IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:NYARANGI, PLATT & APALOO JJA)

CIVIL APPEAL NO 42 OF 1984

KENYA NATIONAL ASSURANCE CO LTD……..APPELLANT

VERSUS

KIMANI & ANOTHER……RESPONDENTS

(Appeal from the decision of the High Court at Nairobi, Sachdeva J)

JUDGMENT

Nyarangi JA This appeal is from the order of the High Court judge (Sachdeva J as he then was) raises questions of importance in insurance matters. The judge held that the appellant company had waived their right to repudiate liability by retaining the excess, that retention of the excess after discovery of a breach of the policy by the respondent insurers constituted an intention to affirm the policy and the insured were entitled to rely on the representation arising from the retention of the excess.

The chronology is as follows:

A policy of a motor vehicle registration mark KNN 511 was issued by the appellant company. The policy provided *inter alia* that the appellant as insurer would indemnify the respondents as the insured against loss or damage to the motor vehicle, its accessories and parts and also against claims by third parties for personal injuries arising out of accidents involving the motor vehicle. Condition 3 of the policy stated that the insured was obliged to safeguard the motor vehicle from loss or damage and to maintain the vehicle in efficient condition. By clause 10, it was stipulated that due observance and fulfillment of the terms of the policy should be a condition precedent to any liability of the appellant.

On the 26th day of June 1976 the motor vehicle was involved in an accident along Kirinyaga Road, Nairobi when it crashed into a shop owned by two Patels, P M Patel and V M Patel and occupied by Messrs Kenya Spares Ltd. As a result of the accident, the two Patels and the occupants suffered loss and damage and one Mukinya sustained personal injuries. The motor vehicle was extensively damaged and had to be written off. Differences between the appellant and the respondent arose after the appellant repudiated liability to indemnify the respondents. So, as per clause 9 of the policy, the differences had to be and were submitted to AB Shah Esq, advocate. The three differences submitted were:

1. Did the insured comply with the conditions of the contract of insurance in terms of clause 3?

2. Is the insured in breach of any of the stipulated conditions?

3. Is the insured entitled to an indemnity under the contract of insurance?

The parties undertook to abide, observe, perform and obey the award to be made and published. In addition, the parties said they would do everything necessary to enable the sole arbitrator to make his award. If any party willfully or wrongfully did any act to delay or prevent the making of an award, such a party would pay to the other such reasonable costs as the arbitrator would declare in writing. In case a party failed to attend before the arbitrator following reasonable notice, the arbitrator would proceed *ex parte*. Lastly the parties gave full power to the arbitrator to determine the question of costs including costs to the parties and how the costs etc would be borne. The arbitrator was expected to make his award in writing one month of the service of the reference on him.

The arbitrator made his award on June 5, 1981. His findings could be summarized as follows: acceptance of the excess at the time the claim was filed did not waive the breach; the question of repayment of excess by the insurer was not considered and the respondent did not demand repayment; the facts as found were that the insurer accepted the excess unaware of the breach of condition and hence the insurer did not waive the alleged breaches, not even by failure to refund the excess; the motorvehicle was not maintained properly; it was maintained in an inefficient condition; but the inefficient condition was on the balance of probabilities the cause of the accident.

The arbitrator proceeded to decide that the insurer is not bound to indemnify the insured respondent in respect of claims arising out of the accident. If the insurer appellant were called upon to satisfy claims made against it pursuant to its statutory liability the insurer be at liberty to claim recompense from the respondent, subject to the insurer accounting for the sum of Kshs 12,000 paid to it as the excess.

The next development was a chamber summons taken out on behalf of the respondents under section 24 of the Arbitration Act and rules 4 and 6 of the Arbitration rules for an order that the award made and filed be set aside and that costs of the application be provided for.

The ruling of the High Court setting aside the award with costs is challenged on several grounds. Mr Kinyanjui first referred to ground 6 of the amended memorandum of appeal and appeared to concede that the judge had jurisdiction to hear the application. Turning to the original memorandum of appeal, Mr Kinyanjui argued grounds 2 and 3 together and contended that, notwithstanding that the breach of condition was discovered after the receipt of the excess by the appellant and although the excess was not returned, the appellant could not be held to have waived their rights under the terms of the policy. Counsel argued that excess is the first amount payable for which the appellant does not indemnify the respondents. It is not a premium which is a consideration. The second question which is raised on behalf of the appellant as contained in grounds 1, 4 and 5 of the original memorandum is whether there was sufficient evidence to constitute the requisite ingredients of waiver. Counsel submitted that there was no representation by conduct on the part of the appellant for the respondents to do any acts, no evidence that the appellant accepted liability under the policy and that waiver is contractual. In the view of Mr Kinyanjui, there is no duty in law to refund the excess. Mr Mitra's submissions on behalf of the insured respondents can be briefly summarized. There was no distinct issue of law referred to the arbitrator, no issue of waiver was referred and so if there is an error of law on waiver, the award has to be set aside.

Counsel urged that money paid under the contract would estop the receiver, that no distinction ought to be made between premium and excess. In Mr Mitra's view, the excess is additional premium for keeping alive a policy. Nor could any distinction be made between acceptance and retention of the excess. When the excess was paid, the appellant had no knowledge about the motor vehicle. By October 1976 the appellant had full knowledge and by accepting money after the knowledge, the appellant had committed a breach amounting to a repudiation. Mr Mitra submitted that there was implied representation because the respondents maintained silence and did not ask for the money paid as excess. That means that the respondents understood the policy to be alive.

The High Court had jurisdiction to deal with the application before it and so consider if there was an error of law on the face of the award arising from the arbitrator's decision on the issue of waiver; *Rashid Moledina v Hoima Ginners* [1967] EA 645.

Stripped of complications, the question I have to determine, it seems to me, is whether the appellant waived their rights under the policy by accepting and retaining the first amount payable by the respondents.

The material motor vehicle was held not to have been maintained in an inefficient condition, meaning in roadworthy condition; *Conn v Westminister Motor Insurance Assoc* [1966] 1 Lloyd's Rep 407. It is appropriate at this stage to deal with the meaning of the terms 'premium' and 'excess'. The amount of premium is a term of the contract between the parties and it depends on the scope of the policy on the risk involved; *Re George & Goldsmiths v General Burglary Insurance Assoc* (1899) 1 QBD 595. In practice the majority of insurance policies provide that payment of premium is a condition precedent to the insurer's liability. 'Excess' is the amount for which the insured insures himself and which under this particular policy had to be paid, as is often the case, at the time the insured requested for indemnity under the policy. The appellant insurer is relieved from liability for the first Kshs 12,000 and if the appellant paid claims for damages brought against the respondents, the appellant company would be entitled to recover from the respondents. Here, there is evidence of third party claims made against the appellant. This would explain the arbitrator's finding that the appellant is at liberty to claim recompense from the respondent if the appellant is called upon to meet claims made against it pursuant to statutory liability. Clearly that is why the appellant has not refunded to the respondents the sum of the excess or any part of it. What in my view now matters is that the respondents did not efficiently maintain the vehicle, which is a breach under the policy, and that the appellant has been paid the amount of the excess out of which to meet third party claims. Now that the appellant is possessed of the full knowledge of the breach, he could not reasonably be expected to refund the amount of the excess already paid before the settlement of outstanding claim. In my judgment it does not matter whether the excess was paid before the appellant was in possession of all facts about the motor vehicle. The naked fact is that the excess had to be paid as a condition precedent to any liability of the insurer to make payment under the policy.

Mr Mitra relied on 2 *Chitty on Contracts* (21st edn) para 675, which is headed 'waiver of breach of condition' and states as follows:

'675 Waiver of breach of condition. Acceptance by the insurers of premiums after discovery of the breach of condition of the policy by the assured evinces an election on their part to affirm the policy (rule). If such a premium is accepted by their agent, and remitted to them with information of breach, they must retain it at once if they wish to rescind the policy on the ground of breach of condition(s). So, generally, where the defendants, with full knowledge of the facts (t), by their acts or conduct lead the plaintiff reasonably to suppose that they do not intend to treat the contract as at an end for the future, on account of his breach of condition, they are estopped from setting up the breach as a defence (u). Thus where agents had accepted file insurance premiums and paid them to the company with knowledge that the assured had broken a condition (a), (b) and where in a motor insurance case a clerk of the insurers had notice of such a breach and the insurers had subsequently paid a claim under the policy (c), the insurers have been held to be estopped from setting up the breach of condition as a defence.'

I can say at once that the paragraph is concerned mainly with premium and not excess and so does support the respondent's case.

I shall return to this passage when I tackle the key issue whether the appellants by their acts or conduct led the respondents to suppose that they do not intend to treat the contract as at an end for the future because of the respondent's breach of a condition.

The acceptance and retention of the excess does not suggest that the appellants had overlooked the observance of the terms of the policy. There is no evidence that, as a result of the retention of the excess, the respondents were misled into acting to their detriment. The appellant did not make any statement or conduct itself with regard to the breach committed by the respondents by not maintaining the motor vehicle in an efficient condition with an intention that the respondents should act upon it. In other words, there is no question here of estoppel by representation.

The point made by Mr Mitra about waiver is with respect somewhat audacious. Waiver is an agreement to

forego or not to assert a right. In this action, the appellant satisfied the arbitrator that the respondents had not fulfilled a term of the contract. Besides, the appellant wrote to the respondents to repudiate the insurers' claim to be indemnified. In those circumstances, the point raised on waiver is a bad one.

In *Pioneer General Assurance Society v Mukasa* [1974] EA 165, the respondent was misled by a statement made to her. That has not happened here. The decisions in *South British Insurance Co Ltd v Samiullah* [1967] EA 659 concerned different facts and therefore do not assist here. It follows from what I have set out that I would allow the appeal, and set aside the judgment and decree of the High Court with costs here and below. As Platt and Apaloo JJA agree, it is so ordered.

Platt JA. I have had the privilege of studying the judgments in draft of Nyarangi and Apaloo JJA and agree in the result proposed by Nyarangi JA. Those judgments set out the history of this dispute fully, and I need only refer to two aspects of the case. The first is to reconsider when the courts have jurisdiction to interfere with an award where an error lies on the fact of an award. The second is to add a further explanation of the effect of paying an excess, which may arise form the terms of a contract of insurance.

Jurisdiction

It is often thought that the decision in *Rashid Moledina v Hoima Ginners Ltd* [1967] EA 645 is the culmination of several cases such as *Sohan Lal v East African Builders' Merchants* (1951) 18 EACA 50 and *Tame v Zagoritis* [1960] EA 370; but it is not quite the apotheosis of this aspect of the law of arbitration.

It is difficult to spell out what the reference to the arbitration actually was. Knowledge of the reference is vital in these matters, because that is the foundation of the concept of misconduct. Under the Arbitration Act (cap 49), as Spry JA explained (the *Rashid Moledina* case at 65) an award can only be set aside for misconduct on the part of the arbitrator, and that has been extended by judicial interpretation, to include an error of law apparent on the fact of the award. Spry JA cites *Landauer v Asser* [1905] 2 KB 184 as authority. The learned justice of appeal later explained that *Sohan Lal's* case was based on the Privy Council decision in *Champsey Bhara and Co v Jivraj Balloo Spinning and Weaving Co Ltd* [1923] AC 480. An extract from that judgment followed:

'An error of law on the fact of the award means, in their Lordships' view, that you find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous.'

The *Champsey Bhara* decision was no doubt binding on the Court of Appeal in *Sohan Lal's* case in 1951. It was delivered on Mary 5, 1923, the House of Lords decided *Kelantan Government v Duff Development Co Ltd* [1923] AC 395. The *Champsey Bhara* decision was not referred to. *Landauer v Asser* was distinguished by the Lord Chancelllor and disapproved of by Lord Parmoor (at 418). Approval was given to Channel J's statement still attracts approval in 2 *Halsbury's Laws of England* (4th edn) at para 623 set it out:

'It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitration, that makes the award bad, and it can be set aside … but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile even to submit a question of law to an arbitrator."

This statement is repeated in para 623 of *Halsbury's Law* (*supra*). In a note to *In Re King and Duveen* the authors state the following observations:

'The authorities distinguish two types of cases:

1. when a specific question of law is submitted to the arbitrator; and

2. when a matter or matters in which a question of law becomes material are submitted. In the former the court cannot, but in the latter it can and will interfere, if an error of law appears on the face of the award. *Absalom (FR) Ltd v Great Western (London)* Garden Village Society [1933] AC 395.'

It is therefore clear that the statement of principle in *Champsey Bhara's* case is incomplete, though it may have been sufficient in those circumstances, and the decision in the *Kelantan Government* case is a further statement, and perhaps not referred to in *Rashid Moledina's* case, (*inter alia*) because of the nature of the reference. Should a case arise when a specific question of law is referred to an arbitrator then *Rashid Moledina's* case will not have a sufficiently wide statement of principle.

It was recognized in *Rashid Moledina's* case, that to set aside an award for an error apparent on the face of the award, was an exception. Lord Dunedin in giving the opinion of the Board in *Champsey Bhara's* case remarked (at 487) that it was certainly not to be desired that the exception should be in any way extended. That remark stemmed from Lord Dunedin's quotation of Williams J's decision in *Hodgkinson v Fernie* 3 CB (NS) 189, 202 a decision which has had general approval:

'The law has for many years been settled, and remains so to this day, that, where a cause or matters in difference are referred to an arbitration, whether a lawyer or a layman he is constituted the sole and final judge of all questions both of law and of fact. … The only exception to that rule, are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now I think firmly established viz: when the question of law arises on the face of the award. Though the propriety of the later may very well be doubted I think it may be considered established.'

Those sentiments bore fruit in *Rashid Moledina's* case where Sir Charles Newbold P attended to similar doubts expressed in *Sohan Lan's* case, but decided that the court should not reject the validity of the exception. One thing is clear. As Channell J observed, unless arbitration is to be meaningless, some line must be drawn so that an arbitrator is actually the sole judge of questions of fact as well as law. At present that can only be achieved by distinguishing clearly between cases where a specific point of law has been referred to the arbitrator, and where the question of law arises incidentally in a general reference.

Lord Parmoor pointed out in the *Kelantan Government* case that questions of law could be referred to the courts by a case stated. That is provided for in Kenya by section 22 of the Arbtiration Act. The court may also decide that difficult questions of law should not be referred to arbitration. What is the point, if the court will interfere if requested to do so? This whole question was put to the parties in the present appeal, but no general discussion of the state or value of the exception was forthcoming. Hence a closer examination of the state of the law will not have to wait for another occasion. It will be sufficient on this appeal to point out the limitations of the *Rashid Moledina's* case.

Applying those principles to the present case, the third reference was in general terms – is the insured entitled to an indemnity under the contract of insurance? The real question would soon be discovered to be, whether the retention of the excess paid to the insurer by the insured, amounted in law to a waiver by the insurer or the breach of contract by the insured. Waiver is usually a question of mixed fact and law. Here the breach of the contract was virtually admitted. Payment of the excess was admitted. What was at stake was whether the payment of the excess had the same effect as payment of the premium in keeping the contract alive or whether the insured having other claims against him, could reasonably retain the excess. It follows that these subsidiary matters sufficiently widened the inquiry to prevent the third reference being in reality a specific question of law on waiver. That being so the question of waiver arose incidentally in the course of reference. The High Court therefore had jurisdiction to interfere.

Excess

The High Court was wrong in its view of the facts and inferences to be drawn from them. It was especially wrong on its approach to the excess. The premium paid is the consideration for the contract and concerns the creation of the contract. Consequently it can be said that payment of premium 'keeps the contract alive'. The payment of excess must be paid as part of the performance of the contract. By paying the excess, the insured demands performance from the insurer. The excess is that part of the loss not

insured. Having paid it, the insured demands performance, on that part of the loss that was insured. The excess is not of the same nature as those conditions which must be fulfilled in order that the contract will not be avoided *ab initio*.

Apart from its special nature, the retention of the excess was retained for other reasons than the acceptance of liability by the insurer. Consequently,

I agree with the orders proposed by Nyarangi JA.

Apaloo JA.The appellant, a limited liability company carries on business as an insurance company. The respondents owned a Leyland truck No KNN 511 which at some time prior to June 1976 that vehicle was involved in an accident along the Kirinyaga Road, Nairobi. It crashed into a shop and also injured some third party. The vehicle was so badly damaged, that it was written off as a total loss.

The respondents accordingly sought to be indemnified by the appellant for the loss they sustained by the writing off of the vehicle. It is agreed that it is a term of the policy that the respondents themselves bear the first Kshs 12,000 of the total loss, technically called the 'excess'. So when the respondents filled the appellant's claim form, they paid to the appellant this Kshs 12,000 excess in accordance with the requirement of the policy.

The evidence shows that this payment was made on June 28, 1976. On October 1, of that year, the appellant, by letter of that date repudiated liability to the respondents. The reason for this was the alleged breach by the respondents of a condition of the policy which obliged the respondents to maintain the motor vehicle in an efficient condition. When it repudiated the policy, the appellant did not then or at any time afterwards refund to the respondents the Kshs 12,000 they had paid as excess. No issue seems to have been made of this until the dispute came before an arbitrator.

The repudiation of liability on the policy by the appellant brought differences between the parties and in accordance with condition 9 of the policy, these differences were submitted to the sole arbitrament of Mr A B Shah. Having taken evidence, he felt satisfied that the vehicle was not maintained in an efficient manner. He accordingly held that 'the insurer is not bound to indemnify the insured in respect of claims arising out of the accident'.

The respondents raised before the arbitrator, the issue of waiver and the parties agreed that the arbitrator rule on this question of law. The point taken by counsel on behalf of the respondents, was that as the appellant accepted the excess of Kshs 12,000 and failed to refund it to the respondents despite the repudiation of liability, the appellant should be held to have waived the breach of the condition and that therefore the respondents were entitled to recover under the policy. That contention was disputed by counsel for the appellant. The learned arbitrator found that there was no waiver.

The respondents contested this holding in the High Court on the ground that the arbitrator having misconstrued the law, was technically guilty of misconduct as to justify the setting aside of the award under sub-section 2 of section 24 of the Arbitration Act. In the court below counsel for the appellant is recorded to have accepted that if indeed the learned arbitrator's holding on the issue of waiver was erroneous in law, it constituted misconduct and would justify the award being set aside. But he contended that the arbitrator decided that issue of law correctly and resisted the setting aside of the award.

That an error of law on the face of an award amounts in law to misconduct, justifying the intervention of the court, seems to be legal position in this country. (See *Rashid Moledina & Co Hoima Ginners Ltd* [1967] EA 645). Having heard argument, the learned judge arrived at a conclusion diametrically opposite to the one arrived at by the arbitrator. He held that inasmuch as the company kept the 'excess' and failed to refund it to the respondents on learning of the breach, it waived it. The court accordingly proceeded to set the award aside. It is this that provoked this second appeal to this court.

The memorandum of appeal contains no fewer than six grounds. But argument before us centred on grounds 2 and 3 which were formulated as follows:

2. The learned trial judge erred in holding that the 'excess' is in its true nature consisted with keeping up the insurance policy and that it is moneys paid to keep up the policy.

3. The learned trial judge erred in holding that acceptance or retention of the premium or the excess after discovery of the breach of the policy by the insurers evidenced an election on their part to affirm the policy.

The argument addressed to us by counsel for the appellant followed more or less the grounds of appeal quoted above. It was said waiver being in its nature estoppel by conduct, there could not be one unless the respondents showed that the appellant made a representation either expressly or by conduct which it intended the respondents should act upon and that they acted on it to their detriment. Counsel contended the appellant made no representation of any sort to the respondents and they, on the evidence cannot be said to suffer any detriment by action on a representation made to them by the appellant. Accordingly, we were invited to say that the learned judge was in error in his holding.

For the respondents, it was submitted that although the appellant did not know of the breach of the condition of the policy when the excess payment was made, when it became cognisant of it, it did not then immediately return the money. In retaining it, it was submitted, the appellant impliedly represented that the policy was still alive. That being so, counsel argued that the appellant waived the breach and could therefore not rely on it to repudiate liability. Both sides cited and relied on a number of decided cases. In some of them waiver was held to have been established, the contrary was held in others. The divergent holdings show that each case was decided on its own special facts.

So the only helpful guidance we can receive from case law on this subject is the principle of law on which these decisions were based. In *Lickiss v Milestone Motor Policies at Lloyds* [1966] 2 All ER 972 and 975 Lord Denning MR.

'The principle of waiver is simply this: that if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so.'

See also *Plasticmoda etc v Davidsons (Manchester)* [1952] 1 Lloyd's Rep 527. Although in slightly varying language, that is how the underlying principle of waiver was conceived in Hardy Ivamy, *General Principles of Insurance, MacGillivray on Insurance Law* and 22 *Halsbury's Laws of England* (3rd edn) p 82 to which counsel referred us.

The question for decision is, how does this case stand judged against that authoritative statement of principle? Can it be said on the facts of this case that the appellants led the respondents to believe that it will not insist on its contractual right to repudiate liability for non satisfactory maintenance of the vehicle? It is admitted that at the time the excess payment was made the appellant did not know of the breach of the condition by the respondents. It is also not in dispute that when it became cognizant of it, it notified the respondents of its intention to repudiate liability. Is the fact that it did not then return the excess, evidence that it intended to waive the breach? In view of its express repudiation of the contract, it would hardly be accurate to say that it impliedly agreed to waive it.

It seems if the retention of the excess cannot be explained on any rational hypothesis, it may be regarded as conduct on the part of the appellant indicative of an intention to keep the contract alive. But it is common ground that third parties have made claims against the appellant which by reason of section 10 of the Motor Vehicles (Third Party Insurance) Act, it had to meet regardless of its repudiation of liability to the respondents.

That being so, the retention of the 'excess' seems of little significance because the appellant may wish to keep this money to recoup itself in respect of compensation it may make to third parties.

Furthermore, the retention of the excess apart, there is no evidence that the respondents believed that the

appellant would not insist on its rights. They cannot reasonably hold any such belief, well knowing that the appellant had informed them that it would rely on the breach to repudiate liability. It is also difficult to see that the respondents can point to anything done by the appellant towards them which will make it inequitable for it to rely on its right of repudiation. In this sense, I think the respondents must be able to say that:

'in view of what you said or did to us, it would be contrary to your good conscience to insist on your right to repudiate liability.'

If they could justifiably say this on the evidence, then they could rightly say, it would be inequitable for the appellant to be permitted to insist on its strict right of repudiation.

The respondents relied on the decision of the predecessor of this court in *Pioneer General Assurance Society v Mukasa* [1974] EA 165. It was there held that as the insurance company misled the insured into believing that there was no urgency over reports in writing, they waived that requirement and could therefore not rely on it to repudiate liability. Clearly, there was evidence there that the company misled the insured and were held disentitled to insist on the requirement of writing. Here, there is no evidence or the faintest suggestion that the appellant led the respondents to believe that notwithstanding the breach of condition by the respondents they would still meet liability under the policy. So this case is plainly distinguishable.

In *Hemmings v Sceptre Life Association Ltd* (1905) 1 Ch 365 – a case on which the respondents relied, it was held that by accepting premium with knowledge of facts which entitled the insurance company to repudiate, they must be taken to have affirmed the policy and were consequently bound by it. Here, it is common ground that when the excess payment was received, the appellant had no knowledge of the breach. So this case provides no assistance to the respondents.

The respondents also relied on–*South British Insurance Co v Samiullah* [1967] EA 659. In this case, on the day the insurance contract was entered into, the insurance company knew the insured had concealed a material fact yet they did not then repudiate the policy or a reasonable time thereafter. Not having done so, it was held that their delay amounted to a waiver of the right to repudiate. Again, the facts of this case have not the slightest affinity to the present case.

An examination of the case law, shows that the plea of waiver failed or succeeded on a disparate set of facts. The only common bond that unites these cases, is the legal principle on which they were based, namely estoppel by conduct. In my opinion, on the facts of this case, the appellant cannot properly be said to be estopped by conduct from relying on its contractual right of repudiation.

This is sufficient to conclude this appeal in the appellant's favour. Mr Kinyanjui also complained that part of the trial judge's error arose from the fact that he equated 'premium' with 'excess' but says the two are different concepts in insurance law. Mr Mitra retorts that these are mere labels or insurance jargon and both related to the payment of money. In the contention of Mr Mitra, there is no conceptual difference between the two.

Although he did not, in terms, say so, that is how the learned judge also conceived it. Because he said:

'Acceptance or retention of the premium or the excess after discovery of the breach of the policy by the insurers evinced an election on their part to affirm the policy.'

I think there is, as a matter of contract law, difference between the two. One is vital to the existence of a binding contract, the other is not. Premium is the consideration that moves from the promisee to the promisor to make the agreement enforceable. In its absence, the agreement will be a *nudum pactum* both in law and equity. 'Excess' on the other hand, is the insured's agreed contribution to the loss. Its non-payment does not avoid or impair the legal nature of the contract of insurance. Its only result, is that the insurer's obligation to the insured is diminished to the extent of the excess.

It is not entirely clear whether the judge's conclusion would have been otherwise if he had appreciated the juristic difference between the two. But to argue as Mr Mitra did that it all related to the payment of money simpliciter, seems to me to oversimplify the question and I am in disagreement with him on his contention. I think, therefore, that the learned arbitrator was right in holding that no waiver was established. I think, with respect, the learned judge's contrary conclusion was erroneous.

Accordingly, in my judgment, there was no error of law on the fact of the award and the judge below was not justified in setting it aside. It follows that the appellant is entitled to have that award restored. I would therefore allow the appeal and order accordingly.

Dated and Delivered this 4th November, 1987

J.O. NYARANGI,

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL