IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 108 OF 1989

BETWEEN:

FINANCE BANK OF MALAWI.....PLAINTIFF

-and-

BRIAN HANKS.....1ST DEFENDANT

-and-

THE ESTATE OF
ATHER HASAN SYED QUADRI.....2ND DEFENDANT

MATTHEWS CHINTHITI.....3RD DEFENDANT

R.E. BROWN AND OTHERS.....4TH DEFENDANT

CORAM: TEMBO, J

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Christie, of Counsel for the 4th Defendant

Magwira (Miss), Official Interpreter

RULING

Tembo, J. This is an appeal of the plaintiff against the decision of the learned Registrar, late Mr. Qoto, which he made on 30th August, 1999. The Registrar had heard and determined the summons of the 4th defendants which had been made under Ord. 14A - of the Rules of the Supreme Court(RSC).

By their summons, the 4th defendants, the underwriters, had asked the learned Registrar to determine a number of questions of law or construction. Thus without prejudice to the 4th defendants defences based on avoidance or otherwise:-

(1) Whether on a true and proper construction of the policy, the plaintiff is entitled to an indemnity from the underwriters pursuant to clause 2;

(2) If (contrary to the underwriter's case) it is held that the plaintiff is entitled to indemnity under insuring clause 2, whether any such right is excluded April 3, 2001from coverage under the policy by virtue of exclusion 4 (X);

(3) In so far that it is the plaintiff's case as set out in paragraphs 4, 27-29 inclusive of the Amended Statement of Claim that the First and Second defendants are entitled to indemnity from underwriters such a claim is excluded by virtue of exclusion 4(X) of the policy; and

(4) In the event that the plaintiff is not entitled to an indemnity from the underwriters pursuant to the policy, whether the plaintiff has any other right to proceed against the underwriters.

Let me, at this point, state the fact that the policy, under consideration, though it was arranged and issued in the United Kingdom, it has an overseas jurisdiction clause. By that clause, the Insurance Policy shall be governed by the Laws of Malawi and the courts in Malawi have jurisdiction in any dispute in relation to the Policy.

At the outset of the hearing, the learned Registrar had ruled that Questions 2 and 3 were unsuitable for determination under Order 14A of the RSC, in that those questions would involve the determination of evidence and facts which cannot be done without a full trial.

Eventually, the learned Registrar only determined question 1. His answer to the question was in the negative. Thus, that the plaintiff was not entitled to an indemnity from the underwriters pursuant to clause 2 of the policy. Having so decided or determined question 1, in the circumstances, the learned Registrar felt that it was unnecessary for him to also consider question 4.

The court has heard full oral arguments of counsel for and against the appeal. Besides that both sides have made written submissions on the issues involved in the appeal.

Order 58 r.1 appeal

At this stage, let me point out that the appeal is made pursuant to Order 58 r.1 of RSC. Such being the case, this appeal ought to be dealt with by way of an actual rehearing of the summons of the 4th defendants which led to the ruling or order under appeal. I have to treat the matter as though it had come before me for the first time. Be that as it may, the plaintiff, being the party appealing, even though the original summons was not by it but against it, had the right as well as the obligation to open the appeal. Besides the foregoing, I should give to the ruling of the learned Registrar the weight it deserves, although am not in any way bound by it: These are principles enunciated in the judgment of Lord Atkin in **Evans v Bartlam** (1937) A.C. 473, p. 478.

Order 14A application

It is expedient to expressly note that the summons of the 4th defendants was made under Order 14A of R.S.C. Let me make the following pertinent observations on conditions precedent to the evoking of the procedure under that Order. The court may upon the application of a party determine any question of law or construction of any document in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without full trial of the action; and

(b) that the determination will finally determine the entire cause or matter or any claim or issue in the case, subject only to any possible appeal.

Besides the foregoing, it is a matter of vital importance that there should be no dispute of facts respecting a point or issue of law to be determined by the court. Alternatively, the parties should agree on the facts to which the point or issue of law to be so determined relates. The test, therefore, of whether a question of law is suitable to be determined under this procedure is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted. This means that there is no

dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. In the premises, the suitability of disposing of an action under this procedure entirely depends on whether the court can determine the question of law raised without a full trial of the action.

Besides, the court is not justified, under this procedure, even with the consent of the parties, in deciding abstract questions of law raised by pleadings. The court's function remains to be, and is, to decide questions of law when arising between parties as a result of a certain state of facts: **Stephenson, Blake & Co. -v- Grant Legros & Co. Ltd** (1917) 86 L.J. Ch. 439

In addition to the foregoing, where for the purposes of deciding questions of law it is necessary or desirable to ascertain the facts beyond those that appear in the pleadings, the court should not order the trial of those questions as a preliminary point of law, especially where the law is itself unsettled or obscure. Finally, the question of law to be determined by the court, under this procedure, should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity, about what is the question that has to be determined.

As to evidence, summons under Order 14A should be supported by affidavit deposing to all the material facts relating to the questions of law or construction to be determined by the court. For purposes of Order 41 r. 5 (2) of R.S.C., proceedings under Order 14A are not interlocutory proceedings, since by its nature, the application will decide the rights of the parties and will terminate the action or otherwise finally dispose of it: **Rossage -v- Rossage** (1966) 1 W.R.L. 249. For that reason, the affidavits for use in proceedings under Order 14A ought only to depose to such facts as the deponent is able of his own knowledge to prove.

The House of Lords has strongly protested against the practice of courts of first instance allowing preliminary points of law to be tried before and instead of first finding the facts: In **Tilling -v- white man** (1980) A.C. 1, 17; **and Allen -v- Gulf Oil Refining Ltd** (1981) 1 All E.R. 353, 355 Lord Wilberforce said the following (respectively) -

"The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken a little time, he allowed a preliminary point of law to be taken...So the case has reached this House on hypothetical facts, the correctness of which remains to be tried. I, with others of Your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this frequently adds to difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If the practice cannot be confined to cases where the facts are not complicated and the legal issues short and easily decided, cases outside this guiding principle should at least be exceptional.";

“My Lords, I and others of Your Lordships have protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice. The present is such an example..... The fact is that the result of the case must depend on the impact of detailed and complex findings of fact on principles of law which are themselves flexible. There are two many variables to admit of a clear - cut olutions in advance”.

Background of the case

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Amended Statement of Claim

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The plaintiff is the Finance Bank of Malawi (the bank). It is suing the four dependants, who include the 1st, 2nd and 3rd defendants. These were directors and officers of the bank. The 2nd defendant is dead, instead his estate is sued. The 4th defendants, the underwriters, are sued on behalf of and represent eight Lloyds Syndicates which subscribed to a Lloyd’s Directors’ and Officers Policy of insurance (Number 479/PF IN 0596A01) (the Policy) issued on 18th April, 1997, to the bank. This policy is a claim made policy covering the period 1st November, 1996 to 31st October, 1997.

The bank is alleging that it has lost a total sum of money slightly in excess of K100,000,000 and is therefore claiming damages from the 1st, 2nd and 3rd defendants for breach of duty of care in that these defendants failed to apply sound banking policies; laid down banking rules and that they also failed to supervise staff among other things. Besides that, it is alleged that these defendants, thus 1st, 2nd and 3rd defendants were negligent in the performance of their duties in the area of lending funds and credit management. In that respect, it is said that during trial the plaintiff will demonstrate that the advances or loans, particulars of which are, specified in the statement of claim were given out negligently thereby making the plaintiff lose sums of money in excess of K76,000,000; thus being part of the sum of K100,000,000 which the bank claims to have lost due to the negligence of the 1st, 2nd and 3rd defendants.

In proving the case for failure to apply sound banking policies and failure to follow laid down procedure and failure to supervise staff in respect of 1st, 2nd and 3rd defendants,

the plaintiff will use the principle of RES IPSA LOQUITUR to demonstrate that these losses cannot be explained in any other way other than on grounds of negligence.

Finally, respecting the 4th defendants, it is the case for the plaintiff that by a policy of insurance for the period 1st November, 1996 to the 31st October, 1997, the 4th defendants insured the directors and officers of the bank. They agreed to pay out on behalf of the directors and officers of the bank any loss made against them during the period of insurance which is duly notified to the 4th defendants for any wrongful act committed by persons in the capacity of officers or directors of the bank. That the 1st, 2nd and 3rd defendants who were Managing Director, Corporate Director and Corporate Manager, respectively, were such directors and officers of the bank in terms of the policy of insurance in question. It is alleged by the plaintiff that these persons had committed wrongful acts of negligence.

The plaintiff will use the form of policy document for its full purport and effect and thereby claim from the Insurance payment of any award or damages or compensation which the court will order that the 1st, 2nd and 3rd defendants pay in terms of the insurance policy document.

Amended Defence

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The 1st, 2nd and 4th defendants have served a joint amended defence. The 4th defendants make their defence without prejudice to any rights to avoid the policy on the grounds of non-disclosure and misrepresentation or any defence based on breach of warranty. In the view of the 4th defendants the plaintiff is not entitled to any indemnity pursuant to insuring clause 2 of the policy or at all.

Further or in the alternative and without prejudice to the foregoing, the 4th defendants say that any claim (denied) which the plaintiff might have is excluded by virtue of exclusion 4 (X).

That the policy was subject to the insured directors and officers of the bank committing any or alleged wrongful acts or omission individually or collectively. The 1st and 2nd defendants deny any wrongful acts on their part. And it is the view of the 4th defendants, that their liability does not arise where the directors and officers deny liability, as they have done.

It is further the view of the 4th defendants that the policy of insurance excludes the 4th defendants' liability in a case which is consequent upon the directors or officers dishonesty, fraud and malicious conduct. In that connection, it is said that the 3rd defendant was convicted of theft of K32,787,949.50 which he embezzled dishonestly, fraudulently and maliciously from the bank.

The 4th defendants say that they can only pay the claim if it is not excluded and if it occurred during the period of insurance which is 1st November, 1996 to 31st October, 1997. The 4th defendants further say that part of the theft of K32,787,949.50 was committed in August, September and October, 1996, thus, before the policy was issued.

It is also said that to some extent, the fidelity insurers of the plaintiff paid up to the maximum limit of liability chosen by the plaintiff for which the plaintiff has not disclosed or reduced the amount in the plaintiff's statement

of claim. In that connection, it is the view of the 4th defendants that the policy of insurance excludes loss arising from a claim to the extent that an indemnity or payment is available from any source, other than the policy issued.

Further, the policy excludes the 4th defendants' liability from any claim consequent upon any circumstances existing prior to the inception date of the policy which is 1st November, 1996. In that respect, it is said that the directors or officers or the bank knew or ought to have known that those circumstances could give rise to a claim. That loss of K32,787, 949.50 was known by several members of staff of the bank prior to the policy inception date. In addition, the bank ought reasonably to have known from the daily status print out reports. In that connection, that most of the claims arising from the so called negligent lending in the sum of K79,469,154.50 relate to the period 1995 to October, 1996, thus, before the policy was effected. Thus, the 4th defendants are not liable for losses occurring outside the period of insurance.

The 4th defendants also say that in the month of August, 1996, the bank had intended to effect a directors and officers insurance with the 4th defendants. For that purpose the bank then signed and delivered to the 4th defendants a declaration in writing dated 23rd August, 1996 which the bank agreed should be basis of the contract which the bank decided to effect. On the faith of the statements contained in the declaration the 4th defendants granted the policy sued on. That the declaration, the basis of the insurance was not true in every respect, that there were in it false statements, misrepresentations and concealment and suppression of the truth, particulars of which are set out in paragraph 8 (a) to (d) of the Amended Defence.

That part of K79,460,194.50 is consequential loss arising as interest from the money

allegedly negligently lent out by the bank. In that connection it is said that the policy of insurance excludes any consequential loss.

It is denied by the defendants that it is a term or condition of the policy that costs of starting the claim, whether the bank succeeds or not, should be paid by the 4th defendants. In the view of the defendants costs follow the event.

In the premises, the defendants deny liability for the loss averred in the bank's amended statement of claim and, therefore, pray that the action be dismissed with costs.

CONSIDERATION OF ISSUES RAISED

In grounds of appeal 1 to 5, the bank, in essence, is attacking the finding of fact by the learned Registrar that the 4th defendants had avoided the policy and had returned premium in respect of the 3rd defendant. On behalf of the bank, Mr. Chagwamnjira has argued that there was no evidence before the Registrar on the basis of which such a finding would rightly have been made. The affidavit of Saineti Ellard Jussab, dated 30th June, 1999, is challenged. By that affidavit Mr. Jussab deposes to the fact that he is informed by the 4th defendants that the policy, in question in these proceedings, has been avoided by the 4th defendants as against the 3rd defendant on the ground of material non-disclosure relating to the 3rd defendant's dishonesty. There is thereto exhibited, therefor, a copy of 4th defendants' lawyer's letter to the 3rd defendant at Zomba Maximum Prison.

In view of the legal requirement that affidavits for use in proceedings under Order 14A ought only to depose to such facts as the deponent is able of his own knowledge to prove, Mr. Jussab's affidavit would not be admissible for the purpose. That affidavit purports to contain a statement of fact based on double hearsay sources of information to Mr. Jussab. Mr. Jussab would not of his own knowledge depose to such a fact. In the premises, I reverse the order or ruling of the Registrar in that respect.

Ground 6, that the Registrar had erred in ignoring without discussion at all the objections of the plaintiff that the summons under Order 14A was misconceived in that it was not a proper mode of starting the matter, it being contrary to the requirement of Order 14A, thus that the determination of the summons would not and has not resulted in the final determination of the entire cause or matter or issue in question. In that connection, by his written submission, Mr. Chagwamnjira says that both parties are not aware as to whether the case of the plaintiff should, therefore, proceed to trial. That both parties are not sure if by that decision, the 4th defendants were henceforth discharged as parties from the case. Further, that the parties wonder if the case ought to proceed without the 4th defendants. Besides that, that the parties are not sure if by the decision of the learned

Registrar, the court is, in effect, saying that it is only the 1st, 2nd and 3rd defendants who can sue the 4th defendants in relation to the insurance policy in the case.

Yes, it is the requirement of the procedure under Order 14A that the determination of the question of law or construction of a document must result in a final judgment or order. Thus upon making its determination of the question of law or construction, the court may dismiss the action or make such order or judgment as it thinks just. In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action. This ought to be so in regard to the position of the plaintiff and the 4th defendants only. In fact the summons were to relate to that position only. A perusal of the summons clearly bears out that view. Consequently, the determination of the learned Registrar, now appealed against, and, if confirmed herein, that of this court in that regard would henceforth entail the discharge of the 4th defendants from the case. On the other hand, that decision would in no way effect the position between the plaintiff and the 1st, 2nd and 3rd defendants in the case. The summons does not seek that effect upon the determination of the questions before the court.

Besides the foregoing, the requirement that there ought not to be dispute as to facts relating to the questions of law or construction of document or that parties must admit the facts relative to those questions of law or construction of document: In regard to the summons, a number of facts are in dispute between the parties relative to the questions of law or construction put forward for the determination of the court.

Yes, the learned Registrar had determined that question 2 and 3 appeared to be questions, in regard to which there would be issues of fact or evidence which could only be resolved at the trial. The parties appear to have raised no challenge to that determination. In the result, no submissions were made before me on this point. Although such is the position, I will nonetheless, in passing, allude to these questions later in this ruling.

At this point let me specifically consider question 1 which is that without prejudice to the 4th defendants' other defences based on avoidance or otherwise whether on a true and proper construction of the policy the plaintiff is entitled to an indemnity from the underwriters pursuant to clause 2? Clause 2 of the policy provides as follow:

"Underwriters agree, subject to the terms, conditions, limitations and exclusions of this Policy to:

(a) pay on behalf of the directors or officers of the company loss arising from any claim first made against them during the period of insurance and notified to underwriters

during the period of insurance by reason of any wrongful act committed in the capacity of directors or officer of the company except and to the extent that the company has indemnified the directors or officers.

(b) pay on behalf of the company loss arising from any claim first made against the directors or officers during the period of insurance and notified to underwriters during the period of insurance by reason of any wrongful act committed in the capacity of director or officer of the company but only when and to the extent that the company shall be required or permitted to indemnify the directors or officers pursuant to the law, common or statutory or the memorandum and articles of association".

Clause 3 of the policy prescribes definitions to be used in relation to the policy. It is expedient that some of those definitions be set out herein as follows:

"Director or Officer" means any natural person who was or is or may be a Director or Officer of the Company and in the event of death their estate, heirs legal representatives or assigns.

"Company" means the bank.

"Period of Insurance" 1st November, 1996 to 31st October, 1997 both days inclusive.

(e) "Wrongful Act" shall mean any actual or alleged wrongful act or omission by directors or officers individually or collectively, by reason of their being Directors or Officers of the Company. Related or continuous or repeated or causally – connected wrongful Acts shall constitute a single Wrongful Act.

(f) "Loss" shall mean legal liability of the Directors or Officers to pay:

(1) damages or costs awarded against the Directors or Officers,

(2) settlements as agreed by underwriters (such agreement shall not unreasonably be withheld),

(3) costs and expenses.

(7) "Costs and Expenses" shall mean all reasonable and necessary fees and expenses incurred by or on behalf of the Directors or Officers with the written consent

(such consent shall not unreasonably be withheld) of Underwriters resulting

solely from the investigation and or defence and or monitoring and or settlement of any claim and appeals therefrom.

"Claim" shall mean

(i) any writ or summons or other application of any description whatever or cross claim or counter claim issued against or served upon any Director or Officer for any Wrongful Act, or

(ii) any written communication alleging a Wrongful Act to any Director or Officer.

INTERPRETATION OF CONTRACTS RULES

A consideration of the questions put before the court for determination, as of necessity, involves the interpretation of the policy document. It is, therefore, expedient that a moment be spared for a statement on rules of interpretation which govern the interpretation of contracts in general, and insurance contract, in particular. The learned Registrar had clearly and substantively dealt with this subject in his ruling now appealed against. During the hearing of this appeal none of the learned counsel have raised any challenge against the ruling of the Registrar relative to his statement on the principles of law on this subject. If any thing at all, counsel merely urged the court to confirm the sources of the Registrar's statement on the subject. That I have done and do confirm that the position was rightly and accurately put. In the circumstances, I do adopt the statement, thus to say, that an insurance policy ought to be construed like any other contract and the "object to be sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them" per Lord Diplock in **Pioneer Shipping Ltd. V B.T.P. Tioxide Ltd. (1982) A.C. 724 at p 736.**

It is also clear approach to the question of construction of contracts of insurance to seek objectively to ascertain the intention of the parties from the words they have chosen to use. If those words are clear and admit of one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If however the words are not so clear and admit of more than one meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. Further, contracts must be interpreted against

their background. This principle was expressed by Lord Hoffmann in **Investors Compensation Scheme Ltd. V West Bromwich Building and Same and Hopkin and Sons** (a firm and others) (1998) 1 All E.R. 98. The principles expressed by him were:-

"But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed ¼.. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in **Prenn V Simmonds (1971) 1** W.L.R. 1381 1384 and **Readon Smith Lime Ltd. V. Yngvar Hamsen – Tangen (1976) W.L.R.** 989 is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles can be summarized as follows:

Interpretation is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The background was famously referred to by Lord Wilberforce as the "matric of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood to a reasonable man.

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.

The meaning which a document (or any other utterance would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars" the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason have used the wrong words or syntax ¼ The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if

one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Compania Naviera S.A. V Salen Rederierna A.B. (1985)** A.C. 191, 201:

If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

DECISION AND REASONS THEREFOR

Bearing in mind the numerous persuasive legal arguments which both counsel have made before me, thus, orally and in writing, it is my considered view that the learned Registrar was right in coming to the conclusion he reached on question 1, in particular, and generally on the rest of the questions raised in the summons then before him. To begin with, it must be pointed out that guided by the rules of interpretation, set out hereinbefore, the court is called upon to consider, interpret and apply specific provisions of an insurance contract in answering the questions raised before it. By question1, the 4th dependants seek a determination of the court, without prejudice to the 4th defendants other defences based on avoidance or otherwise, whether on a true and proper construction of the policy the plaintiff is entitled to an indemnity from the underwriters pursuant to clause 2. And close 2 of the policy, is as follows:

2. INSURING CLAUSE

Underwriters agree, subject to the terms, conditions, limitations, and exclusions of this policy, to:

Pay on behalf of the Directors or Officers of the Company Loss arising from any claim first made against them during the period of Insurance and notified to Underwriters during the Period of Insurance by reason of any Wrongful Act committed in the capacity of Director or Officer of the Company except for and to the extent the Company has indemnified the Directors or Officers.

Pay on behalf of the Company Loss arising from any claim first made against the Directors or Officers during the Period of Insurance and notified to Underwriters during the Period of Insurance by reason of any Wrongful Act committed in the capacity of Director or Officer of the Company but only when and to the extent that the Company

shall be required or permitted to indemnify the Directors or Officers pursuant to the law, common or statutory, or the Memorandum and Articles of Association".

It is expedient to read the foregoing provision of the policy together with the first paragraph to the policy in order to better understand the fact that, not the Company but, its directors or officers were the persons who were insured under the policy. It does not matter that the contract of insurance might have been, or was in fact, arranged and paid for by the Company. That paragraph says that:

"We Underwriters of the Syndicates whose definitive numbers and proportions are shown in the Table attached hereto¼hereby agree, in consideration of the payment to us by or on behalf of the assured of the premium specified in the schedule, to insure against loss, including but not limited to associated expenses specified herein, if any, to the extent and in the manner provided in this policy."

Now in regard to insuring clause 2 (a), the 4th defendants agreed to discharge or pay on behalf of the directors or officers loss arising from any claim made against the directors or officers of the company. Applying the definitions of "loss" and "claim" to clause 2(a) that clause then means that 4th defendants agreed to discharge or pay on behalf of the directors or officers any legal liability of the directors or officers to pay damages or costs awarded against them or legal liability of the directors and officers to pay settlement as agree by 4th defendants. Until the legal liability of the directors or officers is established, the duty of the 4th defendants to pay does not arise.

Indeed, upon a true and proper construction of clause (2)(a), no other conclusion clearly, definitely and readily renders itself available to the court other than that it is the directors and officers who acquire rights against the 4th defendants. The Company has no rights under clause 2(a). That is the position when the company does not indemnify the directors or officers. So, in such a case, where the Company does not indemnify its directors or officers, the company would have no basis for any rights against the 4th defendants. This is what the policy of insurance, the contract, says in that regard.

This means that, in regard to clause 2(a), upon the legal liability of the directors or officers of the Company being established, only the directors or officers, being the insured would legally be entitled to sue the 4th defendants therefor. In that situation the Company has no standing to sue the 4th defendants and that is so notwithstanding the fact that the insurance policy under consideration might have been or was in fact arranged and paid for by the Company. It is the insured who must sue the 4th defendants (the insurers) in this case.

In that respect, the decision of the House of Lords in the case of **Bradely v Engle Star Insurance Co. Ltd** (1982) A.C. 957 is the authority. From the headnote, the brief facts of that case were that, the applicant was employed by a Company in a cardroom of its cotton mill for a considerable number of years. She was later certified by a medical panel to be suffering from a respiratory disease caused by the inhalation of cotton dust. The Company was wound up. Subsequent to that, intending to bring an action against the defunct Company's insurers under s.1(1) of the 'Third Parties (Rights against Insurers) Act, 1930, she applied for pre-action discovery against the insurers pursuant to s.33(2) of the Supreme Court Act 1981. She sought an order that the insurers should disclose the terms and particulars of all contracts of insurance issued by them to the defunct Company in respect of the Company's liability to its employees for personal injuries sustained at work during the relevant periods. The district registrar had granted the application but his order was reversed by MacPherson J. on the insurer's appeal. The Court of Appeal dismissed her appeal. She made a further appeal to the House of Lords which was also dismissed.

In dismissing the appeal, the House of Lords held that under a policy of insurance against liabilities to third parties, the insured person could not sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party had been established by a judgment of a court in an action, or by an award in an arbitration, or by an agreement between the insured and the third party. In delivering the decision of the House of Lords, thus affirming the decision of the Court of Appeal in the case, at page 966, Lord Brandon of Oakbrook said this:

"In my opinion the reasoning of Lord Denning M.R. and Salmon L.J. contained in the passages from their respective judgments in the Post Office case set out above, on the basis of which they concluded that, under a policy of insurance against liability to third parties, the insured person cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement, is unassailably correct."

The pertinent passages, referred to, of the decisions of Lord Denning M.R. and Salmon L.J. are as follows, respectively –

Referring to section 1 (1) of the Act of 1930, Lord Denning M.R. said (1967) 2 Q.B. 363, 373 – 374 –

"Under the section the injured person steps into the shoes of the wrongdoer. There are transferred to him the Wrongdoer's rights against the insurers under the contract. What are those rights? When do they arise? So far as the 'liability' of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident,

when negligence and damage coincide. But the 'rights' of the insured person against the insurers do not arise at that time. The policy says that 'the Company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property.' It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise."

"But whether or not there is any legal liability and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action and there is nothing in law that makes such an action possible."

In the circumstances, it being the undisputed view between the parties, that the legal liability of the directors or officers, except in respect of the 3rd defendant, towards the Company is not yet established the directors or officers cannot sue the 4th defendants on the policy at the moment. Yes, such must be the case even in relation to the 3rd defendant. Although the plaintiff has obtained a default judgment against the 3rd defendant so as to satisfy the requirement for the establishment of the legal liability of the insured towards the third party, it is the contention of the 4th defendants that they have avoided the policy in respect of the 3rd defendant. This issue ought first to be determined at the trial in the case between the plaintiff and the 3rd defendant to ascertain if such is indeed the position.

In that connection I have earlier on in this ruling reversed the decision of the learned Registrar where he purported to hold that in fact the 4th defendants had avoided the policy in respect of the 3rd defendant. So, it is a mere assertion by the 4th defendants which can be determined by evidence at the trial. That being the case it is arguable that the 3rd defendant may sue the 4th defendant so that he is indemnified of his legal liability to pay the default judgment to the, Company, plaintiff. Even if such were to be the position, the person to sue the 4th defendants ought not to be the plaintiff but the 3rd defendant. Query whether the 3rd defendant would be able to successfully sue the 4th defendants in view of exclusion clauses 4(X) and 4 (V). The position of the 4th defendants with regard to these clauses is fully reserved. No arguments have been made in respect thereto during appeal. Be that as it may, what is important to note is that the

right to sue the 4th defendants does not vest in the plaintiff and, that in the circumstances, only the 1st, 2nd and 3rd defendants may sue the 4th defendants upon the legal liability of the 1st, 2nd and 3rd defendants towards the Company first being established. The position of the 3rd defendant require to be clarified by evidence at the trial to establish whether or not the policy has been avoided in respect of him.

Turning to insuring clause 2(b), it is apparent that this clause clearly appears to apply in circumstances where the directors are legally liable to pay damages to a third party; where the Company pays those damages to the third party on behalf of its directors and officers; and where, therefore, the Company then seeks from the 4th defendants reimbursement of the sums of money which it has paid to the third party on behalf of its directors or officers. In that connection, Mr. Chagwamnjira has vehemently argued that at the trial the plaintiff will show that in fact it has suffered such a loss and that it has made good such a loss on behalf of the directors or officers. He has gone on to say that were it not for the Company to have done so, the operations of the bank would have collapsed. So, this is a case in point under clause 2(b) and Mr. Chagwamnjira maintains that the plaintiff therefore ought to be indemnified by the 4th defendants. In the court's view, until that far, Mr. Chagwamnjira is right and the court accepts his view.

However, the position of the plaintiff in that regard is compounded by the submission made by Mr. Christie on behalf of the 4th defendants that the situation of the plaintiff, in that case, is caught up by the prohibition in Section 163 of the Companies Act 1984,thus, Cap. 46:03 of the Laws of Malawi. That section is as follows:

"Avoidance of provisions exempting officers

163. No Provision, whether contained in the memorandum or articles of a Company, or in any contract with the Company, shall exempt any directors or other officer of a Company, or indemnify him against, any liability which by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the Company."

To this argument, Mr. Chagwamnjira has fought back by asserting, very forcefully, that the insurance policy contemplated such a position, and that by its clause 9(d), the insurance policy excluded the operation of section 163 of Cap. 46:03 from applying to the insurance policy. It is an interesting and very persuasive argument, one which deserves a substantive consideration of the court. First clause 9(d) of the policy must be set out herein as follows:

"9 CONDITIONS

Underwriters shall not avoid this Policy by reason only that they may be so entitled by virtue of any statute or rule of law that makes or deems void any provision or contract to indemnify or make payment to any Director or Officer of the Company against liability for any Wrongful Act. Underwriters rights to avoid this Policy for any other reason, including but not limited to misrepresentation or non-disclosure, remain unaffected."

It would seem that Mr. Christie was content merely to assert the fact that S.163 of Cap. 46:03 barred the plaintiff from indemnifying the directors or officers of the Company. He appears not to have specifically reacted to Mr. Chagwamnjira's submission in that regard. Be that as it may, it suffices to note that the provision 9(d) is a provision prescribed in a contract with the Company. Further, it ought to be noted that section 163 prohibits any such provision either in a memorandum, or articles of a Company or in any contract with the Company. Besides, the expression of the prohibition is made in a mandatory form. Given that situation, it is idle for Mr. Chagwamnjira, and indeed the parties to the Policy of Insurance in question that they purported to exclude the application of S.163 from applying to the policy. There is no room for exclusion. That, therefore, means both provisions, that is clause 2(b) and clause 9(d) are void for illegality, to the extent that they seek to contradict the provisions of S.163, in so far as the prohibition is concerned. So, where does the plaintiff stand under clause 2 (b) as supported by clause 9(d)? Its position is not any better than that which it has under clause 2 (a). It cannot sue the 4th defendants to seek indemnity at all.

Finally, that then leaves the court with the consideration of the position of the plaintiff under question 4. The learned Registrar had not considered this question for reasons already given. However, I have been specifically asked to consider and answer it now, notwithstanding the learned Registrar's earlier position on it. What, once again, does the question say? It is this:

(4) In the event that the plaintiff is not entitled to an indemnity from the underwriters pursuant to the Policy, whether the plaintiff has any other right to proceed against the underwriters?".

To begin with let me accept as correct Mr. Christie's submission that the only way by which the plaintiff would be allowed to proceed against the 4th defendants, in circumstances envisaged under question 4, would be under some statutory provision

allowing third parties to do so. Further, I should accept as correct the position submitted by Mr. Christie that, in the country, the only statutory provision which we have in that respect is section 65A of the Road Traffic Act which is not applicable to the circumstances of the instant case. Indeed I should further accept as correct that at common law the plaintiff cannot directly maintain a suit against the 4th defendants. Such being the position, and as I have already clearly and succinctly stated above that it matters not that the plaintiff might have, or that in fact they did, arrange and paid for the contract of insurance, it is the insured who can sue the insurers in the case. That in this case, the policy shows that the directors and officers of the Company were the insured without any legal disability from maintaining suit against the 4th defendants, providing that the directors and officers' legal liability to a third party has first been established.

On his part, Mr. Chagwamnjira vehemently lamented the fact that he could not see why a party to the insurance contract, thus the plaintiff, would be said not to have standing to sue the 4th defendants, another party to it. Be that as it may, the unfortunate position in insurance contract remains to be what I have repeatedly already stated above, that it is the insured person who have rights, and not any other person, to sue the insurers. That position is only altered in favour of third parties by express statutory position to that effect. There is no such statute in place which would apply to the instant case for the benefit of the plaintiff in that regard.

Having gone that far, I can only adopt and use the words of Lord Brandon, that for the reasons I have given, and despite the natural sympathy which one is bound to feel for the difficulty in which the plaintiff finds itself, I would dismiss this appeal. It is so ordered. I would only add that even if the appeal had succeeded, the plaintiff would still have had other serious difficulties to surmount with regard to the operation and application of exclusion clauses 4(X) and (V), on which the position of the 4th defendants has been fully reserved.

Costs for this appeal are for the 4th defendants. It is so ordered.

Made in Chambers this 28th day of March, 2001 at Blantyre.

A.K. Tembo

JUDGE