HON. MR. JUSTICE G. SEMEG

HON. MRS JUSTICE V.A.D. W

HON. MR. JUSTICE P.O. HAM

HON. MS. JUSTICE S. KORO

COUNSEL: A.F. SERRY-KAMAL ESQ A

AND MS. V.M. SOLOMON F

PATRICK LAMBERT ESQ

JUDGEMENT DELIVERED ON THE 26th DAY

"**RECEIPT**

I Roland J. Hamilton RJH Insurance Broker, 139 Circular Road, Freetown receive the sum of USD 460.00 (Four Hundred And Sixty Dollars Being overseas Insurance (Fire And Burglary) Premium for the period 11th October 1996 to 11th October 1997 that was duty signed".

The insurance was for stock in trade against burglary and fire. Nothing happened until on the 2nd December when Mr. Mohson was handed the Cover Note (Exhibit "B") by Mr. Hamilton. Mr. Tarraf retained the Cover Note. Again nothing happened until the night of the 26th May 1996 at about 2 a.m. when Mr. Tarraf received a phone call that his store, Ashobi store, has been burgled. He visited the store on the 27th May 2007 and found it completely empty. On the 6th October 1997, Mr. Tarraf reported the matter to the police and was subsequently issued with a report (Exhibits "C"). He tried contacting Mr. Hamilton and then the N.I.C without success. He eventually made a claim on the N.I.C. through his solicitors who wrote three letters (Exhibits D1, D2 and D3) to the N.I.C and a reply (Exhibit "E") was received. The reply was not satisfactory to Mr. Tarraf and, as a result, a writ was caused to issue in which Mr. Tarraf claims:

1. The sum of US $ 40, 000/00
2. *Interest on the said sum of US$ 40,000/00 at such rate as the court thinks fit from the 21st day of May 1997 to the date of Judgement*
3. *Further or other relief*
4. *Cost*

The insured value of the goods in the burglary proposal form (Exhibit G1) is US $ 40,000/00.

In the High Court, the matter was heard by A.B. Stronge J (as he then was) and he, after considering the evidence, held in his Judgement that Mr. Tarraf was bound by the terms of the Cover Note. He further held that N.I.C led no evidence to show that when the peril occurred there was a civil war which directly or indirectly caused the loss and, for this reason, he further held that the N.I.C could not avail themselves of the Exclusion Clause in the Cover Note. He also held that the award should be limited to US $ 20,000/00. In the result, he gave Judgment to Mr. Tarraf as follows:

A. *Loss suffered: US $ 20,000/00 or its equivalent in Leones at the rate of exchange effective on the date of judgment.*

B. *Rate of Interest at 12% (Twelve Percent) as from 26th November 1997 to date of Judgement*

C. *Defendants (N.I.C) to pay the costs of the action, such costs to be taxed.*

(bracketed initials provided)

Against this Judgement the N.I.C filed a Notice of Appeal to the Court of Appeal on grounds as follows:

1. *That the learned trial Judge erred in finding that though the cover note was a contract between the plaintiff (Mr. Tarraf) and Defendant the exclusion clause was not part of the contract and so the Defendant cannot rely on the said exclusion clause (**bracketed words added**)*

2. *The learned trial Judge failed to consider the "War and Civil War Exclusion Clause" in the circumstance of 26th May 1997.*

3. *The Learned trial Judge failed to consider adequately or at all the defendant's documentary evidence tendered in court and evidence*

In the High Court, the matter was heard by A.B. Stronge J (as he then was) and he, after considering the evidence, held in his Judgement that Mr. Tarrat was bound by the terms of the Cover Note. He further held that N.I.C led no evidence to show that when the peril occurred there was a civil war which directly or indirectly caused the loss and, for this reason, he further held that the N.I.C could not avail themselves of the Exclusion Clause in the Cover Note. He also held that the award should be limited to US $ 20,000/00. In the result, he gave Judgment to Mr. Tarrat as follows:

A. *Loss suffered: US $ 20,000/00 or its equivalent in Leones at the rate of exchange effective on the date of judgment.*

B. *Rate of Interest at 12% (Twelve Percent) as from 26th November 1997 to date of Judgement*

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Against this Judgement the N.I.C filed a Notice of Appeal to the Court of Appeal on grounds as follows:

1. *That the learned trial Judge erred in finding that though the cover note was a contract between the plaintiff (Mr. Tarraf) and Defendant the exclusion clause was not part of the contract and so the Defendant cannot rely on the said exclusion clause (**bracketed words added**)*

2. *The learned trial Judge failed to consider the "War and Civil War Exclusion Clause" in the circumstance of 26th May 1997.*

3. *The Learned trial Judge failed to consider adequately or at all the defendant's documentary evidence tendered in court and evidence*

on behalf of the defendant but preferred to rely on the oral evidence of the plaintiff

4. *The learned trial Judge erred in ordering the exchange rate to be as at the date of Judgement.*

5. *The trial Judge had no basis for ordering 12% percent in foreign currency"*

he Court of Appeal, after hearing exhaustive arguments of counsel for the N.I.C nd Mr. Tarraf, gave judgment, delivered by S.C.E. Warne, JSC (as he then was), favour of Mr. Tarraf, varying the award of US $ 20,000/00 to US $ 40,000/00 and dering that:

1. *The Appellant (the N.I.C) shall pay the Respondent (Mr. Tarraf) the sum of USD 40,000/00 being insurance claim.* ***(bracketed words added)***

2. *The Appellants shall pay the Respondent interest at the rate of 12% per annum, from the date of the Judgement delivered on the 7th day of April 2000.*

3. *The Appellants shall pay the costs occasioned by this appeal and the costs below to the Respondent.*

early the N.I.C (the Appellant herein) was dissatisfied with the Judgement and d a Notice of Appeal on grounds (without the particulars) as follows:

1. *The learned Justices erred in holding that the proposal forms were the contract of insurance but failed to state the terms and conditions shown.*

2. *The learned Justices erred in Law and in fact by ignoring the Cover Note as a contract between the Appellants and the Respondent.*

3. The learned Justices were mistaken in holding that there was no evidence of any of the event in the exclusion clause and went on to say there was no evidence of war or a civil war when the matter concerned usurped power.

4. The learned Justices failed to consider whether the Appellants were agents for an overseas insurer and went on to hold that the receipt was not with anything when in fact it was the basis of the contract and contains all the necessary elements.

5. The learned Justices erred in ignoring the terms and conditions in the Cover Note as those of the contract of insurance between the Appellants and Respondent.

6. The learned Justices erred in law in varying the award from US $ 40,000/00 to US $ 20,000/00 when there was no notice for variation of Appeal before them.

7. The learned Justices failed to state on what evidence they decided on the figure of US $40,000/00.

8. The learned Justice erred in Law in arbitrarily awarding interest at 12% without any evidence of the rate of interest applicable in the case of foreign currency having held that the interest being claimed was on foreign currency.

other away. But where the case turns not on belief in the witnesses but on the inferences to be drawn from the facts and/or documents then the appellate court is in as good a position as the trial court. Thus the Court of Appeal was in order, when after quoting LINDLEY MR. in Coghlam Vs Curberland (1898) 1 ON 204, it proceeded to review the materials before it and drawing its own inferences. Like the Court of Appeal, I will proceed on the basis of the principles restated above.

On the basis of the Grounds of Appeal, I draw up for consideration the following issues.

1. *Was there a contract of insurance between Mr. Tarraf and the N.I.C? If so what was the nature of the insurance*

2. *What is the status and effect of the Cover Note?*

3. *Is Mr. Tarraf entitle to judgment and if so, on what terms.*

Counsel for N.I.C. E.E.C. Shear-Moses Esq., in oral argument contends that the contract is one of overseas insurance between Mr. Tarraf and a disclosed principal, Harris and Dixon Insurance Brokers, and the N.I.C being mere agents. I find the contention bemusing and untenable. The contention cannot find support in the Defence filed in the trial court. The relevant paragraphs 3 and 4 of the Defence state:

"3 In answer to paragraph 3 of the statement of claim the Defendants through their reinsurers issued Cover Note No. TR 963063 G to cover fire and burglary/ theft and the latter covered loss of US $ 20,000/00 and not US $ 40,000/00 as alleged. Further the said Cover Note is subject to certain terms and conditions, limitations, exclusions and warranties"

"4 the Defendants deny the allegations contained in paragraph 5 of the Statement of Claim and will state further that it is not responsible for payment of the sum of US $ 40, 000/00 or at all as the Cover Note

issued to the Plaintiff indemnifies the Defendants from any liabilities under the War and Civil War Exclusion Clause (MMA 464). Further the Plaintiff is fully aware of the indemnity on the part of the Defendants".

It seems to me, notwithstanding the poor preparation of the Defense, that the N.I.C was averring an insurance between themselves and Mr. Tarraf, and a reinsurance cover of their risk in the unlying insurance. This is so because they aver to have issued the Cover Note through their insurers and that the Cover Note will indemnify them of any liabilities under the War and Civil War Exclusion Clause. If they were agents for Harris and Dixon (disclosed principals) how could they be indemnified under the Cover Note? Surely they expect indemnification because they were reinsured. It is noteworthy that ground 2 of the Grounds of Appeal refers to the Cover Note as a contract between the N.I.C and Mr. Tarraf.

In my view, overseas insurance, reinsurance and local insurance are different. With overseas insurance the contract is with an insurer overseas, usually transacted through a local insurer or broker who as agent places the risk with the overseas insurer. Reinsurance involves the insurer taking out insurance to cover the risk or part thereof that it/he/she, as the case maybe, has undertaken to cover in another insurance. E.R. IVAMY, in his authorative book: Personal Accident, life and Other Insurance, at page 305, discussing reinsurance, has this to say:

"The business of insurance is not restricted to the making of contract of insurance between the insurer and the outside would.

Both of the contracting parties may be insurers by profession, the object of the contract being to indemnify the insurers taking the place of the assured in an ordinary contract against loss which they themselves sustain in their capacity as insurers under another contract of insurance.

Where there is the case, the contract is termed a contract of reinsurance".

I will add that a contract of re-insurance can be made within the same country or town and does not have to involve a foreign based insurer/re-insurer.

The learned writer of Chitty on Contract: specific contracts – 27th edition, para 39 - 081, at page 937, dealing with the general characteristics of reinsurance has this to say:

> ***"An insurer may take out insurance in respect of the risk covered by the original insurance. Such a contract of reinsurance is quite separate from the underlying contract of insurance, so that there is no privity of contract between the insured and the reinsurer, though the contract of reinsurance will often provide (by the use of general words such as "all terms, clauses and conditions as original") for the terms and conditions of the underlying insurance to be incorporated into the reinsurance".***

The local insurance is the same as the ordinary insurance which is a contract between the insurer and the insured and the transaction is carried out within the same country.

I have gone to this length in dealing or treating the above different insurances because I have formed the view that the N.I.C is either confused as to the purposes and functions of the said insurances or that they feel constrained by the manner the transaction with Mr. Tarraf was conducted.

FORMATION

Mr. Tarraf filled the proposal forms and duly paid the premium to the insurance brokers. It has not been specifically stated in the evidence of the status of the insurance brokers and as to whether they were agents of Mr. Tarraf or the N.I.C., even though, ordinarily, the brokers are the agents of the insured. In Chitty on contract specific contracts, supra, paragraph 39-037, at page 908, the learned authors in describing the status and role of the brokers, has this to say:

"BROKER. Persons seeking insurance frequently engage brokers, whose services are usually remunerated on commission basis by the insurer but who nonetheless are agents of the assured, though they may act for the insurer as well, in which case conflicts of interest may well arise. The broker must act with reasonable care and skill, and if, for example, he fails to arrange a contract of insurance as instructed, it is no defence that the insurer could have escaped liability if the contract had been made, if as a matter of business the insurer would not have refused payment".

And in Halsbury's Laws of England, third edition, paragraph 382, at page 201, the learned authors have this to say as regards insurance brokers and insurance agents:

"If a person, wishing to obtain insurance of a non-marine character employs an insurance broker as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the person for the acts and omissions of the broker. If negotiations for such insurance are conducted on behalf of the insurers by an insurance agent, the responsibility of the insurers for the act and omissions of the agent is similarly governed by the general law of agency"

Mr. Tarraf, in his evidence in chief at page 41 of the record, states that when he had the transaction with Rowland J. Hamilton, whom he knew as an insurance broker, he **"asked him to arrange for the insurance of the goods"** in his store. It appears from the evidence that the brokers were agents of Mr. Terraf in respect of the insurance. (See page 43 of the record – evidence of Mr. Tarraf in cross-examination). This may not affect the outcome. It is not in dispute that the insurance premium was paid and the proposal forms filled by Mr. Tarraf and received by the N.I.C.

After receipt of the proposal forms and the premium, the insurers ordinarily should have provided a preliminary protection by way of a cover note but this was not done. It was only on or about the 2nd December 1996 that Mr. Tarraf was issued with the Cover Note – Exhibit "B" and it was for a fixed period covering 12 months from the 11th October 1996; the exact period that Mr. Tarraf required an insurance cover for.

It is the contention of counsel for Mr. Tarraf that the Cover Note does not affect Mr. Tarraf's insurance with the N.I.C. as the Cover Note is effected by the N.I.C with Harris and Dixon Insurance Brokers for their benefit in providing cover for their risk in the underlying insurance between Mr. Tarraf and the N.I.C. I am in agreement with counsel in so far as the Cover Note is a cover for the risks undertaken by the N.I.C. in the underlying insurance. I will deal with issue of the Cover Note shortly in the Judgment.

The contract of insurance came into effect when the proposal forms were filled and the premium paid and the forms were handed over to and accepted, without demur or qualification, by Mr. Tarraf. The proposal forms, even though being the forms of the N.I.C., constitute an offer from Mr. Tarraf. In the result there was offer, consideration and acceptance.

THE COVER NOTE

"Once the contract is complete the insurer is bound to issue and the proposer to accept a policy in accordance with the stipulations of the proposal". See Halsbury, supra, para 389, page 206. A proposal form usually incorporates the usual terms and conditions of the insurer. The same applies to a cover note: it normally incorporates the terms and conditions of the insurer's standard form of policy either by direct reference or by reference to the signed proposal which usually incorporates the standard forms. ***"As in contract generally, one person may be taken to have contracted on terms of which he was only constructively aware, and generally the insurer's proposal form, which the assured uses to give the insurer particulars of the risk, contains express reference to the***

insurer's terms and conditions". See Chitty on Contract: specific contracts supra, para 39-039, at page 910. In the instant case, the N.I.C. issued the Cover Note to Mr. Tarraf in place of a policy. Normally, a cover note gives interim protection or insurance pending the issuance of a policy; it is usually for a short duration, and is a contract in its own right, independent of the policy. In respect of the Cover Note, however, the period is not interim at all but covers the entire period that Mr. Tarraf wanted the insurance to cover as reflected in the receipt – Exhibit A, also at page 47 of the record and paragraph 3 of the statement of claim, at page 2. In the peculiar circumstances of the instant case, counsel for Mr. Tarraf aptly described the insurance cover as **"cover note/insurance policy"**.

The counsel for Mr. Tarraf contends that the Cover Note – Exhibit 'B' - is in fact re-insurance cover issued by Harris & Dixon Insurance Brokers Limited to the N.I.C and that the same is admitted by the N.I.C in the statement of Defence. I agree with Counsel. However, it is not in dispute that Mr. Tarraf received the Cover Note on or about the 2nd December 1996 (see page 3 of the record,) and continued to have it in his possession and that he never complained about or protested against it (see page 43 the evidence of Mr. Tarraf under cross- examination). It seems very clear to me that Mr. Tarraf adopted and accepted the Cover Note as the insurance cover note/insurance policy as representing the contract of insurance which reflect the terms and conditions. I am further confirmed in this view by the letters (Exhibits 'D1', 'D2' and 'D3') that emanated from Mr. Tarraf's solicitor, particularly Exhibit D2 – the letter dated the 26th November 1997 and predicated with the phrase "Without prejudice". The letters were tendered in evidence by Mr. Tarraf.

The number given to the cover note referred to in the letters is the same and the correct number of the Cover Note tendered in evidence and pleaded in the Statement of Defence. The number given to the Cover Note in paragraph 3 of the Statement of Claim, deleted by amendment, is not the actual number; the actual number is: (C/N No.) TR963063 G shown clearly at the top of the front page and the second page of the Cover Note – Exhibit "B". The number deleted is found in the second page and it incorporates the actual number; and given its placing, it

obviously serves another purpose. In any event, I am in agreement with the trial judge in that, I am of the view, its deletion is of no consequence in the trial. Even with the deletion of the number by way of an amendment, what cover note is being referred to in paragraph 3 of the statement of Defence in the context of the pleadings and evidence if not the Cover Note – Exhibit 'B' – tendered in evidence? The answer, in my view, is non other than Exhibit 'B'.

The period of cover in the Cover Note coincides with the period of cover required by Mr. Tarraf. It contains several terms and conditions relevant to the type of insurance in issue and the sum insured. The Cover Note was received and retained without protest or complaint. Even if it can be argued that Mr. Tarraf did not adopt or accept the Cover Note, I am of the firm view that he ought to be deemed, in the circumstances, to have accepted the Cover Note. I have already held that the Cover Note was issued to the N.I.C. as a protection cover of the risk which represents the insurable interest of the N.I.C. in the underlying or original insurance. In the circumstances of this case, I have no hesitation in holding that the terms and conditions of the Cover Note –Exhibit "B" – ought to be implied into the contract of insurance/oral policy **"since, excepting marine insurance, an oral contract of insurance, though rare, is perfectly valid and may indeed also be described as a policy"** See Chitty on Contract: specific contracts, para 39-001, at

that are not contained in the proposal form – Exhibit "G1" – or by varying the terms of the proposal form.

The proposal form – Exhibit 'G' – does not seem to contain much terms, if at all. It ought to have contained the usual terms and conditions in the standard form of the N.I.C and this could have been done by "incorporation by reference" in the proposal form but this clearly was not done. What was done was to make the proposals and declaration contained in the proposal form the basis of the contract and, this is clear in the statement in the proposal form, I quote:

> ***"I/We hereby declare that the above statements are true and complete and that I/We have not concealed anything material to be known to the company and I/We hereby agree that this Proposal and Declaration shall be the basis of the contract between me/us and National Insurance Company Limited."***

The proposal form is dated 11th October 1996 and signed by the proposer, Mr. Tarraf. One may not be certain whether the terms and conditions contained in the Cover Note – Exhibit "B" – are the usual terms and conditions contained in the standard form of policy of the N.I.C. or not. But I am clear in my mind that the major terms and conditions in the Cover Note are glaringly absent in the proposal form, exhibit "G1", particularly the one in respect of 1st loss, in the sum of US$20,000-00, which is half the amount of the insured sum.

With the introduction of new terms into the contract, Mr. Tarraf clearly had the option to send it back (See Chitty on Contracts; general principles, Volume 1, 28th edition, para: 2-032, at p.104, under the rubric: ONE PARTY'S "USUAL CONDITIONS") unless he had committed to himself to taking it; if he did nothing, his tacit acquiescence by itself could probably not be construed as an approval. However, any positive step taken by which the insured recognizes, or seeks to enforce the policy, will amount to an affirmation or approval of it. See Baker V Yorkshire Fire and Life Assurance Co., (1892) 1 QB 144 at p. 145, per Lord COLFRIDGE, CJ; Newcastle Fire Insurance Co. V Macmorran & Co (1815), 3

DOW 255, HL. The law or the issue is clearly stated in Halsbury's Laws of England, supra, para 390, at page 207, thus –

"In general, the policy amounts to a final indication by the insurers of the sense in which, if it operates at all as an acceptance, the proposal is being accepted. If the proposer does not like it, he may send it back unless he has committed himself to taking it, if he does nothing, his tacit acquiescence by itself will probably not be construed as an approval; but any positive action by which he recognizes, or seeks to enforce, the policy will amount to an affirmation of it and once he has made such an affirmation, he cannot thereafter seek to set it aside". (Emphasis added)

The suggestions in Re Bradley and Essex and Suffolk Accident Indemnity Society, (1912) 1 KB 415 CA at p.430 per FARWELL, L.J. that the assured or insured can affirm the policy without being bound by the new terms seems, in my view, inconsistent with the authorities, namely, Macdonald V Law Union Insurance Co. (1874), L.R. 9QB 328; British Equitable Assurance Co. Ltd V Bailey, (1906) A-C 35 H.L.; Dawsons Ltd V Bonnin (1922) 2 A.C. 413, H.L. I am in complete agreement with the view expressed by MOULTON, L.J., in the same Re Bradley case, (1911-13) ALL ER (Reprint), at page 450 when he said **".....this is not a case in which the insured is disclaiming the policy as not being in accordance with that which he intended to enter into. He is himself claiming under the policy, and he cannot be allowed to claim under the policy and yet contend that he is not bound by its terms".** This statement, in my view, accords more with the authorities and the law as expressed in the statement emphasized in the quotation above from Halsbury's Laws of England, supra. One should note that the issue in the Re Bradley's case, supra, did not turn on the said suggestions or statements.

Counsel for Mr. Tarraf places reliance on the case of Olley V. Marlborough Court Limited (1949)1 KB 532. In my considered view the ratio decidendi of the Olley's case, a case of contract simpliciter, is distinguishable from and is in fact different from an insurance case such as the instant one. In the Re Bradley's case, the term

of the agreement was placed in the hotel room and the customer only knew of the term after he entered his room which was after the contract was made. In an insurance contract there is a relationship between the proposal form and the policy, and the assured had the option of rejecting the policy or affirming same usually well before the event insured against occurs. Mr. Tarraf clearly had the option of rejecting or affirming the Cover Note/Policy well before the event insured against. In short, the natures of the two contracts are significantly different.

Had Mr. Tarraf taken any positive action resulting in affirmation of the Cover Note/Policy? Yes; in my view he had. The letters – Exhibits "D1", "D2" and "D3" – constitute such action. A more significant action is this very suit. Clearly, the suit is based on the Cover Note/Policy as earlier discussed. See the Statement of Claim in its entirety with particular attention to paragraphs 3 and 4. In my judgment, Mr. Tarraf is bound by the terms and conditions of the Cover Note/Policy and I so hold.

WAR AND CIVIL WAR EXCLUSION CLAUSE

The War and Civil War Exclusion Clause provides as follows:

> ***"Notwithstanding any thing to the contrary contained herein this Policy does not cover loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority".***

The trial court was said by counsel, Mr. E.E.C. Shears-Moses, for N.I.C. in the court below to have held that the Exclusion Clause was not part of the contract (See page 94 of the record). The trial court never said such a thing. At page 67 of the record the learned judge, in respect of the Exclusion Clause, said **"on the face of it, this is the peril against which this plaintiff effected the insurance. When the assured has proved a prima facie case of loss within the contract of**

insurance, the insurers are entitled to show that the loss falls within the exception – Hurst V Evans, (1917) 1 KB 352. The burden of proving that the loss was caused by an excepted peril lies upon the insurers". He proceeded to review the case of: Total Broadhurst Lee Co V London and Lancashire Fire Insurance Co. (1908), The Times, May 21 and quoted Justice BINCHAM in his summing up to the Jury when he said inter alia *".....And, finally, you must remember that this is what is called an exception in the policy and it is for the insurers to satisfy you that the exception has which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do, they may have not discharged the burden which is upon them".* Then the trial judge expressed his own views thus: *"The Insurers must produce affirmative evidence of facts supporting their contention, and such evidence, must be sufficient. If they fail to produce such evidence they have not discharged the onus of proof, and the assured, accordingly succeeds in his claim".* The trial judge then reproduced the War and Civil War Exclusion Clause in the Policy/Cover Note and in reference to the CONTRA PROFERENTEM principle cited the case of Cornish Accident Insurance Co. (1889) 23 QB D 453 per Lord Justice LINDLEY, at page 456, that –

> *".....in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But the principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty".*

The trial Judge then went on to say ***"the defendants (the N.I.C.) rely on the above clause*** (meaning the Exclusion Clause) ***for exemption from liability; particularly civil war. <u>The defendants led no evidence to show that when the peril occurred there was a civil war which directly or indirectly caused it"</u>*** (Bracketed words and emphasis added) and he then went on to state ***"I hold that the defendants cannot avail themselves of the exclusion clause ....."***

Given the background leading to this statement which is the subject of the query mentioned earlier, I cannot imagine by any stretch of the language (or imagination) how this could be interpreted and understood to mean that the said Exclusion Clause is not part of the contract. The trial Judge's statement of the law, in my view, is correct and I so hold. I will, however, go further. In the oral argument counsel for the N.I.C. argues that there was a military coup on the 25th May 1997 and that this was a notorious fact. Counsel further argues that the Police Report (Exhibit "C") confirms his statements. He also relies on the letter of Mr. Tarraf to the reinsurers, Harris & Dixon Insurance Brokers Limited, in which he stated that the goods in his shop were looted. A party to a suit may rely on the evidence adduced by his opponent or otherwise in support of his case but it is his primary responsibility to adduce evidence in support of his case. The evidence referred to in both the Police Report and the letter are insufficient evidence. Even Mr. Tarraf was not present when the shop was allegedly looted. It is true that both the Police Report and the letter were tendered by Mr. Tarraf. One expected counsel to have cross-examined Mr. Tarraf on the issues raised, including his sources, and asked direct questions with a view of eliciting evidence that would show a causal connection, a nexus, between the alleged looting and the coup of the 25th May 1997. For the same purpose, one would have expected evidence from witnesses showing the general state of affairs, particularly, in the area of Mr. Tarraf's shop, and how it impacted on people, homes and business premises. Primarily, the evidence ought to have been directed to show that the loss resulted directly or indirectly from the events alleged – usurped or civil war etc. – that the N.I.C. was relying upon. In Spinneys (1948) Ltd, Spinneys Centres S.A.L. and Michel Doumet, Joseph Doumet and Distributors and Agencies S.A.L. V Royal Insurance Co. Ltd (1980) 1 Lloyds Law Reports 407 extensive evidence of the situation in Lebanon was given, including the interrelationship of events and the relevant actors and players. A vivid picture was painted and evidences were given to show causal connections. In reading the evidences of the state of affairs in Lebanon during the relevant period stated in a narrative by Mr. Justice MUSTILL but based on the evidence adduced by witnesses, I had the impression of reading a detailed

historical paper. In the instant case, there is lack of sufficiency of the evidence and, in particular, lack cogent evidence showing the nexus between the alleged state of affairs and the loss, directly or indirectly. In the circumstances, I am of the firm view that the N.I.C has not proved any of the exceptions in the Exclusion Clause, and, in the circumstances, I have no option but to hold, quoting the trial Judge, that the N.I.C. ***"cannot avail themselves of the exclusion clause"*** and I so hold.

VARIATION OF THE AWARD BY THE COURT OF APPEAL

There was no cross appeal by Mr. Tarraf and he did not seek variation of the award of US $ 20,000-00 by the High Court, by filing a notice of contention that the judgement be varied pursuant to Rule 18 (1) of the Court of Appeal Rules. Notice of Motion for enlargement of time was filed but it was never heard by the court below. In my view rule 18 (1) which is reproduce hereunder:-

"18 (1) It shall not be necessary for the respondent to give notice of motion by way of cross-appeal; but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he shall within one month after service upon him of the notice of appeal, cause written notice of such intention to be given to every party who may be affected by such grounds on which he intends to rely and within the same period shall file with the Registrar four copies of such notice, one of which shall be included in the record and the other three copies provided for the use of the Court"

is mandatory and rule 18 (2) reproduced below:

"18 (2) Omission to give such notice shall not diminish any of the powers of the Court but may in the discretion of the Court be a ground for postponement or adjournment of the appeal upon such terms as to costs or otherwise as may be just"

merely allows the court in its discretion to postpone or adjourn the appeal to allow for the filing of the Notice of Contention to vary. Since the Court of Appeal did not act to vary the award on the basis of a cross-appeal or rule 18 (1), one may ask on what basis did it act? Rules 31 and 32, in my view, are not applicable in the circumstances. The Court of Appeal could have acted under rule 9(6) which states.

"9(6) Notwithstanding the foregoing provisions of this rule, the Court, in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant unless the parties have had sufficient opportunity of contesting the case on that ground".

But in such a case the Court of Appeal is obliged to afford the parties sufficient opportunity of contesting the case on that specific ground. From the record this was clearly not done and the court in the judgement failed or neglected to explain the legal ground for its intervention in varying the award. It is my firm view that in the circumstances the Court of Appeal was wrong in varying the award, and I so hold.

1st Loss – A LIMITATION CLAUSE

Since I hold that the Cover Note is the operative document, I have to look at the 1st loss limitation. The 1st loss is the same as the excess in motor vehicle insurance. The insurer can only be liable for the sum in excess of the US$20,000-00 being the 1st loss. In the result the N.I.C. is liable only for the US$20,000-00 over the 1st figure of US $ 20,000-00, and I so hold. See Halsbury's Laws of England, supra, para: 531 page 268.

PROOF OF LOSS

Counsel for N.I.C. raised the issue of the proof of loss before the court but on the objection of counsel for Mr. Tarraf that it was not appealed against both in the court

below and this court, counsel for the N.I.C. sought to amend but withdrew the application in the face of strenuous objection and in the belief that the issue was raised in ground 7 of the Grounds of Appeal. I agree with the counsel for the N.I.C. on this. Ground 7 is a follow up to ground 6 which deals specifically with the varying of award and, it is in that light that ground 6, should be seen. Counsel's complaint in ground 6 is in the context of and in view of Justice WARNE's decision that Mr. Tarraf was not bound by the Cover Note (See page 128, 131 and 136 of the record) and it was therefore irrelevant to the issues. In answer to ground 1, in the given circumstances, it would appear that the evidence on which the learned Justice decided on the figure of US$40,000-00 is the proposal form – Exhibit "G" - where it is stated the insured sum is US$40,000-00.

I am in agreement with counsel for Mr. Tarraf that the appeal was not fought before the court below and this court on the basis of lack of proof of loss but on the Exclusion Clause, among others. However, I would like to draw attention to counsel for the N.I.C's reference, in oral argument, to the absence of stock books and other records. In this regards, I would like to draw attention to the proposal forms and to note that questions on stock and sale books are included therein. I take it there is good reason for these questions. If these important books are kept in the premises insured, is it not likely that these could be lost in the event of fire, and thus deprive insurers of valuable evidence? Perhaps, there should be a requirement by insurers for these books and similar documents of potential evidential value to be kept in different and secure places. Another striking fact is that Mr. Tarraf was never questioned in respect of these, confirming in my mind, that the N.I.C., in the trial, exclusively, but unwisely, focused on the Exclusion Clause which, to their utter surprise, I presumed, mutated into a mirage!

INTEREST ON FOREIGN CURRENCY AWARD

In the written address kindly provided by counsel for Mr. Tarraf, the point raised ground 8 of the Grounds of Appeal was conceded. Counsel now urges the co either to remit the case to the High Court to hear evidence on the interest rat

the relevant currency or, alternatively, for the court to strike out that part of the judgment dealing with the rate of interest on the foreign currency, in which case, Mr. Tarraf would only be entitled to the statutory interest pursuant to the Judges Act of 1883, a statute of general application, applicable pursuant to section 170(1) of the Constitution, 1991, and section 74 of the Court Act, 1965.

In the premises, I set aside the judgment of the Court of Appeal in its entirety and:

(1) Affirm the judgment of the trial court in respect of paragraph A and give judgment to Mr. Tarraf in the sum of US$20,000-00 payable in Leones at a rate of exchange effective as at 7th April 2000 – the date of the judgment given by the trial court.

2) The matter has been in the court for too long. This court will not remit the case to the High Court for it to hear evidence on the interest rate on the relevant foreign currency. Paragraph B of the relief granted by the trial court is hereby set aside and the court makes no order as to the interest payable on the foreign currency.

3) Due to the unhelpful manner in which the parties conducted their respec cases in the High Court and the court below, parties shall bear respective costs in the said courts and also in this court. If costs have paid same to be refunded.