parties were not called upon to address this Court.⁵⁰ This is notwithstanding the fact that we are entitled to found our decision on a matter not put in the grounds of appeal. I would have thought that the parties should have been called upon to address us on the relevant parts of the Consumer Protection Act if we were to found our decision on our reading of any of the said Consumer Protection Act. In concluding thus we were
20 alive to the provision of the Supreme Court Rules under Order III respecting civil appeals. Further, we are mindful of the warning by this Court in *Chilenje v The Attorney General*⁵¹ where it advised as follows:

25 “[T]his Court also had occasion to deal with a similar issue in the case of *General Simwaka v The Attorney-General*, MSCA Civil Appeal No. 6 of 2001. In that case, a Judge of the High Court at the Lilongwe District Registry dismissed an originating summons on

⁴⁹ See our Consumer Protection Act Chapter 48:10 of the Laws of Malawi

⁵⁰ *Chilenje v The Attorney-General* [2004] MLR 34 (SCA); *President of Malawi and another v Kachere and others* [1995] 2 MLR 616 (SCA)

⁵¹ [2004] MLR 34 (SCA)

the ground that the plaintiff failed to give notice of intention to sue the Government, such prior notice being obligatory in suits against Government. The question of notice of intention to sue the Government did not however arise in that case as it was not raised by the defendant, namely, the Attorney-General. On appeal, this Court agreed with the plaintiff that the lower court erred when it based its decision on the alleged failure to give prior notice as that issue was not before the court. It may be useful to reproduce what this Court said, as follows:

“Again, we take the view that the question of notice of intention to sue Government did not arise in this case as it was not raised by the respondent. Material issues necessary for the determination of a case must be raised by the parties themselves. The principal function of the court is to adjudicate on the whole case within the framework of the issues raised by the parties themselves. It is not proper for the court to act on its own motion to raise an issue and decide it in favour of one of the parties to an action: see the case of Nseula v The Attorney-General M.S.C.A. Civil Appeal No. 18 of 1996. There was no defence raised by the respondent which required the lower Court’s decision. It was not open to the lower Court to raise the issue of absence of notice of intention to sue Government as a defence in favour of the respondent. We agree that the court below erred when it based its decision on inter alia a failure by the appellant to issue notice of intention to sue Government.” Observably, the underlying facts of the present case are substantially similar to those in the General Simwaka (supra) case just mentioned above.

Counsel for the respondent advanced further argument contending that the learned Judge was entitled to consider and determine the issue of the irregularity of the judgment under the inherent jurisdiction of the court. Counsel submitted that such jurisdiction empowers a court to deal with issues, though not raised by the parties, if it is just or equitable to do so. The case of Lazard Brothers and Company v Banque Industrielle Moscou [1932] 1 KB 624 was cited in support.

With respect, we are unable to join with Counsel for the respondent in this submission. To start with, we do not think that it would be just or equitable for a court unilaterally to deal with a substantial issue, as in the present case, before or without hearing the parties or at least affording them a chance to be heard thereon. As a matter of fact, the Lazard Brothers' case (supra) cited by the respondent reinforces this view. That case involved a judgment that had erroneously been entered in default of appearance against a company that was non-existent. It was held that the court was entitled, after hearing the parties, of its own motion to set the judgment aside. ... In the result, we agree that the learned Judge in the court below erred in dealing with the issue of the irregularity of the default judgment in the present case when the said issue was not raised by the parties and was not in any way before the court. The first ground of appeal accordingly succeeds.⁵² (Underlining and emphasis supplied by us)

The long and short of it is that the parties never raised the issue of the Consumer Protection Act. It was not even pleaded in the court a quo. It has been raised by one of us as the Court retired to consider its opinion on the appeal. We too do not think that it would be just or equitable for this Court to unilaterally deal with a substantial issue, as to whether the Consumer Protection Act affords the appellant protection, before or without hearing both parties or at least affording them a chance to be heard thereon. The Court should have heard the parties before proceeding to allowing the appeal on the premise that the Consumer Protection Act affords the appellant protection from the exclusion term.

Exclusion Clauses Cases

A variety of cases may be cited to illustrate how exclusion clauses operate as well as in what circumstances a beneficiary of them so far departs from his contract so as to preclude him from relying upon exempting provisions designed to relieve him from liability for loss or damage occurring during the performance of his contract. However, it is sufficient to refer to the following cases which demonstrate that it is not in all situations that exclusion clauses operate in favour of a beneficiary:

⁵² Ibid. 37-38 of [2004] MLR 34 (SCA)

In **L'Estrange v Graucob**⁵³ the appellant bought a cigarette machine for her cafe from the respondent and signed a sales agreement, in very small print, without reading it. The agreement provided that "any express or implied condition, statement or warranty... is hereby excluded". The machine failed to work properly. In an action for breach of warranty the respondents were held to be protected by the clause. It was instructively put by Scrutton LJ that: "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not." However, in **Curtis v Chemical Cleaning Co**⁵⁴ the appellant took a wedding dress to be cleaned by the respondents. She signed a piece of paper headed 'Receipt' after being told by the assistant that it exempted the cleaners from liability for damage to beads and sequins. The receipt in fact contained a clause excluding liability "for any damage howsoever arising". When the dress was returned it was badly stained. It was held that the cleaners could not escape liability for damage to the material of the dress by relying on the exemption clause because its scope had been misrepresented by the respondent's assistant.

Further, in **Parker v South Eastern Railway**⁵⁵ the appellant deposited a bag in a cloak-room at the respondents' railway station. He received a paper ticket which read 'See back'. On the other side were printed several clauses including the words "The company will not be responsible for any package exceeding the value of £10." The appellant presented his ticket on the same day, but his bag could not be found. He claimed £24 10s as the value of his bag, and the company pleaded the limitation clause in defence. In the Court of Appeal, Mellish LJ gave the following opinion: firstly, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; secondly, that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; and lastly, that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering

⁵³ [1934] 2 KB 394

⁵⁴ [1951] 1 KB 805

⁵⁵ (1877) 2 CPD 416

of the ticket to him was done in such a manner that he could see there was writing upon it, was reasonable notice that the writing contained conditions.

In **Chappleton v Barry UDC**⁵⁶ deck chairs were stacked by a notice asking the public who wished to use the deck chairs to get tickets and retain them for inspection. The appellant paid for two tickets for chairs, but did not read them. On the back of the ticket were printed words purporting to exempt the council from liability. The appellant was injured when a deck chair collapsed. The clause was held to be ineffective. The ticket was a mere receipt; its object was that the hirer might produce it to prove that he had paid and to show him how long he might use the chair. Slessor LJ pointed out that a person might sit in one of these chairs for an hour or two before an attendant came round to take his money and give him a receipt.

In **Olley v Marlborough Court**⁵⁷ the appellant booked in for a week's stay at the respondents' hotel. A stranger gained access to her room and stole her mink coat. There was a notice on the back of the bedroom door which stated that "the proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody." The Court of Appeal held that the notice was not incorporated in the contract between the proprietors and the guest. The contract was made in the hall of the hotel before the appellant entered her bedroom and before she had an opportunity to see the notice.

It is said that an exclusion clause would still apply in a case where a person is illiterate. The appellant in **Thompson v LMS Railway**⁵⁸ who could not read gave her niece the money to buy an excursion ticket. On the face of the ticket was printed "Excursion, For Conditions see back"; and on the back, "Issued subject to the conditions and regulations in the company's time-tables and notices and excursion and other bills." The conditions provided that excursion ticket holders should have no right of action against the company in respect of any injury, however caused. The appellant stepped out of a train before it reached the platform and was injured. The trial judge left to the jury the question whether the respondents had taken reasonable

⁵⁶ [1940] 1 KB 531

⁵⁷ [1949] 1 KB 532

⁵⁸ [1930] 1 KB 41

steps to bring the conditions to the notice of the appellant. The jury found that they had not but the judge, nevertheless, entered judgment for the respondents. The Court of Appeal held that the judge was right. The Court thought that the verdict of the jury was probably based on the fact that the passenger had to make a considerable search to find the conditions; but that
5 was no answer. Lord Hanworth MR said that anyone who took the ticket was conscious that there were some conditions and it was obvious that the company did not provide for the price of an excursion ticket what it provided for was the usual fare. Having regard to the condition of education in the country, it was immaterial that the appellant could not read.

In the case of **McCutcheon v MacBrayne**⁵⁹ exclusion clauses were contained in 27 paragraphs of
10 small print contained inside and outside a ferry booking office and in a 'risk note' which passengers sometimes signed. The exclusion clauses were held not to be incorporated. There was no course of conduct because there was no consistency of dealing. But in **Hollier v Rambler Motors**⁶⁰ the court came to a different conclusion. The appellant had used the respondent garage three or four times over five years and on some occasions had signed a contract, which
15 excluded the respondents from liability for damage by fire. On this occasion nothing was signed and the appellant's car was badly damaged in a fire. It was held that there was not a regular course of dealing, therefore the respondents were liable. The court referred to *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association (1969)* in which more than 100 notices had been given over a period of three years, which did amount to a course of dealing. However,
20 in **British Crane Hire v Ipswich Plant Hire**⁶¹ the court held that the terms would be incorporated into the contract, not by a course of dealing, but because there was a common understanding between the parties, who were in the same line of business, that any contract would be on these standard terms. The respondents were liable for the expense involved in recovering the crane. Both parties were companies engaged in hiring out earth-moving equipment. The
25 appellants supplied a crane to the respondents on the basis of a telephone contract made quickly, without mentioning conditions of hire. The appellants later sent a copy of their conditions but before the respondents could sign them, the crane sank in marshy ground. The

⁵⁹ [1964] 1 WLR 125

⁶⁰ [1972] 2 AC 71

⁶¹ [1974] QB 303

conditions, which were similar to those used by all firms in the business, said that the hirer should indemnify the owner for all expenses in connection with use.

The case of **Scruttons Ltd v Midland Silicones**⁶² is for the proposition that strangers to a contract cannot take advantage of the limitation clause. As it were, a shipping company (the carrier) agreed to ship a drum of chemicals belonging to the appellants. The contract of carriage limited the liability of the carrier for damage to £179 per package. The drum was damaged by the negligence of the respondents, a firm of stevedores, who had been engaged by the carriers to unload the ship. The appellants sued the respondents in tort for the full extent of the damage, which amounted to £593. The respondents claimed the protection of the limitation clause. The House of Lords held in favour of the appellants. The respondents were not parties to the contract of carriage and so they could not take advantage of the limitation clause. However, in **Andrews v Hopkinson**⁶³ a case respecting a hire purchase the court came to a different conclusion. The appellant saw a car in the respondent's garage, which the respondent described as follows: "It's a good little bus. I would stake my life on it". The appellant agreed to take it on hire-purchase and the respondent sold it to a finance company who made a hire purchase agreement with the appellant. When the car was delivered the appellant signed a note saying he was satisfied about its condition. Shortly afterwards, due to a defect in the steering, the car crashed. The appellant was stopped from suing the finance company because of the delivery note but he sued the respondent. It was held that there was a collateral contract with the respondent who promised the car was in good condition and in return the appellant promised to make the hire purchase agreement. Therefore the respondent was liable.

Statutory Control in English and Australian decisions

We previously saw that even if terms are incorporated into the contract and so would be effective, there are various statutory controls over the types of terms that may have legal effect. This is more so in England under the Unfair Contract Terms Act 1977 which has rendered many exemption clauses ineffective. Further, the Unfair Terms in Consumer Contracts

⁶² [1962] AC 446

⁶³ [1957] 1 QB 229

Regulations 1999 also provides further protection for consumers.⁶⁴ As we understand it, these statutes and decisions under them have no relevance to the present case. However, for what it is worth, a discussion of how these exemption clauses have been found to be ineffective is to be found in the following English and Australian decisions:

5 In the Australian case of **Peter Symmons & Co v Cook**⁶⁵ The appellant firm of surveyors bought a second-hand Rolls Royce from the respondents which developed serious defects after 2,000 kilometres. It was held that the firm was acting as a consumer and that to buy in the course of a business 'the buying of cars must form at the very least an integral part of the buyer's business or a necessary incidental thereto'. It was emphasised that only in those circumstances could the
10 buyer be said to be on equal footing with his seller in terms of bargaining strength.

And, in England in the matter of **R & B Customs Brokers v United Dominion Trusts Ltd**⁶⁶ the appellant company, which was a shipping agency, bought a car for a director to be used in business and private use. It had bought cars once or twice before. The sale was arranged by the respondent finance company. The contract excluded the implied conditions about
15 merchantable quality. The car leaked badly. It was held by the Court of Appeal that where a transaction was only incidental to a business activity, a degree of regularity was required before a transaction could be said to be an integral part of the business carried on and so entered into in the course of that business. Since here the car was only the second or third vehicle acquired by the appellants, there was not a sufficient degree of regularity capable of establishing that
20 the contract was anything more than part of a consumer transaction. Therefore, this was a consumer sale and the implied conditions could not be excluded.

Further, in the English case of **Phillips Products v Hyland**⁶⁷ the appellant hired an excavator from the second respondents on the latter's standard terms which provided that the driver

⁶⁴ See our Consumer Protection Act Chapter 48:10 of the Laws of Malawi

⁶⁵ (1981) 131 NLJ 758

⁶⁶ [1988] 1 WLR 321

5 ⁶⁷ [1987] 1 WLR 659

should be regarded as employed by the appellant, the appellant thereby remaining liable for any loss arising from the machine's use. The driver negligently damaged the appellant's factory whilst carrying out work at the appellant's request.

It was held that several factors meant that the clause failed to pass the reasonableness test because of the following reason: (1) the appellant did not regularly hire machinery of this sort whereas the respondents were in the business of equipment hire; (2) the clause was not the product of any negotiation between the parties: rather it was simply one of the respondent's 43 standard conditions; (3) the hire period was very short and the appellant had no opportunity to arrange insurance cover; and (4) the appellant played no part in the selection of the driver and had no control over the way in which he performed his job.

The above obtains in England as well as in Australia but is it all terms incorporated into the contract that are rendered legally ineffective due to various statutes? That is the question. Further, do we have equivalent provisions in Malawi? In any event, we wish to observe though that it would be dangerous to determine an appeal on a law which the parties were not called upon to address the court. This is notwithstanding the fact that the appellate court is entitled to found its decision on a matter not put in the grounds of appeal. We would have thought that the parties should have been called upon to address us on the relevant parts of the Consumer Protection Act if we were to found our decision on our reading of any part of the said Consumer Protection Act. In saying this we are alive to the following provision of the Supreme Court Rules which we quote at length:

“ORDER III

CIVIL APPEALS

1. Application

This order shall apply to appeals to the Court from the High Court acting either in its original or its appellate jurisdiction in civil cases, and to matters related thereto.

2. Notice and grounds of appeal

(1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the Court below which shall

set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service. Civil Form 1

(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.

(5) The appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just.

(6) Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground." (Underlining and emphasis supplied by us)

It is for this reason that we find and conclude that in as much as it may appear that the Consumer Protection Act affords protection to the Appellant, it would be dangerous to determine an appeal on a law on which the parties were not called upon to address the court.

This is notwithstanding the fact that the appellate court is entitled to found its decision on a matter not put in the grounds of appeal. Indeed, the order cited above enjoins this Court not to allow the appeal and rest its decision on a ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground. We did not
5 give the respondent an opportunity to address us on the apparent protection of the said Consumer Protection Act. Further, and worse still, the appellant did not raise it but rather our learned brother. As we understand it, our brother herein makes an alternative finding and conclusion that this appeal should succeed as the agreement between the parties herein offended the Consumer Protection Act. This, the majority of us think, represents a complete
10 departure from what this appeal was all about. Indeed, it is not what the parties were called upon to address us in this appeal as revealed by the Notice of Appeal and the accompanying grounds of appeal. Further, it is well to add that the Consumer Protection Act was not specifically pleaded in the court a quo. Indeed, in addition, the issues about the Consumer Protection Act were not canvassed by any of the parties before this Court. Further, it is well to
15 observe that even in jurisdictional issues raised by any court *suo motu*, the cardinal rule is that the parties must be given an opportunity to react to the issue. No judge should simply decide to make it an issue when handing down a judgment respecting a matter not argued or pleaded in the court a quo.

Conclusion

We would dismiss the appeal. We conclude thus as it is obvious that the appellant entered into an agreement that potentially carried mixed risks, and where the document he was given to sign had clear indicative signs that a lot of responsibility was being shifted to him. And, where
5 the document given to him was referring to more terms being in a document he could ask for, it was very naïve of him to sign it just like that. As was rightly observed by the learned authors of Cheshire and Fifoot on Law of Contract if a document is signed it will normally be impossible, or at least difficult, to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant. In the absence of fraud or misrepresentation, a person is bound by a
10 writing to which he has put his signature, whether he has read its contents or he has chosen to leave them unread.”⁶⁸

In signing the documents that were presented to him the appellant was incorporating the absent document. The term absolving the Respondent from liability for any damage to his goods however so caused was as binding on him as if he had read it and consciously accepted
15 it. He cannot genuinely cry foul about not seeing or being shown the additional terms. It is for the above reasons that we would dismiss the appeal.

ORDER

Appeal disallowed with costs. Judgment of the High Court-Commercial Division to stand. Appellant to pay the costs of the respondent. In sum, the appeal is dismissed with costs. It is
20 recorded that the Respondents, Manica Malawi Limited, have effectively succeeded in this appeal. Thus, they are not liable for any costs and that the appellants shall and are hereby condemned to pay the costs of the appeal in this Court.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 10 September
25 2015.

Signed:

HONOURABLE JUSTICE F. E. KAPANDA, JA

⁶⁸ Cheshire and Fifoot, Law of Contract, (9 ed), at 151

Mwaungulu JA (Dissenting):

Précis

My Lords, this appeal must be allowed in its entirety. The court below, following counsel
5 arguments, most similarly before your court, found, after determining there was negligence,
the respondent not liable because of an exclusion or limitation clause in the contract between
the appellant and the respondent. That decision, my Lords, was *per incuriam*. The lower court,
had counsel brought to its attention section 8 of the Consumer Protection Act, would have
concluded differently precisely because there is a paradigm shift since the totem of authorities
10 and authoritative works cited by counsel in this court and below which your lordships have
found appealing. The law, which this court is duty bound to apply, has changed since the
Consumer Protection Act 2003. We should allow the appeal notwithstanding that section 8 of
the Consumer Protection Act, was not raised in the court below and in the submissions and
arguments in this case because of Order 3, rule 2 (6), subject to Order 3, rule 26 of the Supreme
15 Court of Appeal Rules (*Forshey*, 284 F.3d at 1356-57; *Kamen*, 500 U.S. at 92, 94-95, 99; *United
States v Fitzgerald*, 545 F.2d 578, 582 (11th Cir. 1976). Moreover, Order 3, rule 6 of the
Supreme Court of Appeal is, as part of rules of court,, is subservient to a statute, in this case,
section 3 of the General Interpretation Act and section 22 of the Supreme Court of Appeal Act,
which require respectively us to, without proof, take judicial notice of statutes and empower
20 this court to give such Judgment as the case may require.”

We cannot, as your Lordships think, ignore a statute or judicial decisions, changing the
law. If the law at the time of the decision in the court below was what is shown shortly to be,
there is no law that can be applied to the facts of this case as the law as it is now and was at the
time of the judgment below. This Court cannot, therefore, choose to apply the wrong law
25 simply because Counsel faltered in their duty to bring to a court’s attention the correct law.
Counsel for the respondent, just like counsel for the appellant, was under a duty to bring to this
court the authorities and statutes, in this case the Consumer Protection Act, including those
adverse to the respondent’s case. In *Arthur JS Hall & Co. v Simmons (AP)* [2000] 3 All ER 673,
715, Lord Justice Hope said:

“The advocate's duty to the court is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him. It extends to the whole way in which the client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently and economically as possible.”

Although not obtained in civil jurisdiction, this principle has common law pedigree, as Lord Steyn observes in the same case, at 682:

“I am also willing to accept that, although an advocate in a civilian system owes a duty to the court, it is less extensive than in England. For example, in Germany there is apparently no duty to refer the court to adverse authorities as in England.”

The word ‘authorities’ refers to binding decisions and statutes. “Ostensibly, the reason” writes Geoffrey C. Hazard, W. William Hodes, John S. Dzienkowski, The Law of Lawyering (2000), §29-11, “is to serve the law itself by preventing a court from making a decision that is erroneous in light of the authority revealed.” If an authority is withheld a court, counsel is either acting unethically (because is aware of it) or without diligence in not finding the authority.

At the end of the day, this court, as a final court, must do justice. In *Martinez v. Mathews*, 544 F.2d 1233, 1237, Tuttle, *J said*

“Our action in this case could be more seriously constrained by the fact that various aspects of plaintiffs' theories supporting entitlement under the new law apparently have not been previously presented to the lower court. It is frequently said that appellate courts should not consider issues raised for the first time on appeal. See, e. g., *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 n. 4 (5th Cir. 1974). But even if this rule is pertinent here, it can give way when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice.”

This Court, aware of the correct law, cannot ignore it in favour of the wrong law. There would be a miscarriage of justice. Order 3, rule 6 of the Rules of the Supreme Court of Appeal Rules on which your Lordships rely does not cover law. It deals with grounds of appeal. This Court is duty bound to apply the law and cannot make a decisions *per in curium* its or other judicial

decisions or a statute. It cannot choose not to apply the law as it is at time of the lower court's judgment or this court's decision. What would it apply, the wrong law, no law?

This is not, my Lords, the case of the law changing in the course of proceedings where, as Tuttle, J remarks, the law changed in the course of proceedings and there could be injustice if
5 the law was applied retroactively:

*"But the change in the applicable law does not moot the case. Rather, even when the events of a case transpire before such a change in the law, the rule is that if the new law takes effect in the course of a lawsuit, the action can be adjudicated according to the new provisions, unless to do so might produce "manifest injustice." See Bradley v. School Bd.
10 of Richmond, [416 U.S. 696, 714-17](#), [94 S.Ct. 2006](#), 40 L.Ed.2d 476 (1974); Thorpe v. Housing Authority of Durham, [393 U.S. 268,281-83](#), 89 S.Ct. 518, [21 L.Ed.2d 474](#) (1969)."*

This is a case where the Consumer Protection Act was many years in situ and the court below acting despite of it. There would be grave injustice, if justice is according to law, to deny the appellant's the justice which is in the Consumer Protection Act.

15 It is generally unnecessary to require an address from counsel, where on a matter not covered by grounds of appeal, counsel and a court below overlooked or were oblivious to statutory provisions settling the matter or issues between parties. My judgment was the first to be written and indicated that the appeal should be allowed based on the Consumer Protection Act. your Lordships, probably aware of the Consumer Protection Act for the first time after the
20 hearing, take the view that we cannot apply the Consumer Protection Act because this is a ground not raised in the grounds of appeal and the parties or at least the respondent should have been heard on it. I take a different view which, to me is the correct view, that the Consumer Protection Act is the law applicable and this Court must apply it because it is law and that it is covered by the grounds of appeal where the limitation or exclusion clause was the
25 fulcrum of the action and the defence in the court below and on appeal in this court.

Order 3, rule 2 (6) of the Supreme Court of Appeal Rules applies to grounds of appeal, not the law, whether statutory or of judicial opinions, that a court employs to dispose of the case. Moreover, Order 3, rule 2 (6) of the Supreme Court of Appeal Rules is subject to the

plenipotentiary powers of this Court under Order 3, rule 26 of the Supreme Court of Appeal Rules to render any judgment that ought to have been given and Section 22 of the Supreme Court of Appeal Act that empowers this court to give such Judgment as the case may require. Order 3, rule 2 (6) of the Supreme Court of Appeal Rules or Section 22 of the Supreme Court of Appeal Act, as a rule of court cannot ouster or section 22 of the Supreme Court of Appeal Act and section 3 of the General Interpretation Act requiring this court to take judicial notice of legislation.

History

My Lords, this is how the matter arrived before you. On 24 October 2013, at the back of previous dealings, the appellant, Michael Kumalakwaanthu t/a Accurate Tiles & Building Centre, appointed the respondent, Manica Malawi Ltd, to clear shipment from Beira Port in Mozambique and transport the same to Blantyre. The parties entered a standard contract. The appointment form contained a clause, "All business transactions are subject to Manica Malawi Ltd Standard Trading Conditions a copy of which is available on request." Clause 4 of the Manica Malawi Ltd Standard Trading Conditions provided:

"All packing, unpacking, palletizing, or depalletising, sorting, storing (whether in the open or otherwise), loading, unloading, warehousing, transporting all other handling of goods by or on behalf of or at the request of the customer, owner or company, is effected at the sole risk of the customer and/or the owner, and the customer indemnifies the company against any claim which might be brought against the company howsoever arising from such packing, unpacking, palletizing or depalletising, sorting, storing (whether in the open or otherwise), loading, unloading, warehousing, transporting or other handling of goods."

On 3 December 2013 one of the two containers containing the appellant's shipment dropped during lifting at the respondent's container depot in Blantyre, destroying some of the goods.

The Action

On 28 January 2014, the appellant commenced this action claiming damages for negligence. On 14 February, 2014 the respondent filed a defence denying the contents of the

container and negligence on its part. The respondent also pleaded the exclusion or limitation clauses described. On 27 August 2014 the court below dismissed the entire appellant's claim finding, in the process that, although the respondent was negligent and caused the damage without which there cannot be any action in negligence, the respondent was protected by the exclusion clause. The court below never bothered to interpret and decide whether the exclusion clause covered negligence or, at least, brought enough to cover negligence. The lower court, equally, found no problems in determining whether, from where the exclusion clause was, it was part of the contract. The lower court also made orders in relation to costs which, together with the liability question, are subject of the appeal by Misheal Kumalakwaanthu t/a Accurate Tiles & Building Centre.

There is no cross appeal by the respondent. The appellant, however, impugns the lower court judgment in that the court below erred in law and on the facts in holding that the Respondent's trading terms and conditions were incorporated into the contract that the appellant entered with the respondent; and having correctly made a finding that the appellant's goods were damaged because of the negligence of the respondent, the lower court erred in awarding costs to the respondent.

The lower court's findings on negligence

The lower court's finding on the respondent's negligence is, on the evidence and the law, impeccable. Indeed an action for negligence for which a court may, subject to the *de minimis* principle, award compensation arises when a person who, on the neighbour principle, breaches the duty of care expected of a reasonable man and causes injury to another or damage to property. An action for negligence, generally, does not lie where there is no proof of damage. There was negligence, in anyway, in this case where the respondent, entrusted by a contract to unload the appellants' goods, without reasonable care, unloaded in a manner in which the appellant's goods perished. The respondent owed the appellant a duty of care which was breached. The court below, therefore, properly, in my judgment, concluded that the respondents were liable in negligence.

The lower courts finding on exclusion clauses

Again, the lower court's finding that the exclusion or limitation clause was part of the contract is flawless. There was discussion during argument before us concerning whether the respondent sufficiently brought the exclusion clause to the attention of the appellant (*L'Estrange v. F Graucob Ltd* [1934] 2 KB 394; *Parker v. South Eastern Railway Co* [1874-80] All ER 266; *Thompson v. London, Midland and Scottish Railway Co.* [1930] 1 KB 41; *Olley v. Marlborough Court* [1949] 1 KB 532). In *L'Estrange v. F Graucob Ltd* the court held that there were no problems where, like here, a party signed the contract. On the authorities, cited by the respondent's counsel, mostly persuasive in this court, the conclusion that the exclusion clause was part of the contract is inevitable. In *United Transport (Malawi)Ltd v Munthali* [1973-74] MLR 458, the court below held that a party had not sufficiently brought an exclusion clause to the attention of the other where a party, leaving hundreds of miles away from the company's headquarters, received a receipt stating that the conditions were at the company's headquarters. On the facts, the decision was correct.

A party, as was pointed out in *Thompson v London Midland Railways Co* [1930], does not inadequately bring to the attention of another party an exclusion or limiting clause simply because some effort or activity is required to obtain the conditions of a contract. Besides, in this particular case, as counsel for the appellant demonstrates, the requirement that a customer could fetch the conditions of service on the website was not farfetched for a person of the repute and literacy that the appellant was known to be. Moreover, again as the respondents' counsel shows, the appellant had the option to request for the conditions which could not be presented to a customer *inter presentes* because of size the parties had previous dealings. I, therefore, find nothing wrong with the lower court finding that the respondent sufficiently informed the appellant of the whereabouts of these rather debilitating exclusion clauses which in modern law have attracted legislative intervention.

The court below never interpreted the clause and considered whether it covers negligence. The appellant's counsel says that it does cover negligence because of the words 'howsoever arising' in the exclusion clause. This is not really determinative as can be seen from the laborious reasoning, cited by the appellant's counsel, of Lord Justice Simons in *Hollier v Rambler Motors (AMC) Ltd* [1972] 1 All ER 399:

5 “It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinarily literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, tradesman or merchant, as the case may be, will not be responsible for any damage caused by his own negligence. No doubt merchants, tradesmen, garage proprietors and the like are a little shy of writing in an exclusion clause quite so bluntly as that. Clearly it would not tend to attract customers, and might even put many off. I am not saying that an exclusion clause cannot be effective to exclude negligence unless it does so expressly, but in order for the clause to be effective the language should be so plain that it clearly bears that meaning. I do not think that defendants should be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think – unless perhaps he happens to be a lawyer – that he would have redress against the man with whom he was dealing for any damage which he, the customer, might suffer by the negligence of the person.

10 In the absence of any such express reference, it is necessary to proceed to the second test. Words such as “at sole risk” “at customers’ sole risk,” “at owners risk” and “at their own risk” will normally cover negligence as will words which clearly indicate an intention to exclude all liability without exception for example, “no liability whatever” or “under no circumstances” or “all liability,” or all liability save that specified in the clause. If the defendant merely disclaims liability for “any loss,” he may be directing attention to the kinds of losses, and not to their cause or origin; so liability for negligence will not necessarily be excluded. But if he says “however arising” or “any cause whatever” these words can cover losses by negligence. Thus the words “howsoever caused,” “from whatever other cause arising,” “howsoever arising,” “arising from any cause whatsoever,” “relieves from all responsibility for any injury, delay, loss or damage, however caused” have been held to be effective. Likewise a clause which excludes liability for any damage “which may arise from or be in any way connected with any act or omission of any person ... employed by the [defendant]” has been held to be wide enough to cover negligence on the part of the defendant’s servant. However, the intention of the parties must be collected from the entire wording of the clause, and in

construing the clause other parts of the contract which throw light on the meaning to be given to it are not to be ignored. So, for instance, even such comprehensive words as “any liability ... whatsoever” “howsoever caused” “any loss howsoever arising” and “at charters’ risk” may be limited by their context and thus not extend to the negligence of the defendant which it is sought to exclude. On the other hand, where a clause in an agreement expressly accepted liability for negligence only in certain specified respects, it was held that it necessarily followed that it excludes negligence in all other respects.”

Courts, however, shifted from this reasoning and certainly held that there cannot be exclusion for personal injury. This common law principle is now codified in South Africa, United Kingdom, Australia and the United States.

Freedom of contract and consumer protection

Indeed there was a time, now yester, when based on freedom and sanctity of a contract, parties could freely contract out certain wrongful acts, including negligence, by exclusion or limitation clauses. In *Salvage Associate v CAP Financial Services* [1995] FSR 654, Forbes J, in the Australian Supreme Court, said:

“Generally speaking where a party well able to look after itself enters into a commercial contract and with full knowledge of all the relevant circumstances willingly accepts the terms of the contract which provides for the apportionment of financial risks of that transaction, I think that it is very likely that those terms will be held to be fair and reasonable. A case which upholds the attitude of the judiciary in a construction context can be found in Lord Pearson’s speech in *Trollope & Colls Ltd v North West Metropolitan Hospital Board* (1973) 9 BLR 60, where Lord Pearson stated: The basic principle [is] that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvements might be. The court’s function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable.”

There are similar sentiments in jurisdictions faithful to the common law tradition (*Osry v Hirsch, Loubser & Co Ltd* 1922 (CPD) 531 and *Wells v South African Alumenite Co* 1927 (AD) 69, South Africa). These times are epitomized by the cases and works of authors, more especially Chitty, Chitty on Contracts, General, Vol. 1, cited by both counsel. Counsel between them cited cases of *L'Estrange v. F Graucob Ltd* [1934] 2 kb 394; *Parker v. South Eastern Railway Co.* [1874-80] All ER 266; *Thompson v. London, Midland and Scottish Railway Co.* [1930] 1 KB 41; *Olley v. Marlborough Court* [1949] 1 KB 532; *Canada Steamship Lines Ltd v The King* [1952] AC 192 at 208; *Munro Brice & Co v War Risks Association* [1918] 2 KB 78; *Ndasowanjira Art Studio v Casalee Cargo Ltd* [1991] 14 MLR 367; *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125; and *Hollier v Rambler Motors (AMC) Ltd* [1972] 1 ALL ER 399. All cited English cases were before limitations by the Unfair Contract Terms Act 1977; the Malawian case cited is before the Consumer Protection Act, 2003.

Comparative Law

In the United Kingdom, they do not have the equivalent of the Consumer Protection Act. They, however, have the Unfair Contract Terms Act 1977. In the United Kingdom, therefore, exclusion clauses, except for negligence involving personal injury and other proscribed instances, are permissible provided they pass the muster. In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, decided after the Unfair Contract Terms Act 1977, Lord Diplock, heathing a thing of relief from the complex interpretive rules before the Act, said:

“My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even

after due allowance has been made for the presumption; In favour of the implied primary and secondary obligations ”

Subsequent cases, *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Securicor Scotland* [1983] 1 All ER 101; *Office of Fair Trading v Abbey National Plc* [2009] EWCA Civ 116, [2009] 2 W.L.R. 1286; *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237 (Ch), [2011] All ER (D), turn on specific statutory provisions. The UK model obtains in South Africa under the Consumer Protection Act, 2008. There, unlike here, exclusion or limitation clauses, like the one in this contract, would be excluded only if they do not pass the muster.

The current law on Limitation Clauses

10 There are formidable and detailed submissions from either side which, on the view I have taken of the matter, are probably unnecessary on the law as is in Malawi since 2003 when the Consumer Protection Act passed. Consequently, *Hashmi v DHL Express* (2005) Civil Cause No 423 (HC) (PR) (unreported, not cited by Counsel and the court below is *per incuriam* the Consumer Protection Act, 2003.. These cases are, equally, not the law in Malawi under section 15 8 of the Consumer Protection Act: *Selemani and another v Advanx (Blantyre) Ltd* [1995] 1 MLR 262; *Phekani v Automotive Products Ltd* [1993] 16(1) MLR 427 (HC) (the Supreme Court never considered the exclusion clause ([1996] MLR 23 (SCA); *Ndasowa Art Studio v Casalee Cargo* [1991] 14 MLR 367 (HC). The Consumer Protection Act is the applicable law.

The Consumer Protection Act 2003

20 Our statute is very different from the Consumer Protection Act, 2008 in South Africa and the Unfair Contract Terms Act 1977 in the United Kingdom. Its impact, purport and purpose are perceived from the preamble to the Act:

25 “An Act to protect the rights of consumers, address the interests and needs of consumers, establish a Consumer Protection Council, provide an effective redress mechanisms for consumer claims and provide for other matters incidental thereto or connected therewith.”

Section 3 of the Consumer Protection Act provides for consumer rights:

“Consumers shall be entitled to the following rights—

(a) the protection of their economic interest, health and safety in the consumption of technology, goods and services;

5 *(b) true, sufficient, clear and timely consumer education including information on technology, goods and services offered, as well as on prices, characteristics, quality and risks that may be encountered in the consumption of the technology, goods and services;*

(c) fair and non-discriminatory treatment by a supplier or trader of technology, goods and services;

10 *(d) full, timely, adequate and prompt compensation for damages suffered by a consumer which, pursuant to the provisions of this Act or any other written law or other special or general contractual obligations, are attributed to a supplier or trader;*

15 *(e) the freedom and right to associate and join or form consumer unions or associations;*

(f) access to the appropriate or competent authorities for the protection of their legitimate rights; and

(g) any other rights, freedoms, entitlements and interests incidental to or which would facilitate the enjoyment of the foregoing rights.”

20

Section 6 of the Consumer Protection Act provides for a supplier’s obligations:

“(1) A supplier or trader of technology, goods or services shall—

(a) take necessary and appropriate measures concerning technology, goods or services he provides for the prevention of danger;

25 *(b) ensure correct ingredients, measures or weights and give proper indications of technology, goods or services, as the case may be;*

(c) ensure that imported technology, goods meet the Malawi Standards;

(d) cooperate with the Government or Local Authorities in the execution of policies relating to consumer protection;

- the
- (e) not supply technology, goods or services which can cause injury or harm to a consumer or the environment and which do not comply with Malawi Safety Standards;
 - (f) not engage in any unfair trade practices;
 - 5 (g) produce and show a business record, when requested to do so, to a member of the Council or a person duly authorized by the Council: Provided that a member of the Council or a person duly authorized by the Council shall on demand produce to the trader or supplier a valid identification; and
 - 10 (h) provide consumers with true, sufficient, clear and timely information on technology, goods or services that they offer.”

Section 7 of the Consumer Protection Act creates consumer responsibility:

15 “The consumer shall take the initiative to acquire the necessary knowledge of consumer life and endeavour to behave self-reliantly and rationally.”

Specifically, section 8 (3) of the Consumer Protection Act provides:

- 20 “Contractual clauses or stipulations shall have no effect where they purport to or in fact—
- (a) exempt, exclude, reduce or limit the responsibility or liability of a supplier or trader for a defect, deficiency, inadequacy or efficacy of any nature of the technology or goods supplied or the services rendered;
 - (b) imply a waiver of the rights, freedoms or liabilities vested in the consumer pursuant to this Act or any other written law and limit the exercise of the rights, freedoms and liberties of the consumer;
 - (c) place, shift or reverse the burden of proof against the consumer for a defect, deficiency, inadequacy or efficacy which is not immediately apparent to the consumer;

(d) authorize the supplier or trader to unilaterally cancel, repudiate or rescind
the contract except where this power is vested in the trader or supplier in
the case of postal or sample sales; or (e) create contractual terms and conditions,
which are unfair, unconscionable, inequitable, oppressive or unreasonable to
5 consumers or are actuated by bad faith.”

Section 8 (3) (a) of the Consumer Protection Act invalidates these clauses and,
therefore, the respondent has no protection under them. There is no doubt that the
respondent is a supplier. Section 2 of the Consumer Protection Act provides:

10 ““supplier” in relation to a service or technology, includes a person who performs a
service or transfers technology and a person who arranges the performance of a service
or the transfer of technology, goods or services to another person ...”

Section 2 of the Consumer Protection Act defines a defect:

15 “defect” means any fault, imperfection or shortcoming in the, quantity, potency, purity
or standard which is required to be maintained by or under this Act or any other written
law in relation to any goods ...”

The section restricts the definition to goods. The section does not relate the definition to
services. Yet, in section 8 (3) (a) of the Consumer Protection Act the word ‘defect’ relates to
20 services too. The definition must relate to services from the general tenor of the Act and its
overall policy as adumbrated in the preamble to the Act. Moreover, the Act talks about
deficiencies about the manner of performing services. Section 2 defines a deficiency:

25 “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality,
nature and manner of performance which is required to be maintained by this Act or
under any written law for the time being in force or has been undertaken to be
performed by a person in pursuance of a contract or otherwise in relation to any service ...”

The manner, therefore, in which services are performed or rendered cannot be excluded under limitation clauses. Unlike the definition of 'defect' in section 2 of the Consumer Protection Act, the deficiency is not restricted to standards or quality 'maintained by this Act or under any written law'. The deficiency can be for anything that 'has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.' The words 'inadequacy or efficacy' are broad enough to cover all aspects of quality, manner and mode of performing services.

Section 8 (3) of the Consumer Protection Act proscribes all terms in a contract which are "unfair, unconscionable, inequitable, oppressive or unreasonable to consumers or are actuated by bad faith." This clause offends both aspects.

Counsel and the Court below never considered the Consumer Protection Act

The Consumer Protection Act, oblivious to both Counsel and the court below, was not raised in the court below. It is not raised directly in the grounds of appeal and, as we see later, it never should be raised in the grounds of appeal. There is, however, the general issue of exclusion clauses that the court below and the respondent relied on. Indeed, in my review notes, before the hearing, I had it recorded but because of much exchange in the appeal hearing never raised it. As I wrote the judgment which I circulated within hours after the hearing, it occurred to me that I could have counsel address the court on the matter *suo motu*. It was, however, clear in principle that failure by counsel to raise and failure by the court below to consider the Consumer Protection Act, is not fatal to the judgment which this Court must make based on that the Consumer Protection Act nullifies such exclusion clauses.

Distinction between raising an issue or ground not raised and addressing a point of law not raised by the parties or court below

There is a distinction between a court trying to address a point of law (not canvassed by the parties) to buttress the judgment and raising a new matter or issue or ground *suo motu*. There is an obligation on the former for parties to address the court; there is no such obligation on the latter. *T.B. Orugbe and Others v Bulara Una and Others* [2002] 13 SCSM 153 was a decision of the Supreme Court of Nigeria and, like other decisions from other jurisdictions,

therefore, only persuasive in our court. This Court, however, finds the principles in this case and indeed others from other jurisdictions impeccable and adopts them. Tobi, JA, who gave the lead judgment, in a long passage which, for its profundity on the matter under consideration, I quote extensively, said;

5 *"With respect, the case cited by the Court below is not relevant. In Ajuwon, the Court of Appeal raised for the first time the issue of doctrine of lis pendens suo motu in its judgment on which no issue was found by the parties either in their pleadings or in their brief of argument. This is a totally different matter from the one we have in this appeal. There is a world of difference in our adjectival law between the court citing an authority*
10 *to buttress or back up its arguments in the judgment and the court raising an issue suo motu which was not raised by the parties."*

American jurisprudence also makes the distinction (*Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382-83 (1995); *Stevens v Department of Treasury* 500 US 1, 8; *Virginia Bank Shares, Inc v Sandberg*, 501 US 1083, 1099see also the remarks of Justice Scalia in *US v Williams* 504 US 36, 41)); and *Kamen v Kemper Financial Services Ltd*, 500 US 90. In *United States of America v Weyne*, United States Supreme Court for the Ninth Circuit, 2009, the United States Supreme Court said: "Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon" Where the matter, like the exclusion clause has been decided by the High Court, this
20 court, on review of the judgment, can decide on it.

In the United States, following remarks in *Lebron v National Road Passenger Corporation*, courts have felt very free to regard any or any number of new arguments or theories engendered by the claim before the courts (See generally Justice O' Connor's remarks in *Yee v City of Escondido, California*, 503, 533-537. In *United States Nat'l Bank of Ore. v. Independent Ins. Agents* (92-484), 508 U.S. 439 (1993), Souter, J., delivering the opinion for a
25 unanimous Court, said:

"There is no doubt, however, that from the start respondents' suit was the "pursuance of an honest and actual antagonistic assertion of rights by one [party]

against another," *Muskrat v. United States*, 219 U.S. 346, 359, 31 S.Ct. 250, 255, 55 L.Ed. 246 (1911) (internal quotation marks and citation omitted), that "valuable legal rights . . . [would] be directly affected to a specific and substantial degree" by a decision on whether the Comptroller's ruling was proper and lawful, *Nashville, C. & St. L.R. Co. v. Wallace*, 288 U.S. 249, 262, 53 S.Ct. 345, 347, 77L.Ed. 730 (1933), and that the Court of Appeals therefore had before it a real case and controversy extending to that issue. Though the parties did not lock horns over the status of section 92, they did clash over whether the Comptroller properly relied on section 92 as authority for his ruling, and "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. ----, ----, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991), even where the proper construction is that a law does not govern because it is not in force. "The judicial Power" extends to cases "arising under . . . the Laws of the United States," Art. III, § 2, cl. 1, and a court properly asked to construe a law has the constitutional power to determine whether the law exists. Cf. *Cohens v. Virginia*, 19 U.S. (6 Whea.) 264, 405, 5 L.Ed. 257 (1821) ("[I]f, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend") (Marshall, C.J.). The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory."

In the court below and in the grounds of appeal and response to the appeal there is unmistakable reliance on applicability of the exclusion clause. The issue or ground based on the exclusion clause was properly and live before the court below and in this court. The appellant contends that the limitation or exclusion clauses do not apply because they were not brought to his attention. The respondent thinks contrariwise. The general issue here is therefore whether the respondents should rely on it. If the appellant contends that the clauses do not

apply to it for reasons given, a court's assertion that they are excluded by virtue of the Consumer Protection Act just reinforces the court's judgment. It is not introducing a new matter. The court is just citing another authority, a statute, to buttress its judgment. The court is not raising a matter *suo motu*: the court is only applying the law.

5

The Supreme Court of Appeal can decide a matter on authorities not cited by parties or considered by the court below

The case of *T.B. Orugbe and Others v Bulara Una and Other* judgment is equally
10 persuasive on the further point it makes, namely, that a court of law is not restricted to the authorities, statutory or otherwise, cited by the parties. Parties may overlook authorities by oversight or deliberately. It would be incommittant with a court's duty to do justice to ignore clear laws that, oblivious to counsel or the court below, determine the matter between the parties:

15

"A court of law has no legal duty to confine itself only to authorities cited by the parties. It can, in an effort to improve its judgment, rely on authorities not cited by the parties."

20 In *United States Nat'l Bank of Ore. v. Independent Ins. Agents* (92-484), 508 U.S. 439 (1993), Souter, J., continued:

"The judicial Power" extends to cases "arising under . . . the Laws of the United States," Art. III, § 2, cl. 1, and a court properly asked to construe a law has the constitutional power to determine whether the law exists. Cf. Cohens v. Virginia, 19 U.S. (6 Whea.) 264, 405, 5 L.Ed. 257 (1821) ("[I]f, in any controversy depending in a court,
25 *the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend") (Marshall, C.J.). The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of*

Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.”

Consequently, the court can recourse any authority, statute or judicial opinion, which is determinative. In so doing, it is not breaching principles of natural justice:

5

“Historical books or whatever books are authorities and the Koko District Customary Court was free to make use of them in its judgment. That per se is not breach of fair hearing; not even the twin rules of natural justice.”

10

A court, therefore, can delve any legal source to assist disposing of the matter without notifying parties about what authority source it is going to use; a court is under no duty to inform counsel of the authorities, cases, statutes it is going to use:

15

“In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by natives as a legal authority are relevant.

20

Section 73(1) of the Evidence Act, Cap. 62, provided for instances where the court can take judicial notice of facts. Section 73(2) provided that in all cases referred to in Section 73(1) and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. The subsection empowers the court to unilaterally seek aid from appropriate books or documents. The court is under no duty to give notice to the parties that it intends to use a particular book, that will be a ridiculous situation. See generally Suberu v.

25

Sunmonu (1957) 2 FSC 33; Oyekan v. Adele (1957) 1 WLR 876; Balogun v. Oshodi (1929) 10 NLR 50.”

The duty of the court is to circumscribe the facts and apply the law

The facts before the court are that there was contract with an exclusion clause. The appellant did not plead illegality of the contract. The appellant could not have pleaded illegality since it was the very contract relied on. Apart from requirement that the statute of Limitation and Fraud must be pleaded, there is no requirement to plead law. Facts, however, must be
5 pleaded. The contract, therefore, was evidence in itself on which the court below could have drawn inferences. This court under Order III, rule (1) of the Supreme Court of Appeal Rules proceeds by way of rehearing. This court can, therefore, draw inferences on it. The contract *ex facie* has an illegal clause under the Consumer Protection Act. On the face of it, based on section 8 of the Consumer Protection Act, such a clause is unlawful and this court can so find.
10 When it does that it, even though parties never addressed it, the court is not acting *suo motu*. It is doing exactly what courts do, finding the facts and applying the law to those facts. In *Ikenta Best (Nig) v. A-G., Rivers State* (2008) 2 SCNJ 182, Niki Tobi, J.S.C said:

“A court can only be accused of raising an issue, matter or fact *suo motu*, if the issue,
15 matter or fact did not exist in the litigation. A court cannot be accused of raising an issue, matter or fact *suo motu* if the issue, matter or fact exists in the litigation. A judge, by the nature of his adjudicatory functions, can draw inferences from stated facts in a case and by such inferences; the judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are introduced *suo motu*.”

20

The contract and the exclusion clause exist in the litigation. They are not new issues. Inferring that the exclusion clause is, under section 8 of the Consumer Protection Act, unlawful cannot be considered introducing a matter *suo motu*. The Zambian Supreme Court in *Mumba v Lungu* [2014] ZMSC 110, a case I return to for a further point later, is like minded. There the
25 Supreme Court of Appeal determined that the issue in contention was in the affidavits in the court and the court was, therefore, in regarding the matter, not introducing a new matter *suo motu*.

The court will take judicial notice of an illegality on the face of a contract

Moreover, there is no duty on the court to address parties on matters which a court must take judicial notice of. Generally, illegality needs to be pleaded only if it is not *ex facie*. For if it is *ex facie*, the court will take judicial notice of it, even not pleaded. In such a case, if the illegality goes to the substance of the matter, it is unnecessary for the court to raise the matter
5 between the parties. In *Federal Board of Inland Revenue v Halliburton (WA) Limited* (2014) LPELR-24230(CA, the Nigerian Court of Appeal, dealing with the situation where illegality is relevant, stated:

“Although the issue of illegality of the transaction was taken and resolved suo
motu by the Body, its resolution had nothing to do with the substance of the dispute. The
10 fact that the respondent was not heard on it was immaterial, as it did not dwell on the
crux of the dispute (liability to tax) and could not have amounted to denial of fair hearing as
to have caused miscarriage of justice to the respondent who was in no way adversely
affected by it, therefore the court below was wrong to have preoccupied itself with the
issue which was not decisive to the dispute between the parties. (See, *The Registered*
15 *Trustees of the Rosicrucian Order AMORC (Nigeria) v. Awoniyi and Ors* 21 (1994) 7 - 8
SCNJ 390, *Leaders and Co Ltd v Bamaiyi* (2010) 18 NWLR (pt.1225) at 341, *Ogembe v*
Usman (2011) 17 NWLR (pt.1277) 638 at 656.”

The Court of appeal then considered the situation where the illegality goes to the crux of the matter and it is *ex facie*:

20 “It was also held by the Court in the case of *S.D.C. Cem. (Nig) Ltd. v. Nagel and Co. Ltd.* (*supra*) per Ogbuagu, J.C.A., (later J.S.C.), that a court or an adjudicating body can take judicial notice of a transaction that is *ex facie* illegal in these words - "It seems to me that it is only when the contract *ex facie* is found to be illegal, that it does not matter whether illegality has been pleaded or not. This is because, it will be a point of law
25 that can be raised by either the parties, or the court suo motu. The court will take
judicial notice of it, if it appears on the face of the contract.” See *Young v. Mayor of Leemington* (1882) 3 Q.B. 575 and *Mellis v. Shirley Local Board* 16 Q.B.D, 446 referred to in
the case of *Lagos State Dev. & Property Corp. v. Adold/Stamm International (Nig) Ltd.* (1994) 7 NWLR (Pt.358) 545, (1994) 7 SCNJ (Pt.111) 625 at 644 - 645". See again the

cases of Adesanya v. Otuewu (1993) 1 NWLR (pt.270) 414 at 453 (para F), Fasel Services Ltd. v. N.P.A. (2009) 4 SCNJ 242 at 255 or (2009) 4 - 5 SC (pt. 111) 101 at 23 118 per the lead Judgment of Mohammed, J.S.C. (now C.J.N.), Ajayi v. Total Nigeria Plc. (2013) 15 NWLR (pt.1378) 423 at 427.”

5 There is no need, therefore, while illegality is *ex facie* on the contract, to have the court addressed on the matter

A court's duty to raise an issue suo motu and need to be addressed by the parties

A court, moreover, has power to raise any matter *suo motu* if it is necessary to determine the matter between the parties provided that the parties, when called upon, address
10 it on the matter; failure to ask parties to address the court on the matter may be a miscarriage of justice (*Dalek Nig Ltd v Oil Mineral Producing Development Commission (OMPADEC) (2007) 2 SCNJ 218; Lamuratu Shasi and Another v Madam Shadia Smith (2009) SC (Part III) 1; Sunday Gbargha v Adukumo Toruemi and another (2012) 12 (Pt. V) 54; F.A.Akinbola v Plisson Fisko Nigeria Ltd and 2 others (1991) 1 SC (Part II) 1; Ibrahim v Judicial Service Commission (1998) 12*
15 *SCNJ 272; Okafor v Nnaife 91972) 3 ECLSR (Pt 99) 566; Mohammad Juwo v Alhaj Shehu and another 10 SCNJ 26; African Continental Bank v Losada Nigeria Ltd and another (1995) 7 SCNJ 158). The court must hear both parties (Leaders & Company Ltd (Publishers of “this Day” v Major General Musa Bamaiyi (2010) 12 SC (Part IV) 55; more especially the one adversely affected by the decision (ibidem; Alli v Asesonloye (2004) 4 SCNJ 264; Gbadamosi Adigoke v*
20 *Chief Natnaniel Agboola Adibi and another (1992) 6 SCNJ 136; Bola Tinubu v L.M.B. Securities Plc (2001) 12 SCM; and Ajuwonni v Akanni 1993) 12 SCNJ 32). The court will reverse a decision based on a matter taken by the court suo motu if the matter is substantial and has occasioned a failure of justice; not all matter suffice (ibidem).Where the matter raised suo motu goes to the root of the matter parties must be heard on the matter (The State v Moshood Oladimeji (2003)*
25 *11 SCM 121). Moreover, from American jurisprudence, a court has jurisdiction to hear matters raised de novo on appeal. Courts do so when there has been a change in the law (Patterson, 294 U.S. 607) by statute (Forshey v. Principi, 284 F.3d 1335, 1355-56 (Fed. Cir. 2002); Landgraf v. Usi Film Prods., 511 U.S. 244, 270 (1994) and clear judicial decisions (Forshey, 284 F.3d at*

1356; *Kattan v. Dist. of Columbia*, 995 F.2d 274, 277 (D.C. Cir. 1993)); Miller, *supra* note 1, at 1300).

Instances where a court need not raise a matter suo motu and require parties to address it

It is, however, not necessary to hear counsel in three instances raised by the Nigerian Supreme Court in *Korede v Adedokum and another* (2001) 11 SCM and *Gbagbarigha v. Toruemi and Another* (2013) 31 WRN 35 at 51 - 52; *Comptier Commission v Ogun State Water Corporation and Anor* (2002) 7 SCM 43, *Victino Fixed Odds Ltd v Joseph Ojo and Ors* (2010) 3 SC (pt.1) 1; *Federal Board of Inland Revenue v Halliburton (WA) Limited* (2014) LPELR-24230(CA). First, is the instance where a court's jurisdiction is being considered. The position is the same on this point in Malawi (*Mulli Brothers Ltd v Malawi Savings Bank Ltd (No 2)* (2014) Civil Appeal No 48 (MSCA) 9 unreported) and the United States *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1379-80 (Fed. Cir. 2008); *Mitchell v. Forsyth*, 472 U.S. 511(1985). Secondly, are instances where on the face of the record fairness questions occur (*Turner v. City of Memphis*, 369 U.S. 350, 557 (1962)); *Hormel*, 312 U.S. 552) These two instances do not arise here. The third instance occurs here: where parties were unaware or ignored a statute which may have a bearing on the case. In *Omokuwajo v. F.R.N.* (2013) 9 NWLR (pt.1359) 300 at 332, Rhodes-Vivour, J.S.C. said,

"The need to give the parties a hearing when a Judge raises an issue on his own motion or suo motu would not be necessary if: (a) the issue relates to the courts own jurisdiction. (b) both parties are/were not aware or ignored a statute which may have bearing on the case. That is to say, where by virtue of statutory provision the judge is expected to take judicial notice. See Section 73 of the Evidence Act. (c) when on the face of the record serious questions of the fairness of the proceedings is evident".

In this matter clearly, the court below and the parties in the court below were operating *per incuriam* the Consumer Protection Act 2003. Under section 3 of the General Interpretation Act courts are required to take judicial notice of the Consumer Protection Act. Although, therefore, I overlooked raising it, raising the matter was only prudent; it is unnecessary to raise a statute or ruling precedent which a court must take judicial notice and apply as law.

A distinction must be made between grounds of appeal and legal arguments or law in support of the grounds

A distinction must be made between grounds of appeal which are a general statement on the basis on which the appeal will lie and the arguments supporting that ground. This
5 distinction, as we see later, is made by Order 3, rule 6 (2) of the Supreme Court of Appeal Rules. The latter may be on the facts and the law. The court is not bound by the latter at all. Consequently, the court may reject the law advanced in the argument and precisely because counsel submissions, as happened in this case, are not portraying the law. In *Kamen v Kemper Financial Services, Inc et al*, 500 US 90, 99, in the Supreme Court of the United States, Marshall,
10 JA, said:

“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”

In this matter, the contract and the limitation clauses were in the evidence and the issue
15 between the parties. The court below and Counsel on both sides in the court below and also in this court were obviously oblivious to the Consumer Protection Act and only advanced arguments on whether there was notice of the limitation clauses. They did not raise the Consumer Protection Act. This court, therefore, is under a duty to correct the error. It cannot refuse to apply what the law is just because Counsel never raised it. Counsel learns the (correct)
20 law from the Courts. Lower courts learn the correct law from this court. Courts will consider points not raised by parties or previous hearings to avoid erring on the law. There are four statements in the judgment of Justice Marshall in *Kamen v Kemper Financial Services, Inc* 500 US 90 that are informative.

25 In the first he asserts, correctly, in my opinion, that failure to raise the law affecting an issue should not be construed as waiver because the court is not bound by what parties submit to be the law covering a point:

5 “Defending the reasoning of the Court of Appeals, KFS argues that petitioner waived her right to the application of anything other than a uniform federal rule of demand because she failed to advert to state law until her reply brief in the proceedings below. We disagree. When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. See, e.g., *Arcadia v Ohio Power Co.*, 498 U.S. 73, 111 S. Ct. 415, 418, 112 L.Ed.2D 374 (1990).”

10 Secondly, he underlines the duty of the court to identify so that it can apply the correct law.
Listen to this:

15 “It is not disputed that petitioner effectively invoked federal common law as the basis of her right to forgo demand as futile. Having undertaken to decide this claim, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area. Cf. *Lamar v Micou*, 114 U.S. 218, 223, 5 S.Ct. 857, 859, 29 L.Ed. 94 (1885) (“The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof”);
20 *Bowen v Johnston*, 306 U.S. 19, 23, 59 S.Ct. 442, 444, 83 L.Ed. 455(1939). ”

In the third statement he asserts clearly that a court will do this despite that the parties never raised it:

25 “Indeed, we note that the Court of Appeals viewed itself as free to adopt the American Law Institute’s universal-demand rule even though neither party addressed whether the futility exception should be abolished as a matter of federal common law.”

In the fourth, the judge reiterates that if the court did not apply the statute the decision would be based on 'truncated' law, something that should not happen, a court must apply the prevailing law :

5 *"We do not mean to suggest that a court of appeals should not treat an unasserted*
claim as waived or that the court has no discretion to deny a party the benefit of favourable
legal authorities when the party fails to comply with reasonable local rules on the timely
presentation of arguments. See generally Singleton v Wulff, 428 U.S. 106, 121, 96 S.Ct.
2868, 2877, 49 L.Ed.2d 826 (1976). Nonetheless, if a court undertakes to sanction a
10 *litigant by deciding an effectively raised claim according to a truncated body of law, the*
court should refrain from issuing an opinion that could reasonably be understood by
lower courts and non parties to establish binding circuit precedent on the issue decided."

Besides counsel on both sides are, rightly called counsel, in that they advise the judge on
15 what the law is. If they do not live up to that responsibility, a court will and must not fall in
error. In this regard, even if the appellant's counsel never raised the appropriate law, there
was duty on the respondent's counsel to draw the court's attention to it. Where both falter, the
court must nevertheless identify the correct law and apply it.

20 The court in turn is under a duty to apply what the law is; it cannot apply anything else.
Here there is a statute, overlooked by the parties and the court below. While a court on appeal
will generally shun issues not covered in a trial; a court will, as a matter of course, determine
matters of law which go to the justice of the matter. In *McGinnis v Ingram Equipment Co., Inc.*
918 F.2d 1491, 1495-96 (11th Cir. 1990)), Cox J said:

25 *"A general principle of appellate review is that an appellate court will not consider*
issues not presented to the trial court."[J]udicial economy is served and prejudice is
avoided by binding the parties to the theories argued below." *Higginbotham v. Ford*
Motor Co., 540 F.2d 762, 768 n. 10 (5th Cir. 1976). We may, however, in the exercise

of our discretion consider issues not preserved in the trial court "when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice." *Martinez v. Mathews*, 544 F.2d 1233,1237 (5th Cir. 1976); see also *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 928 (11th Cir. 1990)."

5 Cox, J., continued, stressing the duty of the court to apply the law as it is at the time of the judgment;

"We acknowledge the general principle that an appellate court should apply the law in effect at the time it renders its decision. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *Jones v. Preuit & Mauldin*, 876 F.2d 1480, 1483 (11th Cir.1989) (*en banc*)."

Cox J then differentiates between raising new issues or arguments which is not allowed and introducing new areas of law which must be allowed:

15 "Here we confront new arguments and issues not presented until a late stage of the proceedings, rather than simply new law that could be applied to arguments already developed. A party normally waives its right to argue issues not raised in its initial brief. See *FSLIC v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir.1987); *Rogero v. Noone*, 704 F.2d 518, 520 n. 1 (11th Cir.1983)."

20 On these principles, courts, therefore, will, even if parties never raise the issues either in the grounds or submissions and all arguments, consider questions of law where the principles of law are connected or intertwined. In *City of Sherrill v Oneida Indian Nation of Ney York*, 544 US 197, 214:

25 "We resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus "fairly included" within, the questions presented."

There is an unassailable connection and intertwining concerning exclusion or limitation clauses in a contract between the question whether such clauses are lawful and whether they were

properly communicated or part of a contract. The latter question is irrelevant where, as the Consumer Protection Act suggests, such clauses are unlawful.

Apart from this, authoritative works suggest, correctly in my judgment, that once a general question has been raised, a court will, without address from the parties, consider all subsidiary questions:

“Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.” (R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002).”

The questions whether there was sufficient notice of the exclusion or limitation clauses is closely connected to whether these clauses are lawful and permissible under the Consumer Protection Act. The latter is, in the words of Dyk, J in Pfizer, Inc, v Teva Pharms USA, Inc F.3d 1353,1359, predicative and essential to resolution of the issue in a case:

“The district court declined to consider this issue below on the ground that it had been raised too late in the proceedings. We need not address the propriety of the district court's refusal to consider this issue because we may properly decide the issue, even if not raised below, since the issue of whether section 121 applies to CIPs is a predicate legal issue necessary to a resolution of the issues before the court. See Kamen v. Kemper Fin. Servs., Inc.,500 U.S. 90, 99,111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); Forshey v. Principi, 284 F.3d 1335,1356 (Fed. Cir. 2002) (en banc) superseded by statute on other grounds, as recognized in Morgan v. Principi, 327 F.3d 1357 (Fed.Cir.2003). Also, we see no basis for the claim that Pfizer was somehow prejudiced by Teva's failure to raise this purely legal issue earlier in the proceeding. We also conclude that Teva adequately raised the issue on appeal in its “Statement of Issues.”

Moreover, even if not raised by parties, a court will regard a statutory provision when it, like the Consumer Protection Act in this case, is ultimately dispositive of the matter. In *Yesudian, ex rel,United States of America v Howard University, et al.*, decided 13 November

2001, Williams J, following *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.* 508 U.S. 439 (1993) said:

5 *“Yesudian invokes another theory of forfeiture, arguing that Parker abandoned the argument by failing to raise it in the district court before the first appeal, and then failing to present it on that appeal. See Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 738-41 (D.C. Cir. 1995). But any forfeiture from failure to raise an issue in an initial appeal is far from absolute, especially where, as here, the party failing to*
10 *present the issue was the appellee, defending on a field of battle defined by the appellant. Id. at 740-41. Moreover, the "antecedent" and "dispositive" character of the statutory issue, United States National Bank of Oregon, 508 U.S. at 447, here too militates against forfeiture.”*

15 Equally, a court will consider matters, in this case the exclusion or limitation clause, not raised by parties where they are ‘necessary to the resolution of other issues directly before it on appeal.’ In *Cordis Corporation v Boston Science Corporation*, 658 F.3d 1347, 1359, Gajarsa, J said:

20 *“In its Corrected Reply Brief in Cordis II, Cordis stated that “the '312 patent is not being asserted by Cordis and its enforceability is not the subject of this appeal. This appeal concerns a different and separate patent—the '370 patent.” Cordis Cordis II Corrected Reply Br. 1. BSC correctly suggests that this statement constitutes a waiver by Cordis of any challenge to the district court's finding in Cordis I that the ' 312 patent is*
25 *unenforceable. BSC Br. 47-48. BSC errs, however, in concluding that the waiver rendered the associated judgment unreviewable.”*

This court properly reaches “waived” issues when they are necessary to the resolution of other issues directly before it on appeal (*Pfizer, Inc. v Teva Pharms. USA, Inc.*, 518 F.3d 1353, 1359 n. 5 (Fed.Cir.2008); *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1244-

45(Fed.Cir.2007); see also U.S. Supreme Ct. Rule 14.1(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”). Applied here, we conclude that the enforceability of the '312 patent was necessarily before this court in *Cordis II*.”

5 In *Kolstad v American Dental Association*, 527 US 526, 540, Stevens J said”

“This issue is intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award, and it is easily subsumed within the question on which we granted certiorari—namely, “[i]n what circumstances may
10 punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?” Pet. for Cert. i; see also this Court's Rule 14.1(a). “On a number of occasions, this Court has considered issues waived by the parties
below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered ‘fairly subsumed’ by the actual questions
15 presented.” *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U. S. 20, 37 (1991) (STEVENS, J., dissenting) (citing cases). The Court has not always confined itself to the set of issues addressed by the parties. See, e. g., *Steel Co.v. Citizens for Better Environment*, 523 U. S. 83, 93-102, and n. 1 (1998); *H. J. Inc. v. Northwestern Bell Telephone Co.*,492 U. S. 229, 243-249 (1989); *Continental Ill. Nat. Bank & Trust Co. v. Chicago R. 1. & P. R. Co.*, 294 U. S. 648, 667-675 (1935). Here, moreover,
20 limitations on the extent to which principals may be liable in punitive damages for the torts of their agents was the subject of discussion by both the en bane majority and dissent, see 139 F. 3d, at 968; *id.*, at 974 (Tatel, J., dissenting), *amicus*”

This court, like the court below, is duty bound to take judicial notice of legislation.
25 Section 3 of the General Interpretation Act provides that “Every Act enacted by Parliament shall be a public Act and shall be judicially noticed as such.” Equally a court is bound to take judicial notice of judicial decisions. In *Kamen v Kemper Financial Services, Inc et al*, 500 US 90, 99, in the Supreme Court of the United States, Marshall, JA, continued:

“The law of any State of the Union, whether depending upon statutes or judicial opinions, is a matter of which the courts of United States are bound to take judicial notice, without plea and proof.”

The only decision on this matter after the Consumer Protection Act 2003 is *Hashmi v DHL Express*. That decision was *per incuriam* the Consumer Protection Act. It is not binding on the court below and is not, therefore, persuasive in this court. This court and the court below must, certainly, take judicial notice of a statute, namely, the Consumer Protection Act.

The court must then apply the correct law. A court under section 3 of the General Interpretation Act must take judicial notice of a statute and when it does it is duty bound to apply it even if parties never raised it. In *Patterson v State of Alabama* 294 US 600, 606, Hughes, C.J., in the Supreme Court of the United States:

“We have frequently heard that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgement under review but to make such disposition of the case as justice requires. And in determining what justice does require the court is bound to consider any change either in fact or law, which has supervened since the judgement was entered. We may recognize such a change, which may affect the result by setting aside the judgement and remanding the case so that the court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a none federal question, but only to deal appropriately with the matter arising since judgement having a bearing upon the right disposition of the case. ”

The duty of the court on appeal to apply the law as it is at the time of the judgment

At the time of the judgment of the court below, the laws was not as the cases, some with assistance from Counsel, your Lordships and I cited. The law changed dramatically in 2003 with the Consumer Protections Act. This court, like the court below, is duty bound to apply the law as it is and was at the time (*Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473,486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981); *Bradley v. School Bd. of Richmond*, 416 U.S. 696,

711,94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); Jones v. Preuit Mauldin, 876 F.2d 1480, 1483(11th Cir. 1989) (en banc). In *McGinnis v. Ingram Equip. Co.* (p. 1496) Cox, J said:

"We acknowledge the general principle that an appellate court should apply the law in effect at the time it renders its decision."

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A court, therefore, has a constitutional duty to discover if a law exists and, if the law exists, to apply it. It would be an obligation of duty if a court were to desist from this duty because the parties overlooked the law or agreed on it. There cannot be estoppel to ascertaining the law. In *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.* 508 U.S. 439 (1993) SOUTER, J., delivering the opinion for a unanimous Court, said :

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*"There is no doubt, however, that from the start respondents' suit was the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another," Muskrat v. United States, 219 U. S. 346, 359 (1911) (internal quotation marks and citation omitted), that "valuable legal rights ... [would] be directly affected to a specific and substantial degree" by a decision on whether the Comptroller's ruling was proper and lawful, Nashville, C. & St. L. R. Co.v Wallace, 288 U. S. 249, 262 (1933), and that the Court of Appeals therefore had before it a real case and controversy extending to that issue. Though the parties did not lock horns over the status of section 92, they did clash over whether the Comptroller properly relied on section 92 as authority for his ruling, and "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," Kamen v. Kemper Financial Services, Inc., 500 U. S. 90, 99 (1991), even where the proper construction is that a law does not govern because it is not in force. "The judicial Power" extends to cases "arising under ... the Laws of the United States," Art. III, § 2, cl. 1, and a court properly asked to construe a law has the constitutional power to determine whether the law exists, cf. *Cohens v. Virginia*, 6 Wheat. 264, 405 (1821) ("[I]f, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the*

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constitution, to which the judicial power of the United States would extend") (Marshall, C. J.).
The contrary conclusion would permit litigants, by agreeing on the legal issue
presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious
constitutional principles, an opinion that would be difficult to characterize as anything
5 but advisory."

Souter J., continued

Nor did prudence oblige the Court of Appeals to treat the unasserted argument that
section 92 had been repealed as having been waived. Respondents argued
from the start, as we noted, that section 92 was not authority for the Comptroller's ruling,
10 and a court may consider an issue "antecedent to ... and ultimately dispositive of" the
dispute before it, even an issue the parties fail to identify and brief. *Arcadia v. Ohio
Power Co.*, 498 U. S. 73, 77 (1990); cf. *Cardinal Chemical Co. v. Morton Int'l, Inc.*, ante, at 88-89,
n. 9 (addressing a legal question as to which the parties agreed on the answer). The
omission of section 92 from the United States Code, moreover, along with the codifiers'
15 indication that the provision had been repealed, created honest doubt about whether
section 92 existed as law, and a court "need not render judgment on the basis
of a rule of law whose nonexistence is apparent on the face of things, simply because the
parties agree upon it." *United States v. Burke*, 504 U. S. 229, 246 (1992) (SCALIA, J.,
concurring in judgment). While the Bank says that by initially accepting the widespread
20 assumption that section 92 remains in force, respondents forfeited their right to have the
Court of Appeals consider whether the law exists, "[t]here can be no estoppel in the way of
ascertaining the existence of a law," *South Ottawa v. Perkins*, 94 U. S. 260, 267 (1877"

It sounds odd to think that a court then cannot apply statutes, already in existences,
that are overlooked by Counsel or the court below. The Supreme Court of Zambia in *Mumba v*
25 *Lungu* first considers the matter which, in relation to this case, can only be analogous: the
situation where parties themselves want, may be for the first time to raise an issue on appeal.
It is important to note that the statement relates to two aspects: the matter is raised by the

parties (not the court); and the parties are raising an issue or matter (not the law). The Supreme Court of Zambia said:

“As regards the first issue in limine, we accept as correct, the submission by Mr. Lungu that a party cannot raise, on appeal, any issue that was not raised in the lower Court. We have not departed, nor do we intend to depart, from the guidance we gave in the case of **Buchman v. Attorney General**⁴, which Mr. Lungu referred to namely that: “[a] matter not raised in the lower court cannot be raised in a higher court as a ground of appeal.” That guidance was reiterated in **Mususu Kalenga Building Limited and another v. Richman’s Money Lender’s Enterprises**⁵, to which, again, the learned counsel rightfully referred. The reason for this position in our view, is that in an adversarial system of justice, such as obtains in this country, it is generally considered fair to afford the opposing party an opportunity to respond to every issue raised. Furthermore, we are loath to reverse a lower court based on an issue that the trial court has not ruled upon.”

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The Supreme Court of Zambia, however, is adamant that the principle does not apply where the matter raised, which is on the record of the court, is a matter of law and it, not the parties, raises it. The Supreme Court of Appeal said:

20 “This court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected ...”

A court on appeal, based on *Wiborg v. United States*, 163 U.S. 632 (1896), will therefore, consider issues not pressed by parties “Where a plain error has been committed in a matter vital to defendants, this Court is at liberty to correct it, although the question may not be properly raised ...” In *United States v Marcus* 130 S.Ct. 2159, 2164, Justice Breyer, quoting *Puckett v United States*, 556 US 129, 142; *Johnson v United States*, 520 US. 725, 731-737; and *United States v Cotton*, 535 US 625, 631-632, said:

“And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an “error”; (2) the error is “clear or obvious, rather than subject to reasonable dispute”; (3) the error “affected the appellant’s substantial rights, which in the ordinary case means” it “affected the outcome of the district court proceedings”; and (4) “the error seriously affect[s] the fairness, integrity or public reputation of judicial proceed- 4 UNITED STATES v. MARCUS Opinion of the Court.”

Order 3, rule 2 of the Supreme Court of Appeal Rules

10 A statute, therefore, cannot be overlooked and failure to regard it is not saved by Order 3, rule 2 of the Supreme Court of Appeal Rules. Order 3, rule 2 (6) distinguishes as does American jurisprudence between grounds of appeal and arguments and narratives (United States jurisprudence makes a similar distinction Tory A. Weigand, Raise or Lose: ‘Appellate Discretion and Principled Decision-Making,’ 17 Suffolk J. Trial & App. Adv. 179 (2012); Barry A. Miller, ‘Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard,’ 39 San Diego L. Rev. 1253 (2002); Joan Steinman, ‘Appellate Courts as First Responders: the Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance,’ 87 Notre Dame L. Rev. 1521 (2012); Robert J. Martineau, ‘Considering New Issues on Appeal: The General Rule and the Gorilla Rule,’ 40 Vand. L. Rev. 1023 (1987); Amanda Frost, ‘The Limits of Advocacy,’ 59 Duke L.J. 447 (2009); Sarah M. R. Cravens, Involved Appellate Judging, 88 Marq. L. Rev. 251 (2004); Melissa M. Devine, ‘When the Courts Save Parties from Themselves: A Practitioner’s Guide to the Federal Circuit and the Court of International Trade). Order 3, rule 2 (1) of the Supreme Court of Appeal Rules provides for the need for grounds of appeal:

25 “ All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the Court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and

addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service. Civil Form 1”

In this matter the appeal was against the whole of the judgment. Order 3, rule 2 (2) of the Supreme Court of Appeal Rules provided the requirements where the ground is that of law.

“If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.”

In this case, concerning the limitation or exclusion clause, the ground stated that the exclusion clause should be disapplied against the appellant because of lack of notice of it. (...)

Order 3, rule 2 (3) requires that any ground, including a ground based on law to be set without arguments:

“The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.”

This requirement is consequential; the grounds of appeal based on law, therefore, are not supposed to cite the authorities, statutory or judicial opinions, a party will rely on in argument. Consequently, Order 3, rule 2 (6), which we consider later cannot, be applied to omissions of statutes or cases binding on a court at first instance that should not be in the grounds of appeal. Cases and statutes are not covered by the grounds of appeal. They are covered in briefs and submissions. Order 3, rule 6 does not apply to omissions in briefs or submissions or refers to omissions in the grounds of appeal. As we see shortly, there are decisions on matters not raised in briefs.

Order 3, rule 2 (5) of the Supreme Court of Appeal Rules limits the appellant, not the respondent or the court on appeal, to grounds not arguments or narratives raised in the grounds of appeal.

“The appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in

its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just.”

There is nothing in this rule of court restricting the respondent or the court from considering grounds that the appellant never raised. The restrictions are on the appellant. Restrictions on the respondent and the court, subject to what I say later, are in the general law. On the
5 contrary, for a court, as opposed to the respondent, there is no confinement. Order 3, rule 2 (6) of the Supreme Court of Appeal Rules provides:

“Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant ...”

10 This court, therefore, will consider any grounds raised by the respondent or by itself, notwithstanding that the appellant never raised them in the grounds of appeal. When a court does that, there is only one restriction according to the proviso to Order 3, rule 2 (6) of the Supreme Court of Appeal:

15 *“Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.”*

Order 3, rule 2 (6) of the Supreme Court of Appeal Rules does not prohibit this Court from considering grounds of appeal not raised by the appellant. Where, therefore, the ground not raised by the appellant does not result in allowing the appeal, the court may consider it and, at
20 that, even without hearing the respondent or appellant. This must be tautological as a matter of general principle and from Order 3, rule 2 (6) itself. Where considering the new ground, however, will result in allowing the appeal, there are two possibilities. First, a court may consider the point and not allow the appeal based on it. Secondly, if it does allow the appeal, it cannot be based on a ground not raised by the appellant without hearing the appellant. In the
25 latter case, this court can do four things. First, it can remit the matter to the court below for consideration. Secondly, under Order 3, rule ... of the Supreme Court of Appeal Rules, it can require the court below to clarify it for this court. Thirdly, the court can decline to allow the appeal, but pointing to the error. Fourthly, the court can under Order Order 3, rule 2 (4) amend

the grounds of appeal. Indeed, if the court is going to allow the appeal on a ground not advanced by the parties, the court must give the parties a chance to address it. It is important to note that Order 3, rule (2) deals with grounds of appeal, not laws per se. There is no requirement in Order 3, rule 2 (6) that a party must include in the grounds the statutes or cases supporting the appellant's case.

Order 3, rule 2 generally and rule 6 specifically deal with grounds of appeal and do not deal with the arguments or the authorities, statutes or judicial decisions, relied on by the appellant. Statutes and cases the appellant will rely on are not supposed to be in the notice of appeal let alone in the grounds of appeal. They are supposed to be in the briefs, submissions and skeleton arguments. Consequently, there is an obligation not only on the appellant but the respondent as well, as a matter of practice to file submissions or skeleton arguments. Courts, nevertheless, generally will not consider matters not raised by parties in their briefs or submissions (*Sanders v Village of Dixmoor*, 178 F.3d 869 (7th cir, 1999); *Hartman v Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1214 (7th cir. 1993); *United States v Zannino*, 895 F.2d 1, 17 (1st cir.1990); *Carduci v Regan*, 714 F.2d 171, 177 (D.C. Cir.1983); *United States v Dunkel*, 927 F.2d 955, 956 (7th Cir.1991); *AK Steel Corp v United States*, No. 98-1233, 1999 U.S. App. LEXIS 15023, AT *12 (Fed. Cir. 1992); *United States v Ford Motor Co.*, 463 F.3d 1267, 1276-77 (Fed. Cir. 2006); *Graphic Controls Corp. v Utah Med. Prods., Inc.*, 149 F.3d 1382, 1385 (Fed. Cir 1998); *Miller*, *supra* note 1, at 1268 (collecting cases)).

Even these principles are subject to the overarching principle that, irrespective of what parties have done or have not done, a court is duty bound to apply the law as it is at the time of the judgment whether in the court below or on appeal. Order 3, rule 2 (6) does not apply to submissions; it applies to grounds of appeal. Even if it did, it is subject to another more encompassing rule of court in the Supreme Court of Appeal Rules and subservient, as a rule of court, to a statute. Order 3, rule 26 provides:

"The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be

reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.”

It must be that this court on appeal, irrespective of whether a principle of law was raised or not raised by the appellant, the respondent, or court below, must deliver a judgment or decision which ought to have been delivered on the facts and the law. This court cannot abstain from its responsibility where, like here, a law passed by the legislature completely changes the law and the parties and the court below completely overlooked a statute that clearly resolves the matter before this court and the court below.

10 Order 3, rule 2 (6), as stated is a rule of court. So much so that if, it covers statutes and laws, which it, as already discussed does not, it is subservient to section 3 of the General Interpretation Act. This court, like the court below is duty bound to take judicial notice of legislation as such. This rule of court cannot under section 21 of the General Interpretation Act override section 3 of the General Interpretation Act. Section 21 (b) of the General
15 Interpretation Act provides:

*“Where any written law confers power on any person to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of subsidiary legislation ... no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect
20 to the extent of such inconsistency.”*

Where, therefore, section 3 of the Constitution requires the court to take judicial notice of legislation as such, Order 3, rule 2 (6) of the Supreme Court of Appeal Rules, if, as contended by a majority, empowers the court to overlook statutory provisions because parties or a lower court overlooked them, must be invalid to that extent. Order 3, rule 2 (6) cannot
25 oust any statute. Besides Order 3, rule 26 of the Supreme Court of Appeal referred to earlier, section 22 of the Supreme Court of Appeal Act gives this court plenipotentiary powers to do justice according to law. Section 22 of the Supreme Court of Appeal Act provides:

“On the hearing of an appeal from any judgment of the High Court in a civil matter, the Court ...shall have power to confirm, vary, amend, or set aside the judgment or give such Judgment as the case may require.”

My Lords, in this case, in 2003 the legislature passed a law which, in order to protect
5 consumers, proscribes exclusion for limitation clauses like ones the respondent relies on. The purpose of the Act is to protect consumers from the very things that happened here. It is important that the respondent in their contracts require a consumer to insure against such. Under the new law, it must be that service providers must adapt to and adopt new behavior by insisting that customers take out insurance against these vicissitudes before performing or
10 providing such services. On the law as it is, however, a service provider, as your Lordship's agree, cannot rely on such clauses any more. It sounds unusual, therefore, that your Lordships would not want to apply this law that benefits the appellant because, having raised the issue of exclusion clauses in the court below and the grounds of appeal, the Act, in your Lordship's perception, was not invoked in the grounds. There is no obligation to plead the law.
15 A defendant must plead illegality; the appellant was not a defendant. Moreover, this court is duty bound to correct errors of law in a judgment and must apply statutes, even if parties never raised them.

It is curious, though that your lordships, to strengthen your reasoning, cited decisions, binding and persuasive, and principles not raised by the parties. It is difficult to see where you
20 draw the line. If you entertained judicial decisions touching the matter, it must be that statutes can be similarly cited. In this case, your decision will be *per in curium* the Consumer Protection Act. More importantly, the appellant will be denied the justice that under the Act was available to the appellant.

I would, therefore, allow the appeal with cost to the appellant in the court below and
25 in this court.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 10 September 2015.

Signed:

HONOURABLE JUSTICE D.F. MWAUNGULU, JA