THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, JSC, TSEKOOKO, JSC & KAROKORA, JSC)

CIVIL APPEAL NO. 55/95

BETWEEN

ORIENTAL INSURANCE)::: APPELLANT
BROKERS LIMITED)

AND

TRANSOCEA.N (U) LIMITED : respondent

(Appeal from the judgment of the High
Court of Uganda at Kampala (Lugayizi, J.)
dated 7.11.1994, H.C.C.S. NO 256 OF 1993)

JUDGMENT OF ODER, JSC.

The appellant sued the respondent in the High Court for recovery of the sum of shs. 46,126,635/=.

The facts giving rise to the suit are that the appellant, an Insurance Brokers' Company, was contracted by the respondent to procure insurance covers for the respondent in respect of tire, burglary and customs bonds. The contract was in writing, the terms of which were contained in a letter dated 15.11.1988 from the respondent to the appellant (exhibit P.1).

The respondent obtained the necessary insurance covers and for customs bonds for the respondent for a period of three years. Subsequently the respondent unilaterally terminated the contract by a letter dated 17.6. 1992 (exhibit P.2). The gist of the letter was that with effect from 1.7.1992, the respondent would not need the services of the
appellant any more.

At the time of the termination of the contract, the respondent owed National Insurance Corporation shs.37, 679,104/= in respect of unpaid premiums for insurance covers and customs bonds arranged by the appellant for the respondent. Although the respondent promised to pay the appellant the outstanding insurance premiums at the time of the termination of the contract, it never did so.

The appellant had also brokered insurance covers from N/S Universal Insurance Company Ltd for the respondent. For this the respondent owed the appellant the sum of shs. 8,372,541/= for unpaid premiums and shs. 75,000/= as stamp duty on customs bond arranged by the appellant for the respondent. All these totaled the sum of shs.46, 126,635/=, for/to which the appellant sued the respondent to recover.

The respondent defended the suit, denying in its written statement of defence that it owed the appellant the sums claimed in the suit.

At the commencement of the trial of the suit two issues were apparently agreed to by he parties, namely, whether the respondent owed any money to the appellant; and if so, how much? But in the course of his judgment, the learned trial judge came up with four issues:
They were:
1. Whether the respondent owed the appellant any money;
2. If so, in what form was the debt — was it commission, premiums or both?
3. Depending on the answer to the second issue, whether the appellant was entitled to sue the

defendant as it did to recover what it was owed by the respondent.
4. If the answer obtained from issue 3 above is in the affirmative exactly how much money did the respondent owe the appellant?

The learned trial judge answered the first issue in the positive finding that the respondent owed the appellant some money at the time of the termination of the contract. The 2nd issue was answered to the effect that what the respondent owed the appellant when the contract was terminated was in the form of commission for insurance covers and customs bonds arranged in favor of the respondent.
The answer to the third issue was that the appellant was not entitled to sue the respondent for recovery of the sums of money claimed in the suit. This was because, according to the learned trial judge, evidence advanced on behalf of the appellant showed that after arranging the insurance covers and customs bonds in favor of the respondent, it would deduct from the premiums what was due to it (the appellant) and would then pass on the premiums to the insurers. There was no evidence to prove that practice or custom existed as entitled the appellant to sue the respondent for default in payment.

The third issue having been answered in the negative, as it was, the
learned trial judge concluded that it was not necessary to answer the fourth issue, and dismissed the suit with costs. Hence this appeal.
Six grounds of appeal were set out in the memorandum of appeal
complaining that:

1. The learned judge erred in law in deciding the appellant's claim on issues other than the ones the parties had agreed upon before the commencement and end of the trial.

2. The learned trial judge having decided not to get bogged down by the two issues agreed upon by the parties erred in law to have proceeded to determine the Suit on his own

issues without first raising the said issues to the parties, afford an opportunity to the parties or any of them, if it so wished, to adduce further evidence on the new issues and to make such appropriate legal submission before the end of the trial.

3. The learned trial judge erred in law to have ruled that the appellant had no cause of action to sue for premium when this particular issue had already been determined in the appellant's favor by another judge who had earlier handled the case and the parties were only able to proceed with the case before the trial judge because the plea by the respondent to the effect that the appellant had no cause of action to sue for the premium had been overruled.

4. The learned trial judge having found that the appellant was an agent for the Insurers, and by Custom of the trade was entitled to receive the premium from the respondent insured from which it would deduct its commission before passing the balance to the Insurers erred to have held that it could not sue for the recovery of the said premium from the respondent.

5. The learned trial judge erred in law to have held that the appellant as an agent could not sue in its name for what it was supposed to receive as per custom of the trade from the respondent on behalf of its principal unless expressly authorized to do so by the principal.

6. The learned trial judge having held that the appellant was entitled to the commission on the policies and custom bond effected for the respondent erred not to have at least given judgment in favor of the appellant to the effect that it was entitled to recover the Commission from the respondent.

The memorandum of appeal then prayed that the appeal be allowed with costs; the judgment of the lower court be set aside, and judgment be entered as prayed in the plaint of the suit in the

court below.

Mr. Sekandi, learned counsel for the appellant, took grounds one and two together. He submitted that the learned trial judge erred by introducing new issues in addition to the two agreed by the parties at the commencement of the hearing of the suit, consequently, the appellant was prejudiced because the new issues introduced new matters after the parties had already adduced evidence and addressed the trial court on the basis of the issues as originally agreed. Having introduced new issues, as he did, it was contended, the learned trial judge should have allowed the parties address him on them. Otherwise, the learned trial judge should have stuck to the two original issues for this submission, the learned counsel relied on Odd Jobs -V— Mubia (1970) E.A. 476; and Norman —V— Overseas Motor Transport (Tanganyika) Ltd (1959) E.A. 131.

In his counter submission, Mr. Kiapi, learned counsel for the respondent, said that under 0.13. r.1 of the Civil Procedure Rules (C.P.R.), a trial court is entitled to franc issues even after evidence has been adduced at the trial. The learned counsel also relied on the case of Odd Jobs (Supra). In this instant case, it was contended, the four issues framed by the learned trial judge were covered by the pleadings and evidence on record. In the circumstances, no prejudice was occasioned to the appellant.

Under the provisions of 0.13 of the CPR, a trial court has the jurisdiction to frame, settle or determine issues in a suit. The relevant rules of that order provide:

> “1 (5.) At the hearing of the suit the court shall after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary; ascertain upon what material propositions of law or fact the parties are at variance, and shall there upon proceed to frame and record the issues on which the right decision of the case appears to depend.”

> “3. The court may frame issues from all or any of the fol1owing materials—

(a) allegations made on oath by the parties; or by any person present on their behalf, or made by the advocates of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of the documents produced by either party."

''5(1) The court may at any time before passing the decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."

In my view at least two consequences appear to follow from the provisions of 0.13 rr. 1(5), 3 and 5(1) of the CPR. Firstly a trial court has wide discretion to frame or amend issues from all materials before it, including pleadings, evidence of the parties and submissions from counsel. Secondly, the court may amend issues or frame additional issues at anytime, including during judgment. In doing so, the court may impose such terms as it thinks fit.

In the case of Odd Jobs (Supra) on which the appellant in the instant case relied in canvassing the first and second grounds of appeal, the facts, briefly were these: The respondent sued the appellant in the High Court of Kenya for money had and received being the proposed purchase price of a motor car in respect of which no completed contract had been entered into.
No issues were framed in the High Court. In evidence, the respondent agreed that he had driven the car away but it was a condition of the contract that the appellant should carry out repairs. Although the advocate for the appellant objected to the evidence being given he questioned his witness about the alleged repairs and addressed the judge thereon.

Judgment was given for the respondent on the ground that the appellant had failed to carry out an essential, term of the agreement of sale. The appellant appealed to the East African Court of Appeals contending that the judge had no jurisdiction to decide the case on a ground which had not been pleaded. It was held firstly, that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court, for decision, and secondly, that on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

Commenting on the provisions of the **Kenyan Civil** Procedure Rules, worded in identical terms as our rr. 1(5) and 5(1) of O.13, Duffus, P. said what I agree with as good law.

He said—
"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties H Apart from those provisions, the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates on which a decision is necessary in order to determine the dispute between the par ties."

The decision in the case of Odd Jobs (Supra) obviously does not assist the appellant's case, if anything, its against the arguments put forward by its learned counsel. The effect of the decision is that a trial court may frame issues based on the evidence of the parties or statements made by their counsel though the point has not been covered by pleadings.

In my view, the decision in the case of Norman —V— Overseas Motor (Supra) is to the same effect. In the instant case, the 3rd and 4th issues framed by the learned trial judge and which are the objects of the appellant's complaint, in my view, were only amendments of the two original issues, and merely details of the two original issues. In the circumstances, the amendment of the

original issues was validly made by the learned trial judge. Even if they were new issues (which I think they were not) the learned trial judge had a duty to frame issues as were necessary for the determination of the matters in controversy between the parties, in accordance with the statutory provisions and the decided cases I have referred to.

The issues as amended by the learned trial judge were all matters in controversy in the suit between the parties and required decisions for the determination of the case as a whole. With due respect, I am unable to agree with the learned counsel for the appellant that the issues as amended by the learned trial judge were prejudicial to the appellant; and, still less, that what the learned trial judge did amounted to a miscarriage of justice to the prejudice of the appellant. The first and second grounds of appeal, therefore, fail.

Next, I will deal with the third, fourth, fifth and Sixth grounds of appeal together. This is because they all concern the issue of whether the appellant had a valid claim against the respondent for payment of the premiums due on the insurance covers arranged by the appellant. In this connection the appellant's counsel submitted, first, that the transaction between the appellant and the respondent was governed by general law and insurance custom, and usage. He then referred to evidence which showed the s liability to the appellant. Such evidence include the letter (annexture "B" to the Plat) written on 14.10.1992 by National Insurance Corporation (NIC) to the respondent. The letter listed 14 insurance policies issued by NIC to the respondent through the appellant. The total premium on the policies amounted to shs. 37,679,104/=. The letter indicated that the respondent had contracted to pay the premium to its insurers (NIC) through the appellant as their Brokers.
Another evidence to the same effect was given by Boniface Makola (PW1) the appellant's Managing Director. This evidence, it is contended, was not controverted.

Secondly, the learned counsel submitted that, the appellant's claim for payment of the premium for the insurance policies in question was upheld by the relevant finding of the learned trial judge in his judgment to the effect that the appellant had not agreed to work exgratia; that the respondent had paid in part what it owed the appellant; and that the respondent owed the

appellant some money at the time of the termination of the appellants appointment as the respondent's insurance brokers.

Thirdly, on the relevant law, the appellant's learned counsel referred to Ivamy - general Principles of Insurance Law, 4th Edn, Page 599; Halsbury's Laws of England, 3rd Edn. Vol 22 paragraphs 68, 698, 71; Malgilliv & Parking on 1nsurance Law, 16th Edn; Paragraph 493.

In his reply, Mr. Kiapi, learned counsel for the respondent submitted firstly, that the third ground of appeal is so general that it offends the provisions of rule 84 of the Rules of this court. Secondly, that the learned trial judge was justified in finding, as he did, that the appellant was not entitled to sue for the premiums. The finding was based on evidence adduced by both the parties. It was contended that such finding was rightly, different from the trial court's ruling following the respondent's preliminary objection at the trial that the plaint did not disclose any cause of action. The ruling which rejected the preliminary objection was based on the pleadings and submission and not on evidence as the final finding was.

Thirdly the custom referred to in the fourth ground of appeal was not pleaded in the plaint consequently the appellant was entitled to rely on custom as a basis for its claim against the respondent. It was contended that where a party seeks to rely on trade usage, the principle of fair play demands that the usage should be pleaded, and proved. Proof of the usage if it existed in the instant case, could have come from the evidence of PW1, whose evidence, the respondent's learned counsel conceded, was not controverted. As it is, it was contended, evidence did not show that such usage or custom existed and that the appellant relied on it in making its claim.

With respect, I am unable to accept the respondent's complaint that the third ground of appeal offended rule 84 of the Rules of this court. I think that as framed the ground contains sufficient particularly to the extent which substantially complies with the requirements of that rule.

Still on the third ground, with respect, I find no merit in the appellant's complaint in it that because an interlocutory ruling by the trial court had overruled the respondents objection that the plaint disclosed no cause of action, therefore the learned trial judge should have found for the appellant in the suit, namely that it was entitled to sue for the premiums. The interlocutory ruling was based on pleadings and the parties' respective submissions for and against the preliminary objection. At that stage, the trial court had not heard the parties' respective evidence. Having overruled the preliminary objection, as he did, the learned trial judge, in my view, was not bound, facto, to find for the appellant in his judgment. The judgment was based on the pleadings and evidence received by the trial court from the parties. At the end of the trial, the learned trial judge was under a duty to find for or against the appellant, in the event, he found that the appellant was not entitled to sue for the gross premiums, lie then dismissed the suit. The third ground of appeal therefore, fails.
In the circumstances the main issue to consider in my view, is whether the learned judge's decision just referred to was proper on the facts of the case and the law applicable. This, in my view, is the substance of the fourth, fifth, and sixth grounds of appeal.

The substance of the appellants claim was pleaded in paragraphs 3 to 7 inclusive of the plaint) which may be summarized as follows:

(a) The appellant was appointed by the respondent as its insurance brokers, for fire, burglary and customs bond insurance covers. The appointment was by letter dated 15. 11. 1988.

(b) As such insurance brokers the appellant obtained a number of insurance covers for the respondent for a period of three years from National Insurance Corporation (NIC) and Universal Insurance Company Limited (UICL).

(c) The respondent did not pay the premiums for a number of insurance policies so obtained by the appellant for the respondent, although it promised to pay. Consequently the appellant was indebted in the sums of shs. 37679, 104/= and shs. *8,372,549/= g*ross

premiums to NIC and UICL respectively. Shs. 75,000/= was also owed to, UICL as stamp duty on the respondent's customs bond.

(d) The appellant's services were terminated in writing on 17. 06. 1992, when the respondent thus indebted in the in the total sum of shs. 46, 126, 653/= for which the appellant committed itself on the respondent's behalf and was liable to the insurers
It is clear from the foregoing that the appellant made the claim in the suit as the respondent's insurance broker for gross premiums due from
the respondent to the two insurers and as agent of the insurance companies.

The respondent defended the suit. The substance of its defence as pleaded in the alternative in the w.s.d. was that:

(a) The sum claimed by the appellant was due to NIC and UICL and did not belong to the appellant;

(b) The appellant had no authority to sue the respondent for money owed to the third parties;

(c) The respondent had always been willing to effect payment of any indebtedness to NIC and UICL either directly or through
their authorised agents.

The evidence supporting the appellant's claim consisted of verbal testimony and documentary evidence. The respondent's letter dated 15.11.1988 (Exhibit P.1) appointing the appellant as its insurance brokers stated in part:
Your firm has accordingly been allocated the following
classes of insurance;
(a) Fire and allied risks;
(b) Burglary
(c) Motor

In addition to the foregoing you will from time to time be called upon to arrange for execution of customs Bonds (B.I.F) with customs and Excise Department.
Our insurers are M/S National Insurance Corporation and you are advised to immediately contact them for the details of our policies on the aforesaid classes of insurance so that appropriate steps can be taken to revise and renew them.

By copy of this letter M/S NIC are accordingly informed."
In his evidence, Boniface Makola (PW1) explained that as the respondent's insurance brokers the appellant's responsibility was to get the respondent's instructions and use the broker's knowledge in insurance to ensure that the
the insured was covered up properly; and subsequently bill them for the work done.

The appellant's responsibility to the insurers was to pay them for the premium for policies issued. The appellant as brokers also earned commissions on premiums paid to the insurers. The rates of commissions were set out by the Commissioner of Insurance. Commission on fire was 25%, burglary *20%* and customs bonds 12.5% as specified in the letter dated 26.5.1994 (Exhibit P4) from the commissioner of Insurance to the appellant

He also testified: that the appellant dealt with NIC, but the respondent when subsequently added on UICL as its insurer, the appellant was also the respondent's broker for insurance covers procured from UICL .The appellant's appointment was terminated by the respondent in a letter dated 17.6.1992 (Exhibit P.2). The letter said in part:
"This is to inform you that effective 1st July 1992 all our policies will be effected with NIC on a direct basis.

As we advised you all payments due which have already been processed in your names on behalf of the above company will be remitted for onward transmission to our insurers.

We hereby instruct you to liaise with them regarding the final details of these payments and to establish which policies whereby sums are due to your good selves. Please advise us of what transpires.

We wish to thank you for your dedicated services to us over the years and assure you of our intention to eventually settle all outstanding premiums on our policies……..”

At the time of termination premiums due from the respondent to NIC was shs. 37,679,104/= and to UICL was shs.7, 155,000/=. The sums due were for coverage that the appellant had obtained for the respondent. In a letter dated 5.6.1992 (exhibit P.3) which the appellant demanded from the respondent payment of time sum due in respect of NIC. The letter listed the policies and the sums
due on each policy. The respondent never paid.
.
PW1 also tendered in evidence as exhibit P.4 a letter dated 26.8.1994, from ULCL, informing the appellant what was due to UICL on covers provided for the respondent. The letter is headed “OUTSTANDING PREMIUMS CLIENT: TRANSOCEAN (U) LTD” and in part reads:

> ‘We wish to refer to your visit to our offices concerning the outstanding premiums which are due to us for the business you introduced to us from your clients M/S Transocean (U) Ltd. We now confirm that the amount due to us is as follows:
> Total shs.7, 155,000/=
>
> We look forward to receiving the payment soon.”

PW1 said that the respondent also failed to pay what was due to UICL.

A letter dated 9.7.1991 (Exhibit P.7) from the respondent to the appellant appears to give same explanation for the respondent's failure to pay what it owed in premiums. The letter reads

> "RE: FINE AND BURGLARY POLICIES.
> We have noted that these policies expire on 7th July, 1991.
> We wish to renew the same on the current terms.
>
> However we are experiencing some financial difficulties beyond our control and would therefore request you to approach our Insurers for a grace period of not more than two months. We shall remit the total premium involved within this period".

In cross-examination, PWI said that as a broker, the appellant could sue on behalf of the insurers, claim money on their behalf and finally send the money to them; and that when demands made to the respondent did not yield any results, the appellant instructed its lawyers M/S Ssekadi & Advocate who wrote to the respondent a demand letter (Exhibit P.6).

Kenneth Kerere (DW1) testified for the respondent. He agreed that the appellant was appointed in November 1988 as the respondent s insurance brokers. The appellant performed as expected and effected insurance covers for fire, burglary and customs bonds from NIC and UICL.
The respondent made some payments for insurance covers but not for all of them. Subsequently the appellant's appointment was terminated in 1992. Thereafter NIC and UICL got in touch with the respondent with a view to arranging payment of what was due to them. Both the insurers agreed to meet and negotiate. DWI then put in evidence, a letter dated 7.9.1993 (exhibit D.1) from NIC to the respondent, indicating that the appellant had sued the respondent for outstanding payments on premium, and asking the respondent for a meeting to sort out payment of the outstanding premium. Another letter dated 17.3.1994 (Exhibit D.2.) was also written by UICL to the respondent.

The letter said:

> ”PAYMENT OF OUTSTANDING PREMIUMS
> Please refer to our letter of 28th June 1993 ref: UNICO/CIB/370 concerning the above subject.
>
> However, we would like to inform you that your Brokers M/S Oriental Insurance Brokers Ltd approached us sometime back with a view of cooperating with them to sue you but we refused, having been promised to be paid the outstanding amounts in installments until Settlement in full.
>
> It is regrettable therefore to note now no payment has been made.
>
> Please let us have at least half of the total balance within seven (7) days from the date of this letter otherwise we shall be forced to take the same steps which Oriental took.”

It must be observed that the appellant’s suit against the respondent had already been commenced when the insurers wrote the letters Exhibit Dl arid D.3 to the respondent making arrangements for payment of outstanding premiums by the respondents direct to the insurers.

My search for previous decisions from our jurisdiction which may be relevant to the matter under consideration did not yield any fruit. I am therefore grateful to both the learned counsel for referring us to the works of some learned authors which were of great assistance on the matter at hand.

In considering the law applicable I will start with our own Insurance Decree No. 9 of 1978, which was in force when the suit was filed in 1995, Section 45 (3) and (4) provided;

> ”43 (3) Every premium collected by an insurance agent shall be paid to the insurer not later than twenty—one days after reception thereof, and where payment is not feasible either because of the remoteness of the agent from the insurer or otherwise howsoever, the agent shall effect the transfer of the funds within the said period.
>
> (4) Any insurance agent who contravenes sub—section *(3)* of this section, is guilty of an offence, and shall on conviction;
>
> (a) For the first offence, be liable to a fine of five hundred shillings;
>
> (b) for the second offence, be liable to a fine of one thousand shillings;
>
> (c) for the third offence, be liable to a fine of two thousand shillings, and in addition his license shall be cancelled and he shall be disqualified from being licensed again as an insurance agent.”

In my view 5.45(5) (4) imposed statutory duty on an insurance broker or agent towards his insurer. That duty was to remit premiums collected to the insurer. Failure to do so was a criminal offence punishable by fines.

A question which might well be asked was if a broker was under a duty to remit premiums collected to the insurer (the principal for whom he was agent) was he not under an implied duty to collect the premiums due to the insurer and to compell payment by the insured to him (the broker) of the outstanding premiums due to the insurer? My answer would be in the positive.

I think he (the broker) was under an obligation to do so, because the premiums which he was under a statutory duty to remit to the insurer must first be received by him. For that reason alone, I think that an insurance broker was entitled to sue the insured for unpaid premiums in respect of which insurance policies or covers had been procured for the insured.

The Decree defined “insurance agent”, in section 57 as a person licensed to solicit risks and collect premiums on its behalf for which he receives or agrees to receive payment by way of commission or other remuneration for the insurer.

It defined “insurance broker” as a person who, as an independent contractor and not as an agent of the insurer, is carrying on the business of soliciting or negotiating insurance for a. commission or other remuneration on behalf of the insured or prospective insured, other than himself. Decree 19 of 1978 was replaced by the insurance statute, 1996, which came into force on *4*.4.1996. Provisions of the statute relevant to the matter under consideration appear to be the following:

(i) Section 34, which provides:-

“(1) An insurer shall not allow credit on the premium payable or more than thirty days except for business emanating from a broker licensed under this statute.

(2) where the insured fails pay premium within the period under subsection (1) the policy shall be avoidable and the insurer shall be entitled to recover expenses incurred “

(ii) Sections 72 and 73 of the statute provide for inter alia, insurance brokers and agents

(iii) Under Section 2 of the statute, “insurance agent” is defined as a “person appointed and authorised by an insurer to solicit applications for insurance or negotiate for insurance coverage on behalf of the insurer, and to perform other functions, that may be assigned to him by the insurer, and who in consideration for his services receives commission from the insurer.”

The same section defines “insurance broker” as a person,

"(a) not being an agent, and

(b) acting as an independent contractor for commission or other remuneration, who solicits or negotiates insurance business on behalf of an insured or prospective insured other than himself."

In the course of his function as such, an insurance agent or broker collects premiums for policies or covers issued through him. Such premiums are payable to the insurance company issuing the policies or covers. As I understand it, the effect of the statutory provisions I have referred to above is that the insurance agent or broker is under a duty to remit premiums received by him from the insured to insurer. The insured is also under a duty to pay the premiums to the insurer through the insurance agent or broker for the policies or covers procured for him by the agent or broker. In the circumstances, I think that an insurance agent or broker is entitled to demand for payment by the insured of premiums in respect of such insurance policies or covers. On receipt of the premiums, the agent or broker would deduct his commission and pass on the premiums to the insurer. On failure by the insured to pay the premiums through the agent or broker. I think that he is entitled to sue for the, premiums.

Halsburys Law of Eng1and, 3rd Edition, Vol. 22, Section 3 discusses mostly the business of Marine Insurance and the relevant British Laws and statute (Marine Insurance Act, 1906 16 Edn 7c 41), but I think that the principles discussed there apply equally to other forms of insurance business Paragraph 68 under "payment of premiums" on page 41 partly states:

"Unless otherwise agreed, where a Marine policy is effected on behalf of the assured by a broker, the broker is directly responsib1e to the assured for the amount which may be payable in respect of returnable premium. Where a marine policy is effected on behalf of the assured, the broker who accepts receipt of the premium, such acknow1edgment is in the absence of fraud, conclusive as between the insurer and the assured, but not as

between the insurer and the broker.

It fo1lows from the above provisions that the general rule that the general rule the assured is liable to the broker for premiums as money paid on his behalf, Whether or not they have been paid over by the broker to the under writer."

In paragraph 71 on page 43, it is stated that the broker or agent has a lien upon the insurance policy for the amount of the premium and his charges in respect of effecting the policy.

In Ivamy - General Principles of Insurance Law (Supra) on page 598, the relationship between the assured, the broker and the under writer is discussed, On page 599 it is said:

"The underwriter looks to the broker for his premium**,** and through the broker, as a rule, upon the happening of a loss, he receives notice of any claim. In the ordinary cause of business it is likely that at any given moment there will be a considerable number of premiums due from the broker to the underwriter upon new insurances, and at the same time there may be claims payable by the underwriter to the broker in respect of losses covered by the existing policies. To make or to receive separate payments in respect of each transaction as the payments fall due would lead to an unnecessary amount of trouble. It is not, therefore, the practice of the broker to pay the premium upon each insurance to the underwriter at the time when the "slip" is initialled or the policy signed. All premiums as they fall due, and all claims as they become payable, are debited or credited as the case may be in the books of both. The balance is struck quarterly, and a payment made of sum shown to be due either to the broker or to the underwriter, as the case may be.

As regards any particular policy, however, the premium is treated by the broker and the underwriter as having been paid upon the completion of the contract, and the policy contains a statement that the premium has been paid.

The assured is not, as a rule, liable for the premium to the underwriter, but only to the broker." (The underlining is supplied.)

Referring to a number of decided English cases, foot note No. 18 on page 600 states:

"The broker can sue the assured for the premium,
even though he has not paid the underwriter
and if he has paid it, he has a lien
upon the policy, unless otherwise agreed."

In Malgilli & Parking on Insurance Law (Supra) on Page 192, is discussed the role of agents in insurance business. The learned author
States that most insurance business in practice is transacted through agents or brokers. Prima facie, a broker employed by the assured to effect an insurance has no authority from the insurance company to collect the premium for it, so that payment to him is not necessarily payment to the company. In any event the company can eliminate any doubt by inserting in the policy a condition that the broker or agent is deemed to be his agent in paying the premium. But a broker may be held out by the company as having authority to collect the premium, and a clause in the policy providing that any person procuring the insurance shall be deemed the agent of the insured and not of the insurer has been held as intended to prevent the insurer from being bound by the representatives of a broker, and not to counteract the effect of his being held out as agent to receive the premium. See Kelly —V— London and Stafford — Shire Five (1883) Cab & E. 47.

Where the insurers employ a broker or insurance agency to Collect premiums on their behalf, it is prudent to include in the agency agreement a Clause providing that premiums are to be held in trust for them while in the agent's control and are not to form part of the agent's personal estate.

I take the discussions of the principles of insurance law as discussed by these learned authors to be of great persuasive value.

I would summarize the legal principles governing the relationship between the insured, the broker and the insurer as discussed by the learned authors in their respective text books I have referred to as follows;

(I) Unless otherwise agreed, where insurance policy is effected on behalf of the insured by a broker is directly responsible to the Insurer for the premium. The insurer looks to the broker for his premium, and through the broker, as a rule, upon the happening of a loss the insurer receives notice of any claim.

(ii) As a general rule, the insured is liable to the broker for prenij3 as money paid on his behalf whether or not they have been paid over by the broker to the insurer. As regards any particular policy the premium is treated by the broker, and the insurer as having been paid upon the completion of the contract.

(iii) The insured is not, as a rule, liable for the premium to the insurer, but only to the broker.

(iv) The broker can sue the insured for premium even though he has not paid the insurer, and if lie has paid it7he has a lien upon the policy unless otherwise agreed.

(iv) Generally, the principles of the law of agency applies to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the others Where the insurer holds out the broker as his agent, the broker has ostensible authority to bind the insurer as his principal.

In the instant case the findings of the learned trial judge which gave rise to the complaints in the grounds of appeal were to the effect that:

(1) What the respondent owed the appellant at the time of termination of their services was in the form of commission for insurance covers and customs bonds;

(2) Concerning the third issue, the appellant led no evidence to show that it truly incurred the amount of money claimed in the plaint;

(3) Despite the fact that PW1's evidence (which was not Controverted) clearly showed that the appellant would in this case receive the premium (after arranging insurance covers and customs bands in favor of the respondent) and then deduct the premiums its dues before passing the premiums on to the insurers, there was
no evidence on record to prove that such practice or custom entitled the appellant to sue the respondent for the premium if the respondent defaulted in paying for it. In the circumstances the learned trial judge was unable to find that the appellant was entitled to sue the .defendant like it did.

(4) If the appellant had worked out its commission and clearly spelt it out in the plaint in such a way as to show that it was suing the respondent for both its commission and insurer's premium, the learned judge might have found a way of enabling the appellant to recover in respect of that part of its claim against the respondent which was good (i.e. the part relating to the Commission)

With due respect I am unable to agree learned trial judge in his findings in question, for the following reasons.

First, the findings were inconsistent with the evidence adduced out by both the appellant and the respondent. I have already referred to the evidence. So, I will mention some salient aspects of the evidence. These are that in accordance with the terms of their appointment contained in P.1 the appellant procured insurance and customs bonds covers for the respondent for a period of three years. According to this evidence, which was not challenged, the procedure was that the appellant obtained insurance covers for the respondent and billed the respondent for them.

The appellant also earned commission for the policies (or covers) so procured for the respondent the rates of commission were officially approved as per exhibit P.5: To the insurers the appellant paid premiums for the policies or covers issued. As brokers, the appellant claimed payments for premium on behalf of the insurers and sent money to them. The appellant could also sue the insured for unpaid premiums and pass on the money to the insurers. The appellant's appointment was terminated by the respondent on 17.6.1992. By then the sums claimed in the suit were owing to NIC and UICL on policies procured from them. After the termination, the respondent promised to settle what was owing. Demand for payments was put to the respondent in a letter dated 5.6.1992 (exhibit P3) before the termination and subsequently, but no settlement was forth coming.

In the letter of termination, (P.2) the respondent assured the appellant of its intention to eventually settle all outstanding premiums on its policies.

The evidence of the respondent's witness, DW1, agreed with that of PW1. Further, DW1 admitted that during the subsistence of the appellant's, appointment, the respondent made some payments to cover some of the policies but not all of them.

In the letter dated 9.7.1991 (P.7) the respondent indicated to the appellant that they were experiencing some financial difficulties and asked the appellant to approach NIC for a grace period, undertaking to remit the total premium outstanding.

In my view, the appellant's financial difficulties appear o have been the reason for not wanting to pay the premium claimed in the suit. This view is strengthened by the letter of 17.3.1994 (D.2) from UICL to the respondent. By this letter TJICL was apparently inducing the respondent to pay the premium owed by them by installments, which was an easier term than facing a suit to pay all at Once.

Secondly, the findings in question of the learned trial judge were Contrary to the law applicable to the case. I have already set out in detail in this judgment our statutory provisions and the Principles of insurance law re1evant to the facts of this Case. It is not, therefore, necessary to repeat them. In a nut-shell they, in my, entitle an Insurance broker
or agent in a case Such as this One to sue the insured for premiums not paid to the broker, and for commissions due from the insured in respect of insurance policies or covers procured by the broker or agent. This the only way by which the broker can recover his commission on outstanding premiums, and pass on the premiums so recovered to the insurers.

In the instant case, I think that the appellants were entitled to sue the respondent for the unpaid premium. I am also satisfied that on the evidence in the case as a whole the appellant proved its claims in the suit to the required standard.

The fourth, fifth and sixth grounds of appeal therefore succeed.

In the result I would substantially allow this appeal with ¾ of the cost in this court. I would set aside the judgment and orders of the lower court and substitute it with one allowing the appellant's suit with costs in the court below. Since Tsekooko JSC and Karokora JSC agree there will be orders in the terms proposed by Oder JSC.

A.H.O. ODER

JUSTICE OF THE SUPREME COURT.

JUDGMENT OF KAROKORA J.S. C.

I have had the advantage of reading in draft the judgment of Oder, and I agree that the appeal must be allowed with costs to the appellant

The facts of the case which are not in dispute are sat out in Oder, J.S.C's judgment and therefore, I do not need to repeat them here.

At the commencement of the trial, Mr. Ssekandj, Counsel for appellant who represented the Plaintiff submitted that the issue for determination by the Court was:—

> We have agreed with learned Counsel that issue for determination is whether defendant owes any money to Plaintiff and if so, how much."

The trial proceeded on with the above issue in the minds of both parties. Evidence was adduced by each party and Counsel addressed the Court bearing in mind the issues which had been presented to Court for determination.

However, when the learned Judge was writing his judgment, he stated on page 8 of his judgment as follows:-

> "I will not get bogged down by the issues agreed upon herein by Counsel.

He proceeded to frame new issues at that stage, namely:-

1. "Whether the defendant owed the Plaintiff any money.

2. If so, in what form was the said debt? (was it commission, premium or both?)

3. Depending on the answer obtained from *2* above, whether the Plaintiff was entitled to sue the defendant like it did in this suit in a bid to recover what it was entitled to from the defendant.

4. If the answer obtained from issue 3 above is in affirmative, exactly how much money did the defendant owe the Plaintiff?"

The learned trial Judge answered the first and 4th issue against the appellant and dismissed the suit, holding that the Plaintiff had no right to sue.

The appellant was not amused. He raised six grounds of appeal. In 1st and 2nd grounds he complained against the framing of issues by the learned trial Judge while he was writing judgment without affording opportunity to the parties to know those issues and addressing Court n them. The complaints were: —

1. The learned Judge erred in law in deciding the appellants claim on issues other that the ones the parties had agreed upon before the commencement and end of the trial.

2. The learned trial Judge having decided not to be bogged down by the two issues agreed upon-by the parties erred in law to have proceeded to determine the suit on his own issues without first raising the said issues to the parties, afford an opportunity to the parties or any of them, if also wished, to adduce further evidence on the new issues and to ma]e such appropriate legal submission before the end of the trial.

Before us, Mr. Ssekandj for appellant contended that whereas the trial Judge had powers to amend or alter issues during the course of the trial, in. the instant case he contended that the learned Judge should not have amended or introduced new issues without reference to the parties. However, again above submission, Mr. Kiapi, Counsel for respondent submitted that under Order 13 r1 (5)5) the Court had powers to amended issues during the course of the trial.

Probably before I go into discussion of whether or not the Court had jurisdiction to amend the issues or not, I should quote Order 13 r1 (5) and r5 of the Civil Procedure Rules.

Order 13 r1 (5) states:—

> "At the hearing of the Suit the Court shall, after reading the pleadings, if any and after such examination of the parties or their advocates as my appear necessary, ascertain-upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

Then Order 13 r5 (1) states as follows:-

> "The Court may at any time before' passing the decree amend the issues or frame additional issues or such terms as it thinks fit, and such amendments or additional issues as may be, necessary for determining the matters in controversy between the parties shall, be so made or framed."

It is clear from the above provisions that it is the Judge who frames the issues. Equally there is no doubt that a Court may at any time before passing a decree amend the issues or frame additional issues.

However, it must be noted in the instant case that at the commencement of the trial, two issues were agreed upon by Counsel of both parties arid the trial proceeded and ended with the two issues in mind. However, during the course of writing the judgment, the learned trial Judge amended the issues so that the issues which were two turned out to be 4 issues. Now question is whether the Judge had erred in law in deciding the case on other issues than those the parties had agreed upon at the commencement of the trial without first bringing the new issues to the parties attention and giving opportunity to the parties to adduce further evidence on the new issues and make appropriate legal submission.. From the close scrutiny, of the evidence on record it is clear that there, was evidence on record dealing with issues of commission and premium, but these had not been raised as issues in controversy. However, after full hearing the case was adjourned for writing a judgment. During the course of writing the judgment, the learned trial Judge

amended the issues raising the issue of whether the debt owed by defendant to Plaintiff was in form of commission, premium or both.

Without going, into the merits of how these issues were determined since Oder, J.S.C., had disposed of these, the complaint, is that the learned trial judge ought not to have raised these issues without referring them to the parties and without giving opportunity to the parties to address him on them.

It was contended that the ppel1ant was prejudiced by the procedures adopted by the trial. Judge, when the parties did not address him on them.
With respect, I think it is clearly spelt out under Order 13r (1)(5) r3, r5 of the Civil Procedure Rules that the trial Judge/Court has after reading the pleadings, if any, and after examining parties or theft advocates, in order to determine areas where they are in controversy, proceed to frame and record the issues on which the right decision of the case will depend.

Admittedly, the practice in Uganda has been that the issues are framed by the Court after consultation with the parties or their advocates at the beginning of the trial. This is implicitly stated by Manyindo D.C.J., **in Civil Appeal No. 28/1993 Jovelyn Barugahare V A.G.** S.C. (unreported> where after quoting the holding of the trail Judge who had relied on Order 13 r3 stated: —

> "It is clear from the above provisions that the issues are to be framed by the Court after consultation with the parties or their advocates at the beginning of the trial. The trial Judge is not bound by those issues. On the contrary, the Judge may amend the issues strike out some of them or even add new ones any time before passing the decree,"

We were referred to the case of **Odd Job V Mubia (1970) E.A. 476**, case from Kenya, where the East African Court of Appeal held that it is the duty of Court to frame the issues and that the

Court has wide powers of amendment, There, the Court went further to state that a trial Court may frame issues on points not raised in the pleadings but arising from matters by the parties or their advocates on-which a decision ‘is necessary in order to properly determine the dispute before the Court.

However, although the Court is, under Order 13 r5 (1) empowered to amend the issues or frame additional issues on such terms as it thinks fit for the purpose of determining the matter in controversy between the parties, I think that where the Court amends the issues which parties had agreed upon, it is necessary to give the parties the right to adduce further evidence or address the Court on the amended issues. See **Haji Mohamed Durvesh V. Villano & Fassio (I957)E.A 91** and I think the need to give opportunity to adduce further evidence and address the Court on the amended issue is greater especially where the amendment is done so late like in this case, where it was done at the stage of writing judgment. See also **J. Barugahare V.** A.G. (SC) (supra).

Therefore as no opportunity was given to appellant/parties to address the Court on the amended issues, the complaints in 1st and 2nd ground of appeal were rightly raised, because they must have been prejudiced when issues were raised belatedly without affording parties opportunity to express their opinions and call evidence or address the court on the new issues. At that stage the learned trial Judge ought to have directed summoning of Counsel for both parties and told them about the amendment of issues he had effected and requested ‘them to either call evidence if need arose or to address him on the amended issues This would Obviously in my view be necessary in the interest of justice, so that no one could say, that he/she was condemned on any of the issues without being heard.

In view of the above, grounds 1 and 2 of this appeal would succeed. And as I am in total agreement with Oder, J.S.C., on the rest of the grounds of this appeal. I would allow the appeal with costs to appellant. I would set aside the judgment and order of the lower Court and would enter judgment for the appellant in the Court below.

Dated at Mengo this 1st day of October 1997.

A. N. KAROKORA

JUSTICEOF THE SUPREME COURT

JUDGEMENT OF TSEKOOKO, J.S.C

I have had the advantage of reading in draft the judgment prepared by my learned brother, Oder, J.S.C, and agree with his conclusions.

The appellant was at the time material to this case an Insurance Broker. On 15th November 1988, by letter of the same date (exh.p.l) the respondent appointed the appellant as the respondent's Insurance Broker. The letter allocated the appellant the following classes of insurances:

(a) Fire and allied risks,
(b) Burglary, and
(c) Motor.

On 17th June 1992 the respondent terminated the services of the appellant by letter (exh.pll). By then the respondent owed the appellant a sum of shillings 46,126,653= arising from the appellant's work for the respondent as Insurance Broker. In reality the money consisted of premiums from which the appellant would earn his commission because the respondent failed to pay the said money to the appellant, the latter brought an action in the Court below to recover the same.

In its written statement of defense the respondent denied liability and in the alternative pleaded in paragraph 6 thereof that:-

"6…the defendant shall aver that-

a) the said claimed amount of shillings 37,679,1O4 and shillings 8,372,549 to National Insurance Corporation Limited respectively does not belong to the plaintiff.

b) the plaintiff has no authority, express implied, to sue the defendant for money owed (if at all) to third parties.

c) the defendant has always been willing to effect payments of any indebtedness it may be owing to the said National Insurance Corporation Company and Universal Insurance Corporation Company Limited either directly or vide their authorized agent/agents

d) One of the alleged creditors National Insurance Corporation, has already expressed desire to directly meet the defendant with a view of working out a mode of payment of its outstanding premium without any reference to the plaintiff."

The effect of the averment in para6 (d) above is that the respondent would avoid payment of the appellant's commission which the appellant could have had to deduct if the premiums were paid through the appellant.

At the beginning of the trial Mr. Ssekandi who represent the appellant at the trial proposed issues in the following words —

> "We have agreed with learned counsel that issue for determination is whether defendant owes any money to plaintiff and if so how much?"

Evidence was led by both parties. The two counsel addressed the judge.

In the course of writing his judgment the learned judge stated at page 8, that -

> "I will not get bogged down by the issues agreed upon herein by counsel."

The learned judge then proceeded to reframe and expand the issues into four, namely :—

1) "Whether the defendant owed the plaintiff any money.

2) If so, in what form was the said debt? (Was it commission, premium or both?)

3) Depending on the answer obtained from issue 2 above, whether the plaintiff was entitled to sue the defendant like it did in this suit in a bid to recover what it was entitled to from the defendant?

4) If the answer obtained from issue 3 above is in affirmative, exactly how much money did the defendant owe the plaintiff?"

The first and the fourth issues are the issue or issues which were framed at the beginning of the trial) though they were combined as one issue.

The judge answered the issues against the appellant. He then dismissed the suit holding that the plaintiff had no right to sue. It is the framing of issues by the learned judge while writing his judgment and without reference to the parties which is the subject of complaints in grounds one

and two of the memorandum of appeal. The complaints state —

1. "The learned trail judge erred in law in deciding the appellant's claim on issues other than the ones the parties agreed upon before the commencement of the trial.

2. The learned trial judge having decided not to get bogged down by the two issues agreed upon the parties erred in law to have proceeded to determine the suit on his own issues without first raising the said issues to the parties to afford an opportunity to the parties or any of them if it so wished to adduce further evidence on the new issues and to make such appropriate legal submission before the end of the trial."

Mr. Ssekandi for the appellant quite correctly conceded that the trial judge had powers to amend or alter issues. But learned counsel contended that in this case the learned judge should not have amended or introduced new issues without reference to the parties. Mr. Kiapi, counsel for the respondent supported the course adopted by the learned trial judge.

There is no doubt that it is 4the trial judge who frames the issues. Equally there is no doubt that a court may at any time before passing a decree amend the issues or frame additional issues. Order 13 Rule 1(5) is the authority for the former proposition and for the latter proposition Order 13 Rule 5 is the authority. Order 13 Rule 1(5) reads as follows: —

> "At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material proposition of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

Order 13 Rule 5(1) reads:

> "The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments Or additional issues as may be necessary for determining the matters in controversy shall be so made or framed".

Order 13 Rules 1(5) and Rule *5* should be read together with the provisions of Order 18 Rules 4 and *5.* These read as follows:

> **"R.** 4. Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".

> "R. 3. In Suits in which issues have been framed, the Court shall state its finding or decision with the reasons therefor, upon each separate issue unless the finding upon any one or more issues is sufficient for the decision of the suit".

Clearly Order 13 Rule 1(5) envisages that the Court frames issues in consultation with the parties. In Odd Jobs vs. Mubia (1970 E.A. 476, Law J. A., concluded his judgment at page 479 about framing issues thus:—

> "The Prime responsibility to ensure that issues are framed lies on the Court; but in my view the advocates also have a duty to see that this requirement is complied with by the Courts.

As far as I am aware the practice in many Courts of trial in Uganda in suits where Parties are represented by counsel, is that a trial judge would normally inquire from counsel if they have

agreed on the issues. It is where counsel don't agree or the issues agreed upon are at variance with the Pleadings that the trial judge would normally proceed to frame the issues which he considers to be appropriate. I think it is because of that practice that the learned trial judge proceeded with the trial after Mr. Ssekandi, counsel for the Plaintiff, had suggested the two issues with which Mr. Beyanda, the advocate who appeared for the respondent at the trial, agreed. 0. 13 1 5(1) does not empower a trial judge to amend or add issues arbitrarily.

A case is tried on issues. This explains why order 13 rule 1 (5) is worded as it is namely-

> "At the hearing of the suit the court, shall, after reading the pleadings if any, and after such examination of the parties or their advocates as necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall, thereupon proceed to frame and record the issues on which the right decision of the case appears to depend." (Underlining added).

This Sub-rule indicates that the trial proceeds on matters which are in dispute. Therefore, from the beginning of the trial the parties are enabled to call evidence to prove or disprove issues as framed at the beginning of the trial. See Supreme Court Civil Appeal No. 18 of 1994 – Rukidi vs. Iguru (unreported); Supreme Court Civil Appeal No. 10 of 1991 Kayondo vs. Co-operative Bank Ltd. (unreported).

O.13 R.5 (1) is only permissive and allows the court to amend issues where, it appears from the course followed at the trial that the issue (s) had been left to the court for decision: Odd Jobs .vs. Mubia (1970) E.A. 476. This is so in a case where evidence is challenged by the other party by cross-examination or calling of a witness in rebuttal. Parties must address the court thereon. In odd's case Duffus, P., referred to the Kenya's provisions of Order 14 Rules 1(5) and 5(1) which appear to be identical to our Order 13 Rules 1(5) and 5(1) and stated, at page 479*(4)* that

> "It is therefore, the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions, the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not

covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties." (Underlining added).

In that case the real issue for determination and the issue on which the judgment was based was whether the contract was dependent on a condition precedent being carried out by the appellant. Although the issue had not been pleaded nor framed, evidence was led on it. Both parties called evidence on the issue before the hearing of evidence was
closed. The most important aspect in the case of Odd is that no issues were framed at all before the commencement of the trial.

Clearly Odd's case is thus distinguishable. In the circumstances I am persuaded by the arguments of Mr. Ssekandi that the trial judge erred in introducing the second and third issues belatedly while writing his judgment without consulting the parties or their advocates.

He ought to have postponed writing his judgment, drew the attention of counsel to his (judge's) desire to amend the issues. He should have sought the advocate's views whether
they wished to call evidence on the new issues or whether they should address him on the same before he concluded his judgment. I think that such course of action is contemplated by Order 13 Rule 5(1) (supra). This course was particularly desirable in this case in which the trial judge dismissed the plaintiff's case.

In my view and with due respect to the learned trial judge the appellant was prejudiced by the procedure adopted by the learned judge.

I think that grounds one and two ought to succeed.
I would allow this appeal with costs to the appellant
I would set aside the judgment and Order of the Court below.

I would enter judgment for the appellant as prayed in the plaint and I would award costs of this appeal and of the court below to the appellant.

Delivered at Mengo this 1st day of Oct 1997

J. W.N. Tsekooko
Justice of the Supreme Court.