IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 1267 OF 2005

IN THE MATTER OF DYOLL INSURANCE COMPANY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 2004

AND

IN THE MATTER OF THE INTERPRETATION OF REINSURANCE POLICIES ISSUED TO DYOLL REINSURING LOSS DAMAGE OR DESTRUCTION OF PROPERTY AND CONSEQUENTIAL LOSSES INCURRED BY SAFE HAVEN LIMITED

AND

IN THE MATTER OF THE INTERPRETATION OF REINSURANCE POLICIES ISSUED TO DYOLL REINSURING LOSS DAMAGE OR DESTRUCTION OF COFFEE CULTIVATION

IN CHAMBERS

Mr. R. N. A. Henriques Q.C., Mr. David Batts and Miss Debbie-Ann Gordon instructed by Livingston Alexander and Levy for the Joint Liquidators

Mr. Gordon Robinson instructed by Miss Lynda Mair of Patterson Mair Hamilton for Safe Haven Limited

Mr. John Vassell Q.C., Mr. Jermaine Spence and Mr. Laurence Jones instructed by DunnCox for the Coffee Trustees

Mrs. Symone Mayhew instructed by the Director of State Proceedings for the Financial Services Commission

Miss Ingrid Pusey for the Financial Services Commission

Miss Natalie Montague for the Jamaica Agricultural Society

February 15, 16, March 3, 13, 14, 15, April 20, May 17, 18, June 16, 19, and June 29, 2006

INSURANCE, REINSURANCE, FRONTING, AGENCY, INSOLVENCY, PRIVITY OF CONTRACT, ESTOPPEL

SYKES J

1. Are Mr. Gordon Robinson, counsel who appeared on behalf of Safe Haven Limited ("Safe Haven"), and Mr. John Vassel Q.C., counsel for the Trustees of the Coffee Insurance Trust Fund ("the Coffee Trustees") correct when they submit that proceeds of reinsurance policies in these types of fronting arrangements should go directly to the insured and not form part of the estate of Dyoll Insurance Company Limited ("Dyoll") for distribution to the unsecured creditors? This is the ultimate question that must be answered in this judgment. The issues raised in this judgment are not only of interest to the immediate parties but to the insurance industry generally. It is impossible to avoid examining the concept of privity of contract in order to see what role it plays in the resolution of these matters.

2. It is now agreed by all the parties that Dyoll was a front for Munich Re, Wellington Re, Hannover Re and Swiss Re ("the overseas reinsurers") which would be unable to insure the risks directly. Dyoll was paid a fee which was nowhere near the real premium for the reinsurance for which it acted as a front. The noun, front, immediately suggests that Dyoll is not involved in a conventional insurance/reinsurance arrangement whereby the primary insurer underwrites the risk completely and then on its own motion without reference to the original insured, seeks reinsurance. This does not mean these fronting arrangements were uncommon. Fronting as a reinsurance device is not uncommon. There are very good reasons for fronting. These reasons will be discussed and explored in this judgment.

3. In these matters the reinsurers are willing to pay out the reinsurance proceeds. In fact in the case of the Coffee Trustees the reinsurance moneys have been paid out and are standing in an interest bearing account awaiting the outcome of this hearing. In respect of Safe Haven, the reinsurance proceeds are still with the reinsurers. It is agreed that the insurance arrangements in both matters are facultative reinsurance and not treaty insurance.

4. Safe Haven and Dyoll have sought to emphasise the distinctives in their respective cases that make them different from each other although the result may well be the same. They also submit that not only are the cases different from each other but they are different from conventional insurance/reinsurance cases and therefore should be viewed outside of the prism of the conventional. Implicit in both sets of arguments is the conclusion that the law of contract governs the relationship between the parties. No other legal concept is implicated in the resolution of the issue. It necessarily follows from this that the respective cases depend upon what was agreed between the parties at the time of the contract. Counsel for Safe Haven and the Coffee Trustees contend that when one looks at the true arrangement between the parties it is clear that it was intended that the reinsurance proceeds should be paid directly to the insured and not to the primary insurer. The two applications were heard together (not consolidated) because they raised similar legal issues.

5. On the other hand the Joint Liquidators submit that these cases are governed by the conventional rule that reinsurance proceeds are assets of the primary insurer which fall to be distributed pari passu among the unsecured creditors, the group in which Safe Haven and the Coffee Trustees fall. The insureds, the JLs say, have no special claim to the reinsurance proceeds.

6. The JLs for their part have relied exclusively on cases and texts from England and Wales to support their position. I must say, at this early stage, that an examination of the cases from England and Wales as well as the texts and other material reveal an outstanding lack of reported cases which have examined fronting issues in any detail. The text writers when stating their position on fronting rely on cases in which fronting was not examined in great detail or at least not examined in the context that is now before me. This does not mean that the learning is valueless but it would seem to me that if we are in uncharted waters it is only prudent to see which jurisdiction, if any, has dealt with the issue sufficiently often so that a body of jurisprudence has either developed or is emerging. Wisdom and learning are not confined to any one jurisdiction or one group of persons. It is my view that any responsible Supreme Court, when dealing with unfamiliar issues, should seek to find out if other legal systems have confronted similar issues and unless constrained by legal authority or other important considerations, a responsible Supreme Court, after critical examination, ought to decide whether the learning from other jurisdictions can be applied to the question at hand.

7. The combined efforts of counsel have established beyond doubt that the courts in the United States of America have much greater experience of fronting issues than the courts in the United Kingdom, Canada and Australia. Mr. Batts sought to stigmatise the cases from the United States as parochial. This is not a correct characterisation because, even the most thoughtless and careless of readers of the literature and case law from the United States could hardly fail to recognise and appreciate the struggle of those courts to reconcile and harmonise two competing principles, namely, privity of contract and allowing parties the freedom to arrange their insurance coverage as they see fit. By this I mean that the courts in the United States which have examined fronting understand that the original insured is not usually a party to the reinsurance contract. It is also recognised that documentation in fronting arrangements may take the form of conventional reinsurance but the clear intention of the parties, in some instances, is that the reinsurance proceeds should go to the original or primary insured. In other words there is no one conclusion regarding reinsurance proceeds merely because there is a fronting arrangement. Each case has to be carefully examined to see whether in the particular case the parties contemplated that the reinsurance proceeds should go to the original insured. The United States courts have recognised that, in appropriate cases, the reinsurance proceeds should go to the insured and not form part of the estate of the insolvent primary insurer.

8. From the cases, there are two approaches to reinsurance proceeds when the primary insurer is insolvent. I shall call one the conventional approach and the other, the Koken approach. The latter name I derived from the case of ***M. Dianne Koken v Legion Insurance Company*** 831 A. 2d 1196, a decision from the United States of America, in which the court held that reinsurance proceeds should go to the insured. This case will be examined in some detail later in this judgment. I now set out, summarily, the facts which Safe Haven and the Coffee Trustees submit take their respective cases outside of the conventional approach to reinsurance proceeds.

9. Mr. Robinson outlined the following distinctive features of the Safe Haven insurance programme that compel the conclusion that the reinsurance proceeds should not form part of Dyoll's insolvency estate:

a. Dyoll was a front for the reinsurers;
b. the formal reinsurance documents did not constitute the entire arrangement between the parties, meaning, Safe Haven, Dyoll and the reinsurers;

c. Dyoll was not obliged to pay the reinsurance premiums;
d. the reinsurance premiums were paid by the Safe Haven through IIB Re to the reinsurers;
e. the presence of simultaneous payments clauses;
f. Dyoll was not liable to Safe Haven on the policy issued by Dyoll to Safe Haven;
g. the fronting fees payable to Dyoll were consistent with Dyoll not being liable to Safe Haven.

10. In the case of the Coffee Trustees Mr. Vassell Q.C. relied on these unique features:

a. Dyoll was a front for the reinsurers;
b. the documents in existence do not represent the full agreement between the parties, meaning, the Coffee Trustees, Dyoll and the reinsurers;
c. Dyoll did not pay the reinsurance premiums which were paid directly by the Coffee Trustees to the reinsurers;
d. Dyoll was not liable to the Coffee Trustees on the policy issued by Dyoll;
e. the fronting fees were too low for there to be any liability on Dyoll's part to the Coffee Trustees.

11. Mr. Vassell for the Coffee Trustees submitted that the correct analytical approach to resolving the problem comprises two stages. Stage one is to find out what was agreed. Stage two is to determine the meaning of the terms. He submitted that the fact that Safe Haven and the Coffee Trustees were involved in fronting arrangements between Dyoll and the reinsurers does not mean that there must be uniformity in conclusion in the two cases. According to Mr. Vassell, fronting is just a generic term. One has to look at the specific fronting contract before the court to determine what the parties agreed. There is no one size fits all in fronting contracts.

The dramatis personae

12. Let me introduce, more fully, the dramatis personae in these matters. Dyoll is registered under the Companies Act of Jamaica and registered under the Insurance Act, 2001, as an insurer. The Joint Liquidators ("JLs"), Messieurs John Lee and Kenneth Krys, were appointed by the Supreme Court of Jamaica on August 18, 2005. Their appointment represented the culmination of fast paced events that were precipitated in large measure by the passage of Hurricane Ivan through the northern Caribbean. With the visitation of Hurricane Ivan many claims were made on Dyoll. It appeared that Dyoll could not satisfy the claims. On March 7, 2005, the Financial Services Commission ("FSC"), the regulator of insurance companies, assumed temporary management of Dyoll. By May 5, 2005, the FSC had filed a petition asking that Dyoll be wound up. On June 3, 2005, the Supreme Court ordered that Dyoll be wound up. Mr. Keith Hartley was appointed the Provisional Liquidator. On June 10, 2005, Mr. John Lee of PriceWaterhouseCoopers was appointed Special Manager of the estate and business of Dyoll and finally the JLs were appointed.

13. Safe Haven operates a golf and country club in the Cayman Islands which was damaged during the passage of Hurricane Ivan. It had an insurance policy with Dyoll. It is readily agreed that Dyoll retained 22.5% of the total risk for itself. There is no evidence that this 22.5% were reinsured. Dyoll was a front for 35% which were reinsured with overseas reinsurers.

14. The Coffee Trustees administer the Coffee Industry Insurance Fund that was established by a trust deed for the benefit of coffee farmers. The purpose of the fund was to establish a crop insurance scheme which became necessary after Hurricane Gilbert (1988) wrought great destruction in the coffee industry. The premiums for insurance came from a cess paid by coffee farmers. It is agreed that Dyoll retained 2.5% for itself. Dyoll fronted 92.5% for the overseas reinsurers.

15. International Insurance Brokers ("IIB") is a brokerage firm that offers insurance and reinsurance brokerage services. It has two divisions – IIB Retail and IIB Re which are the retail and reinsurance divisions respectively. IIB negotiated the terms of the fronting contract with the overseas reinsurers.

The applications

16. The JLs are asking directions in respect of Safe Haven in this form:

> *That the reinsurance proceeds payable under the reinsurance contract between Dyoll and Munich Re, Wellington Re and British Caribbean Insurance Company, Jamaica reinsuring a portion of the risk insured by Dyoll under a contract of insurance with Safe Haven, are part of Dyoll's Liquidation Estate and should be distributed among all the unsecured creditors of Dyoll on a pari passu basis.*

Safe Haven is asking for these declarations:

> ***1.*** *A Declaration that the Joint Liquidators of Dyoll are not entitled to apply any payment received from the re-insurers, Munchener Ruckversicherungsgesellschaft ("Munich Re") and Wellington Americas ("Wellington"), relating to that portion of the*

Applicant's loss covered by the reinsurers under the policies of re-insurance of which the Applicant is the original insured other than by way of simultaneous payment to the Applicant of the full amount of any such payment;

2. *A Declaration that any payment made or to be made by the said reinsurers or any of them pursuant to the said reinsurance policies relating to the risk covered for and loss suffered by the Applicant is to be made by the said reinsurers directly to the Applicant and that such direct payment shall discharge the said reinsurers from any obligation whatsoever to Dyoll or to the Joint Liquidators.*

17. With respect to the Coffee Trustees the JLs wish this direction:

That the reinsurance proceeds payable under the reinsurance contract between Dyoll and Munich Re, Hannover RE and Swiss Re reinsuring a portion of the risk insured by Dyoll under a contract of insurance with the Trustees of the Coffee Insurance Trust Fund, on behalf of and for the benefit of the Coffee Industry Board, Cooperative, Approved Growers and Individual Farmers, are part of Dyoll's Liquidation Estate and should be distributed among all the unsecured creditors of Dyoll on a pari passu basis.

18. The Coffee Trustees did not file any documents saying what directions they wished to be given to the JLs. It would remiss of me not to say something about the manner of the applications. The liquidators in this case were appointed by the court and to that extent are officers of the court. It would have been preferable if the JLs had simply asked a neutral question perhaps in the form of how they should treat the reinsurance proceeds rather than suggest how the court should order that proceeds be treated. Had this been done it would have reduced the intensely adversarial atmosphere that permeated the proceedings and Safe Haven would not have felt compelled to file its own documents asking for certain declarations.

19. We now need to look in the world of reinsurance as well as the lexicon of that industry.

Terminology

20. Let me begin with the contract of insurance between an insurance company and the insured. The company is the insurer and person seeking insurance is the insured. I shall call this insurer the primary insurer. The primary insurer may seek insurance for the risk it is carrying. This is called reinsurance. The expression *reinsurance* is not restricted to just the contract between the primary insurer and the reinsurer. The reinsurer itself may buy reinsurance. Thus reinsurance is the generic name given to insurance purchased by an insurance company to cover risks already insured. However, reinsurers have different names depending on where they fall in the reinsurance chain. Even the contracts entered into may have different names depending on where in the chain they are concluded. Any insurance company which reinsures is called a *cedant* or *ceding* company, because it is ceding or passing on some of the risk to another insurance company. The transfer or passing of the risk by the ceding company is called a *cession* or outward business. Conversely, when an insurance company receives or assumes the risk the expression used is *assumption* or *inward business.* This is sufficient for the issues I have to decide.

21. There are two types of reinsurance – facultative or treaty. Facultative reinsurance covers a single risk and is usually negotiated for the specific risk in question. Treaty reinsurance is simply an agreement between an insurer and a reinsured under which the former is bound under the agreement between itself and the latter to accept risks of a particular class as distinct from a specific risk. For example, the treaty (which means agreement) may cover property damage policies. In such circumstances the reinsurer cannot isolate any specific risk and say "I don't want this one." The insurer would simply reply, "I don't care for your wish. The risk falls within the treaty so you must reinsure it." Treaty reinsurance is irrelevant to this case and no more need be said about it.

22. Facultative reinsurance is attractive to both insurers and insureds. Facultative only means optional or permissive. First, the terms of facultative reinsurance are very specific to the risk. Second, the parties have great flexibility to negotiate the terms appropriate to the specific risk. To put it another way, the terms of the policy can be custom built. Third, if the risk is very large or potentially very catastrophic then facultative reinsurance may be appropriate.

The difference between conventional reinsurance and fronting

23. In conventional reinsurance, the primary insurer assumes the risk of the insured and then purchases reinsurance. When it does this the reinsurance is not for the benefit of the insured. Often times the insured has no knowledge that this has occurred. The insured's claim, in the event of a loss or liability, is against the primary insurer. It cannot claim against the reinsurer. It is not a party to that contract. It did not provide any consideration and neither was it an intended beneficiary under the reinsurance contract. This explains the conventional rule that applies in an insolvency which is that the reinsurance proceeds are the assets of the primary insurer and not the insured. This is the position in the United States of America, the United Kingdom, Canada and Australia. In this situation there are two contracts of insurance that are independent. The first is between the insured and the primary insurer and the second is between the primary insurer and the reinsurer. The other method of concluding reinsurance arrangement is by fronting.

24. I shall let Evans J describe *fronting* for us. In ***Sedgwick Tomenson Inc v P.T. Reasuransi Umum Indonesia*** [1990] 2 Lloyd's Rep 334, 341 he said:

> *The meaning of 'fronting' is clear. When one insurer is willing to take a risk but either is unable to do so, not being licensed to do business in the territory in question, or is not acceptable to the assured, for part or all of the risk, either for commercial (security) reasons or perhaps on political grounds, then another insurer may be able to 'front' for him, by underwriting the insurance in full and then reinsuring part or all of the risk with him. There may be standing arrangements to this effect when a number of insurers belong to a group or pool and for whatever reason the insurance is accepted by one or more insurers but the risk is shared by them with others under built-in reinsurance agreements.*
>
> ***The usual form of remuneration for the fronting insurer is an 'overriding commission' of, say, 1 per cent. No-one doubts that the named insurer is liable in full to the assured, in accordance with his contract and regardless of the reinsurance arrangements, though in the normal course he would recover an indemnity, depending on the terms agreed with the reinsurer.*** (My emphasis)

25. The passage from Evans J. emphasises one of the distinctive features of fronting which is that the cedant company (primary insurer) receives a commission from the reinsurer (not the insured). The reinsurer is paying the cedant for agreeing to lend its name to the transaction. This is not a premium. If it were then it would be the cedant company purchasing reinsurance on its own account from the reinsurer. Evan J. insists that there are two contracts of insurance: one between insured and primary insurer and the second between the primary insurer and reinsurer.

26. Fronting fees tend to be quite low. The reason for this arises from the fact that as a practical matter the ultimate loss rests on the reinsurer, assuming there is no solvency on either the part of the front or the reinsurer. This is so even if the front is liable to the insured. In instances where the front is liable the fronting company ought to be prudent when deciding for whom it will front, because it does not wish to be left 'holding the bag of liability'. If the front has doubts about the reinsurer, it is not unusual for the front to ask for security from the reinsurer because the front wants to know that the reinsurer is good for the money. The front is now guarding against the reinsurers insolvency. An example of a front demanding security, in this case a letter of credit, is the case of ***Sirius International***

Insurance Co. (Publ) v. FAI General Insurance Ltd. [2005] 1 Lloyd's Rep 461. The liability of the front to the insured really comes down to what was agreed between the parties.

27. Good and legitimate reasons exist why a fronting arrangement may be necessary. The risk may be unattractive or too large for any single company to underwrite. The insured may not have much confidence in the local insurance companies. The balance sheets of local companies may indicate that they are not financially robust. There is also the possibility that the domestic insurer cannot take the risk because of the ratio between capital and the value of risk underwritten that must be maintained, that is to say, if the primary insurer wishes to take on additional risk it will have to increase its capital base. Additionally, some regulators require a deposit before the insurance company can do business and that deposit has to be kept at a fixed ratio to the value of the risks it underwrites. The reinsurer may be prohibited from selling directly to the insured. It could also be that the insurer will not take the risk without reinsurance support. It may be too that at the time a domestic insurance company is asked to underwrite a risk its experience in the industry may be that at that particular time reinsurance may be difficult if not impossible. It does not wish to underwrite the risk and then find that it cannot obtain reinsurance, so it may say to the insured, "I am terribly sorry. I am not prepared to underwrite this risk. However, if you are able to find an overseas reinsurer which will take the risk and is prepared to enter into a fronting arrangement with me, I would be only too happy to facilitate that kind of arrangement." In any of these circumstances the insured may find reinsurers who may be prepared to take the risk, agree terms and ask a local company to issue the policy on its (the local company's) documentation. It is obvious that because the arrangements are purely contractual and consequently the parties may have a fronting arrangement where the front is liable on the policy between itself and the insured.

28. This understanding is supported by expert evidence, in the Safe Haven case. The expert evidence of Mr. Thomas Pragnell, the Executive Chairman of IIB and an experienced reinsurance broker supports this position. At paragraphs 14.1 to 14.6 he describes fronting. I shall set out these vital passages.

> *14.1 Fronting is a universal practice in reinsurance markets worldwide. It occurs for a number of reasons. Let us assume that a person (A) owns a large beachfront hotel in Jamaica. The risk may be so large that no one insurer could prudently take it. Insurer B might be willing to take a part of the risk (say 10%). Even if B has reinsurance treaties,*

there are many reasons why it might not want to burden the treaties with A's risk or "eat up" treaty capacity.

14.2 In such circumstances, B could consider taking the risk and buying facultative cover on a risk-specific basis. Such a course of action has inherent dangers. B may take the risk with the intention of facultatively laying-off the excess risk beyond its contemplated retention. However, since facultative reinsurance is typically on a case-by-case basis with no obligation on the reinsurer to accept the risk offered, B could well find that it cannot lay-off the risk. Thus the reinsurer may demand a higher premium rate than what B charged A or may impose policy condition that B did not impose on A. The hurricane season could be about to start and the traditional reinsurance markets may close their books on Caribbean risks until the end of the season. B would find itself in an intolerable position and indeed in violation of capital to risk ration requirements prescribed by the regulatory regime under which it operates. For those reason B might decline the risk entirely.

14.3 A well-informed person in A's dilemma or one who is uncomfortable with B's potential list of reinsurers or B's balance sheet strength and prefers to select reinsurers who he is confident will stand behind his risk would engage the services of a specialist reinsurance broker (say X) with access to the reinsurance market. Acting on behalf of A, X would approach a reinsurer direct (sic) who would review the risk and propose a full slate of underwriting terms and conditions including the premium rate. If the terms are acceptable to A, then the reinsurer (C) will ask the broker to find a "fronting company".

14.4 There are good reasons why a "front" may have to be found. First the reinsurer (C) may be prohibited, by legal requirements in the country from which it operates, to write "direct business". Also, C may not wish to be exposed to the argument that by writing A's business direct it is carrying on insurance business in another country.

14.5 In such a case the reinsurance broker (X), having pre-arranged reinsurance with the reinsurer (C), would then place 100% of the risk with the local insurer (B) on the terms previously agreed with the reinsurer and the local insurer (B) would then, pursuant to the pre-arranged facultative cover, be reinsured in respect of 100% or a percentage only of the risk with the reinsurer (C).

14.6 Fronting is common, if not the universal practice, in the captive insurance market where large corporations may set up their own insurance companies to "front" their insurance, retaining only a minute percentage. It is also commonly done in reinsurance pools where a group of insurance company may form a pool to underwrite a special class of risk and arrange for a member of the pool to act as underwriting "front" for the pool.

29. In other words, the reinsurance contract is concluded before the underlying contract between the insured and the insurer is completed. This result is not unusual in the world of reinsurance.

30. Some insurance/reinsurance arrangements have what is known as a "cut-through-clause". Mr. Pragnell explained that "a cut through clause is a clause in a reinsurance contract which purports to give an insured an express contractual right, in certain circumstances, to bypass the primary insurer and claim directly against the reinsurer" (see para. 15.1 of Pragnell's affidavit). This type of clause is not unusual in the United States. According to Mr. Pragnell, in his experience, such clauses are not commonly found in local or international practice.

31. While it is true that in conventional reinsurance it is possible, it is often times the case that the reinsurance contract is concluded before the underlying insurance is in place that does not mean that conventional reinsurance and fronting are identical. Lord Justice Mustill in ***General Accident Fire and Life Assurance Corporation v Peter William Tanter ("The Zephyr")*** [1982] 2 Lloyd's Rep. 529, 532 (Court of Appeal) said:

> *Although in many respects the writing of reinsurance business takes the same shape as in the case of direct insurance, it has one special feature which has led to many of the problems debated at the trial and on this appeal. When a primary insurer is deciding whether or not to take a line on a particular risk, and if so in what amount, he may decide to participate only if he can obtain reinsurance. In such a case the broker will have a better prospect of persuading the underwriter to participate in the primary insurance if he is able to offer him reinsurance at the same time. Accordingly, a practice has developed whereby a broker instructed to obtain a primary cover will on his own initiative approach potential reinsurers to obtain from them in advance a binding promise to provide reinsurance for whatever person may subsequently write a line on the primary cover and desire to reinsure the whole or part of that line. The reinsurer conveys this promise by initialling a percentage line on a slip, which identifies the subject-matter, the nature of the risk and the value. The slip does not, however, identify the reassured and could not do so: for at the stage when the potential reinsurer is approached, it is not known whether the primary insurance will ever be written at all, and if so by whom; or whether any of the primary insurers will desire to effect reinsurance; or whether any insurer who does desire to reinsure will be willing to do so with the reinsurer whom the broker has approached, and on the terms which he has offered. With this promise "at large" in his pocket, the broker can offer to an underwriter a package consisting of the opportunity to take a line on the primary cover, and at the same time to place an order for reinsurance.*

32. The point I wish to extract from this passage is that just as in conventional reinsurance it is possible to secure reinsurance coverage before the primary insurance coverage is in place, so too in fronting there can be placing of reinsurance without the front being in place.

The practical matter of concluding reinsurance

33. The reinsurance slip is a vital document in the reinsurance industry. The process begins with the reinsurance broker sending a reinsurance slip to the reinsurer. The way in which reinsurers indicate their willingness to underwrite the risk is by signing and stamping the slip and returning it to the broker. It is often the case in conventional insurance/reinsurance that the broker has already placed reinsurance before placing the primary insurance contracts (see ***General Accident Fire and Life Assurance Corporation v Peter William Tanter ("The Zephyr")*** [1984] 1 Lloyd's Rep 58).

34. It is impossible to overstate the role of the reinsurance placement slip in conventional reinsurance where no policy is issued subsequent to the conclusion of the reinsurance contract. Hobhouse J. (as he then was) in ***General Accident Fire and Life Assurance Corporation v Peter William Tanter ("The Zephyr")*** [1984] 1 Lloyd's Rep 58, 69 makes the point quite well.

> ***Another point which emerged clearly from the evidence was that the slip is the record of the contract between the assured and the underwriter. It is the contract; it is not merely evidence of an oral contract; it is not open to either party to contend that part of the contract between the assured and the underwriter is to be found elsewhere.*** *In this the evidence correctly reflected the legal position as stated by the Courts; see for example Mr. Justice Matthew in Thompson v. Adams, (1889) 23 Q.B.D. 361 at p. 365 and Lord Justice Roskill in American Airlines Inc. v. Hope, [1973] 1 Lloyd's Rep. 233 at p. 243.* ***Thus if something is agreed between the underwriter and the broker as part of the contract between the underwriter and the assured it must be written in the slip. It is of course conceptually possible to make a contract which is partly oral and partly written but that is not the practice of the market. The contract is the slip. ...*** *The policy is the formal contractual document issued to the assured and unequivocally contains the terms of the contract. The practice could not accommodate slips or policies which did not correctly record the terms of the contract with the assured. Another practical reason is that later underwriters subscribe slips in part on the faith of the subscription of the leaders and the earlier underwriters. The later underwriters are entitled to believe that those subscriptions are to an insurance contract in the terms written on the slip. If this belief was not to accord to the true position, the market could not operate in the way it does.* (My emphasis)

35. If no policy is subsequently issued then the reinsurance placement slip is the contract that defines the parties' rights and obligations (see ***Insurance Company of the State of Pennsylvannia v Grand Union Insurance Company*** [1990] 1 Lloyd's Rep. 208; see ***Youell v Bland Welch*** [1990] 2 Lloyd's Rep. 423, 429 per Phillips J. at first instance and Beldam L.J. in the Court of Appeal at [1992] 2 Lloyd's Rep. 127, 141, for the relationship between the slip and the policy).

36. In the two cases before me the reinsurance slips purport to capture the agreement between Dyoll and the reinsurers. Indeed there is no dispute that the documents here assumed the form of conventional insurance/reinsurance. There is no doubt that there are two contracts: one between Dyoll and the insured and the other between Dyoll and the reinsurers. It would appear from the cases to be examined from the United States that fronting takes the form of conventional insurance/reinsurance, that is to say, two contracts as described by Evans J. in ***Sedgwick***.

The effect of a winding up order on reinsurance proceeds in conventional reinsurance

37. The cases relied on by JLs to support their contention (which are all cases of conventional reinsurance) do establish the proposition that reinsurance proceeds go to the reinsured and not the original insured. The JLs submit that the conventional law should be applied to the fronting arrangements in the cases before me.

38. The JLs are correct when dealing with conventional insurance/reinsurance arrangements and some fronting arrangements. It is well established that when a winding up order is made the company is divested of the beneficial ownership of its assets and is no longer free to dispose of them as it sees fit. The winding up order immediately activates the statutory scheme for distribution of the assets of the company. As explained by McPherson SPJ in ***Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76 at 78*** cited by Barrett J in ***HIH Casualty and General*** 188 FLR 153 at paragraph 97:

> *Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled. It is a process, comparable to an administration in equity, that begins or "starts' with and (sic) order of the court. However it is not the court order itself that "winds up" the company; the order does no more than direct that the company be wound up, which is then carried into effect by an officer of the court, the liquidator, who does the things that I have identified in order to liquidate the company's assets and wind up its affairs. In referring to "winding up' or to the company being "wound up", and to the manner and the incidents of doing so, s 601 therefore speaks not of proceedings aimed at obtaining an order of court to wind up the company but of the process that ensues from and follows such an order. Leaving aside the case of a successful appeal, winding up thus "starts' when, and not before, an order to wind up is made appointing a liquidator.*

39. The creditors' normal rights are transformed into a right to (a) see that the estate is administered in accordance with the relevant insolvency laws and (b) prove their debt in the insolvency (see ***Ayerst (Inspector of Taxes v C & K (Construction) Ltd*** [1976] A.C. 167 and ***Mason, Riddel and Wardrop v Amaca Pty Ltd*** [2005] EWHC (Ch.D. paras. 115 and 116) (Companies Court) delivered October 10, 2005). Only secured creditors have a proprietary right in any of the company's property. The other creditors are unsecured and so must abide by the statutory scheme.

40. When insolvency overtakes an insurer the insolvency regime established takes over. There is no special law, outside of specific statutory enactment, applicable to an insolvent insurer. The reinsurance proceeds in an insolvency fall to be distributed according to the applicable insolvency law. Barrett J. in ***HIH Casualty and General*** was dealing with an insolvency of an insurance company. The issue of who should get the re-insurance proceeds arose. There was a Herculean attempt to circumvent the doctrine of privity. Barrett J. stated at paragraph 11:

> *In the absence of statutory intervention, a person insured by an insurer has no right to the proceeds of reinsurance held by the insurer in respect of the relevant risk, at least where that insured is not named in the contract of reinsurance as a third party beneficiary in such a way as to activate principles discussed in Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107 (see also Omaha Indemnity Co v Carpenter (1987) 5 ANZ Insurance Cases 75,171 (60-831)). There is no suggestion that any such principles apply in the present case or would ordinarily have sensible application to reinsurance. In general, principles of privity of contract operate in the way I have stated to exclude an individual insured from access to proceeds of reinsurance received by his or her insurer, whether before or after the onset of insolvency: see generally Nepean v Martin (1895) 11 TLR 256, Re Law Guarantee Trust and Accident Society [1915] 1 Ch 340 and Re Harrington Motor Co Ltd; Ex parte Chaplin [1928] 1 Ch D 105.*

41. His Honour stated at paragraphs 13 and 14:

> *Reinsurance can be described as the insurance entered into by an insurer (the cedant or reinsured) in respect of its contractual liabilities to pay claims incurred under its contracts of direct insurance. It is entered into to limit the exposure of the reinsured to losses on the insurance business written.*
>
> *A reinsurance contract constitutes a separate contract of insurance between the reinsurer and the reinsured. It is not an assignment of all or any part of the rights and liabilities already existing under a contract of direct insurance and the original insured does not acquire any rights or liabilities thereunder.*

42. In the Canadian case of ***In Re Northern Union Insurance Company*** 33 Man. R (2d) 81 the liquidator instituted proceedings to determine whether the proceeds of reinsurance belonged to the estate of the insolvent insurer (Northern Union Insurance Company Ltd) or to the insured (British Columbia Hydro and Power Authority and United Power Ltd). The loss had occurred before the insolvency and part of the claim had been paid by Northern Union to British Columbia Hydro. Northern purchased facultative reinsurance for that risk. At the time of the winding up order Northern owed an unpaid balance in excess of $2,000,000 to the insured. British Columbia claimed the sum on the basis that it had a special or prior or beneficial claim to it. The effect of the submission was that this balance did not form part of the estate of Northern. This is how Kroft J. of the Manitoba Court of Queen's Bench framed the issue at paragraph 7:

> *Put another way -- does the money due under the facultative reinsurance policies which indemnify Northern Union against liability under the B.C. Hydro policy become part of the general estate which is to be administered by the liquidator for the benefit of all loss claimants and other creditors, or is it impressed with some special characteristic to the exclusive benefit of B.C. Hydro? No other insured has raised this question; however, it is common ground that Northern Union reinsured many of its risks. It was not suggested that the policy issued by Northern Union to B.C. Hydro, or the reinsurance policies issued by the reinsurers to Northern Union, were peculiar in any way. Neither was it submitted that B.C. Hydro had a different status as regards the reinsurers than would other loss claimants, where reinsurance had been placed.*

43. Kroft J. said at paragraph 20:

> *The general principles pertaining to the position of an original insured in relation to reinsurers were not the subject of argument. They are expressed in almost the same words in virtually all of the American cases which I was asked to consider. A contract of reinsurance in the absence of some special provision to the contrary operates solely as between the reinsurer and the reinsured. It creates no privity between the original insured and the reinsurer. In the event of insolvency of the insurer, the proceeds of the reinsurance become assets to be distributed generally amongst the creditors and the original insured has no equitable claim upon them. That is, the liability of the reinsurer is solely and exclusively to the reinsured.*

44. The appeal against Kroft J.'s judgment was dismissed by the Court of Appeal and the Supreme Court of Canada refused leave to appeal (see ***Northern Union Insurance Co., Re British Columbia Hydro & Power Authority and United Power Ltd. v. Dunwoody Limited*** 36 Man. R. (2d) 115).

45. In another Canadian case, this time from the Ontario Supreme Court, Catzman J. in ***Treverton et al. v Superintendent of Insurance for Canada (Ernst & Whinney Inc)*** 45 D.L.R. (4^{th}) 712 had to consider the question of reinsurance proceeds on a winding up. At paragraph 33, he said:

> *Before leaving Nor. Union, I should record that its result is consistent with authority in the United Kingdom and with the overwhelming weight of authority in the United States to the effect that, unless a reinsurance treaty otherwise provides, the original insured has no right or interest in respect of the reinsurance, the original contract of insurance and the contract of reinsurance are two distinct contracts, and the insurer remains solely liable on the original insurance and alone has any claim against the reinsurer; that, where an insurer is in liquidation, proceeds of reinsurance are payable, in the absence of specific language in the reinsurance treaty, to the liquidator of the insolvent insurer and*

form part of the general assets of the estate, and the original insured has no claim against the reinsurer; and that such proceeds, when received by the liquidator, are subject to no trust or equitable claim in favour of the policyholders whose policies were reinsured with the reinsurer.

46. All these cases involved conventional insurance/reinsurance arrangements. They all decided that disposition of reinsurance proceeds, in the absence of statutory intervention and contractual agreement to the contrary, has to be according to the insolvency regime established by law.

47. Mr. Robinson set out to deflect this understanding from being applied in the Safe Haven case by referring to a passage from the judgment of Lord Denning M.R. in the case of ***Eagle Star Insurance Co Ltd v Yuval Insurance Co. Ltd*** [1978] 1 Lloyd's Rep 357. The claimant, in a summary judgment application, sought to recover from Yuval which had fronted for the reinsurer. Yuval successfully resisted the application. The Master of the Rolls said these words at page 360:

I will deal first with the summons under O.14. It seems to me there are several triable issues. First the "fronting arrangement". Although Eagle Star did not know of it themselves, their brokers, Pearson, Webb, Springbett, did know, or may be deemed to have known, that there was a fronting arrangement. They knew that Yuval were only getting a small commission of 1 per cent.; and that the real principals (who were to take the premiums) were Bastion Ltd., a company with which Mr. Delbourgo was closely concerned, as were the brokers themselves. It is open to question whether Eagle Star can sue Yuval as principals on this treaty of reinsurance when, to the knowledge of their agents, Yuval were only front men for Bastion. Bastion are now in compulsory liquidation. So if Yuval are liable, they will have to pay the whole of the << Pounds Sterling>>69,000, in return for which they have only received the tiny commission.

48. Based on the researches to date, this is the closest that any reported English case has come to suggesting that a front may not be liable to the insured. This case does not provide strong support for Mr. Robinson's submissions. The first comment I make about this passage is that the court was simply deciding that summary judgment was not appropriate because there were triable issues. Second, the passage does not reflect a thorough analysis of fronting because the issue before the court did not require the Master of the Rolls to analyse the matter deeply. Third, it would be quite remarkable if a well established reinsurance practice could be subverted by a passage such as this where the court did not have the benefit of full arguments on the matter which would undoubtedly have lead to greater analysis of the issues involved in fronting. Fourth, the fact that Yuval might be liable to pay the whole sum for a small proportion of the premium is not startling as the Master of the

Rolls would have us believe. It comes down to what was agreed between the parties. I shall now look at the position in England as demonstrated by the JLs.

The English position on reinsurance proceeds in fronting contracts

49. There seems to be a dearth of reported cases from England dealing with fronting. The JLs rely heavily on ***McGillvray on Insurance*** (9th) pp. 888 – 895. I have examined another leading text, *O'Neill and Woloniecki*, ***The Law of Reinsurance in England and Bermuda***, (1998) (Sweet & Maxwell). Neither text has presented a convincing argument on why the conventional position should be applied to fronting contracts where the parties have agreed that the reinsurer should pay the original insured directly. Neither text examined the cases from the United States. The two English cases that come closest to the point in issue before me are ***Sedgwick Tomenson*** and ***Eagle Star Insurance***. Even the JLs would concede that neither case provides strong support for their position and that they (the JLs) indeed are praying in aid cases which do not have fronting as a feature. When Evans J. said that no one doubts that there are two contracts and that the front is liable in full to the insured, he did not cite any authority for this proposition. It is obvious that the English position rests on the application of the strict privity of contract doctrine.

50. It is at this point that the cases from the United States of America are helpful. Not all the cases from the United States that I am about to examine have actually grappled with the question of an insolvent front. However, there seems to have evolved some markers that point to the conclusion that the reinsurance moneys are to go to the insureds, outside of specific statutory provision. While it is true that the United States have a well documented history of third parties suing on contracts it is not to be thought that third party beneficiaries were simply transplanted into insurance arrangements without careful analysis and thought. It is fair to say that the number of cases in which insureds have been able to enforce a reinsurance contract against a reinsurer is not many.

The United States position

51. The cases examined reveal a strong general rule that reinsurance proceeds when there is an insolvency go to the insurer and not to the insured. This strong general rule is based on the doctrine of privity of contract. This might come as a revelation particularly to those familiar with Professor Corbin's article in which he documented the well established principle, in America, of third parties being able to enforce contracts entered into for their benefit (see ***Contracts for the Benefit of Third Persons***, (1930) 46 L.Q.R. 12). In the opinion of the professor, the law in the United States was so developed that he felt he could confidently state that "*after many hundreds of decisions, it is now settled in every State that under some circumstances two parties can by contract confer enforceable rights upon a third party; and this result has been crystallised and adopted by the American Law Institute in its restatement of the American law of contracts*" (see pages 12 – 13). The legal atmosphere in the United States is therefore much more conducive to third party beneficiaries than Jamaica's and I dare say most other common law jurisdictions.

52. It appears that even where cut through clauses are present it is by no means a foregone conclusion that the insured will be allowed to sue the reinsurer. Edward J. Boyle in his valuable article, *Insurance Company and Insurance Intermediary Insolvency in the United States and the Impact on Reinsurers,* Int. I. L. R. 1993, 1 (9), 291 – 303, makes it clear that it is by no means axiomatic that the courts will allow the insured a direct cause of action against the reinsurer. He indicated that in the absence of cut through clauses many courts in the various states give effect to the statutory scheme of the particular state. He did acknowledge, however, that in certain circumstances the courts permitted the insured to sue and recover from the reinsurer once it was clear that the insured was intended to be a third party beneficiary. Mr. Boyle points out that cut through clauses have not survived unscathed. He indicates that in some instances they have been held to create an improper preference in favour of a particular creditor. I am saying all of this to make the point that one cannot simply take jurisprudence from another jurisdiction that has developed a different legal philosophy and ethos and transplant it into another legal environment without full and mature consideration.

53. So strong is the rule that some states, for example Louisiana and Pennsylvania, have enacted direction action statutes. The purpose of these statutes is to circumvent the privity doctrine and permit the insured to go directly against the reinsurer. Despite the enactment of these statutes it is still possible, at common law, for the insured to recover reinsurance proceeds. The privity of contract doctrine is still preserved. However, it appears that the courts require exceptionally strong evidence that the insured was intended to benefit before the courts are prepared to allow the insured to recover reinsurance proceeds. To put it another way, exceptions to the strict privity of contract rule are allowed in well defined circumstances.

54. In ***Fontenot v Marquette Casualty Co.*** 258 La. 671, 247 So. 2d 572, the Supreme Court of Louisiana (a court that hears appeals from the Court of Appeal of Louisiana) held that the contract in question did not evince an intention to confer a cause of action on the insured. The court relied on the strong general rule that the insured is not privy to the contract of reinsurance. It came to its position by an analysis of insurance/reinsurance. However it is important to note that the court never said that it was impossible for a contract to achieve the purpose of giving the insured a direct claim to the reinsurance proceeds. The majority recognised three exceptions to the general rule. These are (1) where the reinsurer by his conduct in relation to the insured assumes the insurer's responsibility and liability; (2) where the reinsurer and insurer merged and (3) where the contract expressly so provides. The majority noted that the third instance was more in the nature of coinsurance and not reinsurance. It is not necessary to explore the soundness of the majority's conclusion regarding the third exception.

55. In ***Reid v Ruffin*** 503 Pa. 458, the Supreme Court of Pennsylvania, did not find the circumstances sufficient to permit the third party to claim the reinsurance proceeds. The litigation arose out of a motor vehicle accident. The claimant sued the defendant whose insurers were reinsured. He sought to recover from the defendant's insurer's insurer. The insured argued that the reinsurer ought to be liable to him on two bases. The first, which is the only one material for present purposes, was that the reinsurer reserved a power to approve settlements by the insurer and that reservation showed that the reinsurer exercised de facto control over the insurer, therefore the insured should recover directly from the reinsurer. The majority examined the facts and found that it was only in very limited circumstances that the reinsurer reserved that power to itself. They also found that the reinsurer, generally, did not have any power to prevent the insurer settling claims and it could not direct the insurer to offer a settlement if the insurer was unwilling to do so. The majority stated that there was no reason to overrule the privity principle because the inherent nature of reinsurance proves the point against allowing the insured to sue. They noted that "reinsurance is the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matter prior to and subsequent to loss" (see page 464). This was a case of conventional insurance/reinsurance and not fronting.

56. In the case of ***Mellon v Security Mutual Casualty*** 5 Phila. Co. Reptr. 400 the court while recognising that the original insured is not ordinarily able to benefit from the contract of reinsurance accepted that in certain circumstances an original insured might recover directly from a reinsurer. It held that on the facts of that case the insured had not made out the case for direct action against the reinsurer.

57. Although the claims failed in the three cases examined they nonetheless show that the strict privity of contract doctrine can be circumvented.

58. The Superior Court of New Jersey, Appellate Division, in ***Venetsanos v Zucker*** 271 N.J. Super. 459, 638 A. 2d 1333 (a case of fronting) held that a reinsurer was directly liable to the insured because (a) it was responsible for negotiating and settling matter on behalf of insurer; (b) it was the same person who arranged insurance and reinsurance; (c) the reinsurer made underwriting decisions and (d) the reinsurer and its president had final say on claims and their settlement.

59. Not only was ***Venetsanos*** a case of fronting but it was one in which the insured succeeded on a summary judgment application against the reinsurer. I shall state the relevant facts very briefly. The claimant sued the defendant in negligence. The defendant was insured by Mutual Fire Marine and Inland Insurance Company ("Mutual") which was licensed to operate in New Jersey. The defendant's policy with Mutual was 100% reinsured with Homestead which was not licensed to operate in New Jersey. The claimant was successful in her suit against the defendant. The defendant assigned his rights under his insurance policy to the claimant. The claimant sought summary judgment against Homestead on the basis that Mutual was fronting for Homestead and consequently Homestead should be regarded as the direct insurer and not a reinsurer. The trial judge agreed and entered summary judgment against Homestead which appealed. The trial judge found that Homestead was in control of the policy of the defendant. He also found that although Mutual's name appeared on the policy, Homestead "actually did the insurance investigation, reimbursed Mutual for claims and had final authority on all settlements" (see page 464). The court recognised that in the ordinary case of insurance/reinsurance the reinsurance proceeds were to be distributed for the benefit of all the creditors and direct payment to the original insured was forbidden (see page 470). The appellate court in examining the facts before the judge referred to the following bits of evidence which they said supported the conclusion of the trial judge:

a. Homestead paid Mutual a 20% fee for the use of Mutual's policy and depending on the circumstances Homestead would reinsure all or part of the exposure back to Homestead (see page 466);
b. Homestead on the facts had the entire exposure under the policy in question;
c. Homestead took the initial decision to underwrite the risk and undertook the entire risk but because it was not licensed in New Jersey it had to use Mutual as a front;
d. Although Homestead handled the claim the payments were made by Mutual because it was unlawful for Homestead to issue cheques to another company's policy; and
e. Homestead had the final say on the claim and its settlement.

60. The appellate court specifically said that in a case of "a more orthodox reinsurance situation, an insured would ordinarily be relegated to rights against the primary insurer, for reasons of comity and efficiency, as well as the Uniform Act. ... This is not an orthodox reinsurance matter" (see page 471). The court concluded at page 471 - 472 that:

> *Here, Mutual, the locally admitted insurer, merely provided the use of its policy for a consideration in order to enable a non-admitted carrier and its affiliates to solicit and evaluate risks, sell policies, wholly insure, and wholly control payments of claims on risks in this state. We will not consign a New Jersey insured or its uncompensated victim-assignee to uncertain and probably inadequate recourse against an insolvent insurer to a foreign rehabilitation proceedings in such circumstances, particularly where the reinsuring agreement is unavailable*

61. It was this last sentence that led Mr. Batts to suggest that the decision was based on "narrow parochialism". That is decidedly not the case. I do accept that a distinguishing feature between that case and the cases before me is that the reinsurance agreements in the instant cases are available. However, that should not detract from the analysis done by the court to see whether it was appropriate for the insured to recover directly from the reinsurer. The court also referred to the case of ***Reid v Ruffin*** from Pennsylvania. The court said at pages 472 – 474:

> *We recognize and endorse the general rule that an original insured does not enjoy a right of direct action against a true reinsurer. See Appleman, Insurance Law and Practice, § 7694. It is settled that an ordinary treaty of reinsurance merely indemnifies*

the primary insurer against loss rather than against liability. Where, however, the reinsuring agreement itself provides, or the conduct of the reinsurer demonstrates, that it takes charge of and manages the defense of suits against the original insured, the reinsurer may be held to be a "privy" to the action. In such cases, judgment creditors of the insured have been allowed to proceed directly against the reinsurer. See, Homan v. Employers Reinsurance Corp., 345 Mo. 650, 136 S.W.2d 289 (1940); see also O'Hare v. Pursell, 329 S.W.2d 614 (Mo.1959); Hollipeter v. Stuyvesant Ins. Co., 523 S.W.2d 595 (Mo.App.1975); Slotkin v. Citizens Cas. Co. of N.Y., 614 F.2d 301, 316 (2nd Cir.1979), cert. den., 449 U.S. 981, 101 S.Ct. 395, 66 L.Ed.2d 243 (1980); Appleman, supra, § 7694.

The Pennsylvania case of Reid v. Ruffin, 503 Pa. 458, 469 A.2d 1030, 42 A.L.R.4th 1117 (1983) well illustrates the distinction we make. It, too, involved a suit asserting liability against a reinsurer for failure to settle or compromise. There, however, the primary insurer had retained most of the risk, reinsuring only 25 percent, and it controlled the settlement negotiations. Mere reservation by the reinsurer of the right to approve settlements, except where immediate decision is necessary and it is impracticable to obtain consent, was deemed insufficient to impute the insurer's bad faith to the reinsurer. Although the Pennsylvania Supreme Court recognized the several rules respecting an insured's right to direct action against a reinsurer, its rationale in Reid was specifically grounded in the absence of factors which are here present, and the presence of factors which are here absent. As stated in Keeton and Widiss, Insurance Law, § 7.8 (a) (1) (Practitioner's Ed., 1988):

> *Does a reinsurer have a duty to the primary insured? The answer will usually depend on whether, in the total relationship, the reinsurer has some degree of control over the decisions concerning settlement with the third party claimant. If not, the basis for the duty is lacking; if so, it exists.*

Thus, we find that as a matter of law, Homestead was properly held to the same liability as that of a primary insurer in the summary judgment motions. We do not, and need not, decide whether Homestead was the "actual" or "primary" insurer as held by the motion judge.

62. The Superior Court of New Jersey, Appellate Division, like the courts in England, Canada and Australia recognised the general rule that reinsurance proceeds form part of the estates of the primary insurer, based on the privity of contract rule. However, it accepted that there can be exceptions to the general rule.

The Koken case

63. The final case from the United States that I propose to examine is ***M. Dianne Koken v Legion Insurance Company*** 831 A. 2d 1196. This was a decision of Judge Leavitt. His decision was upheld on appeal by the Supreme Court of Pennsylvania at 878 A. 2d 51 by a majority of 5:2. Miss Koken was the Commissioner of Insurance and under the relevant statute the Commissioner had the power to rehabilitate insurance companies experiencing financial difficulties. The statute also gave the Commissioner power to convert the rehabilitation to a liquidation if the rehabilitation efforts failed. Legion Insurance Company was one such insurance company in rehabilitation. When she decided to convert the rehabilitation to a liquidation, a number of Legion's policy holders sought to have the reinsurance proceeds paid directly to them. The policy holders were Pulte Homes Incorporated, Psychiatrists' Purchasing Group Incorporated, Rural/Metro Corporation and American Airlines Incorporated. The four insured argued that the reinsurance proceeds should come to them because of the special arrangements that they had entered. Leavitt J. agreed. What were those special conditions? I shall deal with each insured in order to show the evidential bases for concluding that they were not conventional reinsurance.

a. Pulte Homes Incorporated

This company ("Pulte") operated a nation wide home construction business. Its business strategy was based on creating customers for life, that is, to secure and retain the same customer as a home purchaser from the time they bought their initial house right through to purchasing their dream house. A part of that strategy was its insurance arrangements. Pulte negotiated and purchased its own reinsurance. It used a reinsurance consultant to place its business. The consultant met with the reinsurers and essentially did everything without any input by Legion. When this was done, Legion acted as a fronting company for a fee of US$100,000.00. to pay the premiums. Pulte paid the premium to Legion who deducted its fronting fee, paid the taxes and paid the reinsurance premium to the reinsurers. Legion had no involvement in the actual settlement of claims. The court found that it was the intent of all the parties that "Legion, as a pass-through, would play no role in the administration of the claims or supervision of Risk Cap [a third party administrator who would handle all claims against Pulte]" (see page 1210). Risk Cap maintained all the files, paid claims, adjusted claims – things that Legion would be required to perform if they were true insurers. Risk Cap communicated directly with the reinsurers. There were annual meetings attended by Pulte and Risk Cap. Legion never attended those meetings.

b. Psychiatrists' Purchasing Group Incorporated

The American Psychiatric Association ("APA") comprises doctors who specialize in psychiatry. It offered insurance protection to its members who are scattered throughout the world. In order for some of its members to have insurance coverage APA had a fronting programme with Legion. Legion retained some of the risk but the manner of funding this risk did not expose Legion to any risk at all. APA paid Legion a dollar for dollar amount for the risk retained, that is, if Legion retained US$2,000,000.00 then APA paid Legion US$2,000,000.00. The court found that this was not insurance at all but a pre-funding arrangement. In practical terms Legion did not participate in the administration of the insurance programme and did not assume a true underwriting risk.

c. Rural/Metro Corporation

This company provided emergency and medical transportation in twenty six states in the United States of America. All essential terms of the company's liability were negotiated directly with the reinsurers. Once this was done, the company looked for a front to issue policies on its (the front's) documents. This was to enable Rural/Metro to meet the insurance requirements for the various states in which it operated. Legion was selected as the front because it operated in all the states in which Rural/Metro operated.

d. American Airlines Incorporated

American Airlines is one of the world's largest commercial carriers. It wished to insure against the myriad forms of liabilities to which they might become subject. American's potential liability is so large that no single insurer can underwrite the risk. In order for American to get insurance cover it obtains coverage from a number of insurers, each taking a portion of the risk. To meet its insurance obligations American worked out its own insurance coverage with Aon, an insurance broker. Aon used its skill and expertise to arrange coverage then looked for a front company that operated in all states of the United States. Part of the coverage was arranged with Syndicate 271, a Lloyd's Syndicate. Legion agreed to issue a fronting policy in order to give Syndicate 271 access to the United States market. Legion's act of issuing the fronting policy legitimised the participation of Syndicate 271 which was not licensed to sell insurance direct in the United States.

There was evidence from a Mr. Arledge who spoke in great detail about the programme developed for American. He testified that the intent of the parties was that if Legion should become insolvent Syndicate 271 would pay directly to American. The court accepted this testimony.

In order to participate in the programme Legion received a fronting fee of 7.5% in the first year and 5.75% in the second year. American paid the premium to Aon which in turn paid the money over to Legion. Legion retained its fronting fee and other fees and then remitted the remainder to Aon Re which paid Aon Group which sent the money on to the reinsurers. American dealt directly with the reinsurers through Aon.

When the September 11, 2001 tragedy occurred (i.e. the attack on the World Trade Centre), American claimed under the Syndicate 271 policy. Legion paid some of the money but this proved insufficient and so American sought direct access to the reinsurance proceeds.

64. I recognise that Legion paid a part of the insurance in respect of American Airlines' claim under Syndicate 271 and to that extent appears to be consistent with conventional insurance/reinsurance arrangements but that was a factor to be taken into account and by itself was not decisive one way or the other. This approach is consistent with the view that one looks also at how the parties actually conducted themselves rather than rely solely on the form that the transaction took on paper. This is not to say that the transaction form has no value in the assessment. It means that the contractual form cannot be the sole determinant of what the parties agreed. This way of looking at the matter is supported by good authority.

65. The thesis of the insureds was that Legion was a pass through insurer, that is to say, it did not assume any risk. Leavitt J. agreed. Leavitt J. had this to say at page 1234:

> *In most liquidations, reinsurance proceeds become general assets of the estate. Amicus curiae, the Reinsurance Association, explains the basis of this general rule with its primer on reinsurance: Reinsurance is insurance coverage taken out by an insurance company on risks that it has originally insured.... The two main reasons cited for purchasing reinsurance are capacity and stability. By arranging for reinsurance a primary carrier can relieve itself from the full burden of a large loss. By accepting a share of the loss, reinsurance has the effect of adding to the financial capacity of the primary insurer and stabilizing the primary carrier's financial results.*
>
> *Reinsurance Association Brief at 5. Where the direct insurer seeks safety in reinsurance in the above-described manner, generally the policyholder has no knowledge of either the existence or application of reinsurance proceeds to its claims. Housing Auth. of*

Lebanon County v. Envirohousing, Inc., 442 F.Supp. 1193, 1196 (M.D.Pa.1977).

The usual occasion for reinsurance has no application to Legion. The Policyholder Intervenors, not Legion, placed the reinsurance; Legion neither adjusted nor funded claims; and Legion did not seek to expand its underwriting capacity through reinsurance. Indeed, it sought to avoid any underwriting because its business plan called for generation of fees not underwriting profits.

The general rule identified by the Rehabilitator and the Reinsurance Association is just that, a general rule that applies in the traditional insurer/reinsurer context. The general rule makes little sense, however, where following it will turn upside down the contractual arrangements established by the Policyholder Intervenors for providing for their liability risks. The question, then, is the exception to the general rule. (My emphasis)

66. Leavitt J. referred to ***Mellon*** and ***Fontenot*** and concluded at page 1235:

Other jurisdictions have established exceptions to the general rule by examining the reinsurance relationship in its entirety. In Great Atlantic Life Ins. Co. v. Harris, 723 S.W.2d 329 (Tex.App.1987), an insurance company used a fronting company, United Bankers Life Insurance Company (United Bankers), to write business in Texas, where it was not licensed. Like Legion, United Bankers "assumed no risk and performed virtually no administrative functions," while the "reinsurer" "posted the required reserves." Id. at 334. United Bankers received a fronting fee, a half point of the premium, but it did not accept any underwriting risk. Over objections, the Texas Court of Appeals held that the receiver of United Bankers should not be able to "collect funds to which [the front] would not be entitled if it were not in receivership."

In keeping with Mellon and Great Atlantic, this Court is obliged to examine the reinsurance arrangements in their entirety to discern the parties' rights and obligations. The traditional approach holds little instructional value for a situation where the insolvent insurer acted only as a pass-through and not as a true insurer.

67. The summaries of the facts of the circumstance of each of the insureds have some things in common:

a. the insured negotiated their own reinsurance;
b. they looked for a front after finding reinsurance;
c. Legion did not do anything except lend its name to the transaction. Legion could do this because it was licensed in all fifty states of the union;
d. Legion never undertook the risk but was more interested in generating revenue from fronting fees than from genuine insurance underwriting;
e. in each case there were two contracts: one between Legion and the insured and the other between Legion and the reinsurers.

68. The contrast with Evans J. (***Sedgwick Tomenson***) could hardly be sharper. The English approach appears to take fronting at face value and does not show an examination of the arrangements in their entirety. These cases I have looked at from the United States while recognising that there are two contracts are prepared to look at the nature of the reinsurance and if the primary insurer's role is nominal to conclude that the original insured should have the reinsurance proceeds.

69. Mr. Batts submitted that the ***Koken*** case turned on section 534 of Article V of Title 40 of the Pennsylvania Statutes which reads:

> *The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate except when the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in discharge of that obligation.*

70. Mr. Batts' submission is not accurate. When the judgment is examined Leavitt J. was examining the common law position well before he mentions that statute and had distilled the relevant principles established by case law in other states. This is demonstrated by Leavitt J.'s statement at page 1236 - 1237:

> *Policyholders may bring a direct action against the reinsurance company where the policyholder is a "third-party" beneficiary or intended beneficiary of the reinsurance contract. Reid v. Ruffin, 503 Pa. 458, 461, 469 A.2d 1030, 1032 (1983). Under Pennsylvania law, a third-party beneficiary relationship is established by reference to the standards of Section 302 of the Restatement (Second) of Contracts. Scarpitti v. Weborg, 530 Pa. 366, 370-371, 609 A.2d 147, 149-150 (1992). The Pennsylvania Supreme Court has summarized these requirements as follows:*
> *[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Scarpitti, 530 Pa. at 372-373, 609 A.2d at 150-151 (second emphasis added) (citations omitted). Prior to our Supreme Court's adoption of the Restatement test, recovery by third-party beneficiaries was allowed only in narrow circumstances. Guy v. Liederbach, 501 Pa. 47, 58-59, 459 A.2d 744, 750-751 (1983) (overruling Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828 (1950)).*
> *In Guy, our Supreme Court established a two-part test for determining third-party beneficiary status: (1) recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) contract performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances*

indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Id. at 60, 459 A.2d at 751.

The Policyholder Intervenors all assert third-party beneficiary rights but on different factual grounds. The rights of Pulte, Rural/Metro and PPG stem from facultative reinsurance agreements specific to their individual risks; they were issued facultative certificates. American claims rights under a reinsurance agreement that is not strictly facultative, i.e., a facultative obligatory treaty. On the other hand, the contract, or wording, between Legion and Syndicate 271 contains language that expresses American's right to cut-through Legion to collect reinsurance directly from Syndicate 271. In spite of the differences in their circumstances, all the Policyholder Intervenors can demonstrate third-party beneficiary status under the two-part Guy test.
Even the Rehabilitator acknowledges that the Insolvency Article in the Legion/Syndicate 271 reinsurance contract expresses a cut-through right in American.

First, it was the intention of the parties that the reinsurer assume all underwriting risk. Legion's only role was that of a fronting company, and the parties did not intend that Legion use the proceeds of the reinsurance for its general business purposes. Further, the reinsurance proceeds were used exclusively and entirely for the payment of Policyholder Intervenor claims, which satisfies the second part of the Guy test. Payment by the reinsurance companies was through Legion but for the benefit of the Policyholder Intervenors. In short, each "reinsurer" functioned as the direct insurer for each of the Policyholder Intervenors.

In determining third-party beneficiary rights under a reinsurance contract, courts look at the extent of the reinsurer's involvement in the underlying insurance program. See, e.g., Reid, 503 Pa. at 461, 469 A.2d at 1032; Venetsanos v. Zucker, Facher & Zucker, 271 N.J.Super. 459, 638 A.2d 1333, 1339-1340 (App.Div.1994) (discussing Reid). In Reid, the Pennsylvania Supreme Court noted that unless certain factors are present, the general rule is that an insured does not enjoy a right of direct action against the reinsurer. Id. at 463-464, 469 A.2d at 1033. In Reid, the requisite factors could not be found because the direct insurer retained most of the risk, with only 25% reinsured, and it controlled the settlement of claims.

In Venetsanos, the New Jersey Superior Court found the Reid factors to be present and held that the insured had a right to claim the reinsurance proceeds. It determined that where a reinsurer (1) underwrote the insurance policy in question, (2) undertook 100% of the risk from an insolvent "fronting" insurer, (3) retained final authority to negotiate and settle all claims on behalf of the "fronting" insurer, and (4) reimbursed the fronting insurer for all payments made under the policy, the policyholder was a third-party beneficiary to the reinsurance contract and could proceed directly against the reinsurer upon the primary insurer's insolvency. Venetsanos, 638 A.2d. at 1339-1340. The Venetsanos court distinguished a fronting arrangement from a "more orthodox reinsurance situation." Id. at 1338. In determining that the policyholder held third-party beneficiary status, the court distinguished the Reid outcome by noting: Although the Pennsylvania Supreme Court recognized the several rules respecting an insured's right to direct action against a reinsurer, its rationale in Reid was specifically grounded in the absence of factors which are here present, and the presence of factors which are here absent. Id. at 1340.

Here, as in Venetsanos, factors are present to support a finding that the Policyholder Intervenors were third-party beneficiaries of the reinsurance contracts between Legion and the appropriate reinsurer. Legion acted as a fronting company, and it bore no true underwriting risk. Legion did not underwrite the risk, but, rather, was content to allow the true risk bearer, the reinsurer, to conduct the necessary due diligence. Legion also did not participate in the claims handling process, or the funding of claims. In all cases, these were the responsibility of the reinsurers.

71. In this passage Leavitt J. was stating the common law basis for the insureds to claim third-party beneficiary rights under the reinsurance agreements. The reference to "the standards of section 302 of the Restatement (Second) of Contracts" at the beginning of this extract is to a statute but rather to an influential body of writing in contract law by leading American academics. He then went on to refer to the cases I have already examined which were applying common law principles. Leavitt J. referred to a decision of the Supreme Court of Pennsylvania which established a two-stage test to determine when a third party can benefit under a contract. Finally he applied the test to the facts as found by him.

72. What the American cases have established is that it is quite permissible for there to be judicial circumvention of the strict privity of contract doctrine where this is necessary to give effect to the intention of the parties. Lest it be thought that this is American heresy I shall show that the highest courts of Australia and Canada, without reference to the developments in the United States, have developed and are developing judicially created routes around the strict privity of contract doctrine. Although England has not followed this lead, I shall demonstrate that in England judicial reform was stymied because of counsel's reluctance to launch a frontal assault on the strict privity doctrine.

English annoyance

73. Steyn L.J. was quite distressed about the injustice that may result from a strict application of the privity rule in ***Darlington BC v Wiltshier Northern Ltd*** [1995] 1 W.L.R. 68. His Lordship fulminated against the inability of third parties to sue on contracts for their benefit as rule having "no doctrinal, logical or policy reason" (see ***Darlington BC at*** 76E). He concluded in unmistakeable terms at pages 76G – 78C:

The genesis of the privity rule is suspect. It is attributed to Tweddle v. Atkinson (1861) B. & S. 393. It is more realistic to say that the rule originated in the misunderstanding of Tweddle v. Atkinson: see Atiyah, The Rise and Fall of Freedom of

Contract (1979), p. 414 and Simpson, A History of the Law of Contract: the Rise of the Action of Assumpsit (1975), p. 475. While the privity rule was barely tolerable in Victorian England, it has been recognised for half a century that it has no place in our more complex commercial world. Indeed, as early as 1915, in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. [1915] A.C. 847, 855, when the House of Lords restated the privity rule, Lord Dunedin observed in a dissenting speech that the rule made

> *"it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."*

Among the majority, Viscount Haldane L.C. asserted as a self-evident truth, at p. 853, that "only a person who is a party to a contract can sue on it." Today the doctrinal objection to the recognition of a stipulatio alteri continues to hold sway. While the rigidity of the doctrine of consideration has been greatly reduced in modern times, the doctrine of privity of contract persists in all its artificial technicality.

In 1937 the Law Revision Committee in its Sixth Report (Cmd. 5449, para. 41-48) proposed the recognition of a right of a third party to enforce the contract which by its express terms purports to confer a benefit directly on him. In 1967, in Beswick v. Beswick [1968] A.C. 58, 72, Lord Reid observed that if there was a long period of delay in passing legislation on the point the House of Lords might have to deal with the matter. Twelve years later Lord Scarman, who as a former chairman of the Law Commission usually favoured legislative rather than judicial reform where radical change was involved, reminded the House that it might be necessary to review all the cases which "stand guard over this unjust rule:" Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd. [1980] 1 W.L.R. 277, 300G. See also Lord Keith of Kinkel, at pp. 297H-298A. In 1981 Dillon J. described the rule as "a blot on our law and most unjust:" Forster v. Silvermere Golf and Equestrian Centre (1981) 125 S.J. 397. In 1983 Lord Diplock described the rule as "an anachronistic shortcoming that has for many years been regarded as a reproach to English private law:" Swain v. The Law Society [1983] 1 A.C. 598, 611D.

But as important as judicial condemnations of the privity rule is the fact that distinguished academic lawyers have found no redeeming virtues in it: see, for example, Markesinis (1987) 103 L.Q.R. 354; Reynolds (1989) 105 L.Q.R. 1; Beatson (1992) 44 C.L.P. 1 and Adams and Brownsword (1993) 56 M.L.R. 722. And we do well to remember that the civil law legal systems of other members of the European Union recognise such contracts. That our legal system lacks such flexibility is a disadvantage in the single market. Indeed it is a historical curiosity that the legal system of a mercantile country such as England, which in other areas of the law of contract (such as, for example, the objective theory of the interpretation of contracts) takes great account of the interests of third parties, has not been able to rid itself of this unjust rule deriving from a technical conception of a contract as a purely bilateral vinculum juris.

In 1991 the Law Commission revisited this corner of the law. In cautious language appropriate to a consultation paper the Law Commission has expressed the provisional recommendation that "there should be a (statutory) reform of the law to allow third parties to enforce contractual provisions made in their favour:" Privity of Contract: Conflicts for the Benefit of Third Parties, Consultation Paper No. 121, p. 132. The principal value of the consultation paper lies in its clear analysis of the practical need for the recognition of a contract for the benefit of third parties, and the explanation of the unedifying spectacle of judges trying to invent exceptions to the rule to prevent *demonstrable unfairness. No doubt there will be a report by the Law Commission in the not too distant future recommending the abolition of the privity of contract rule by statute. What will then happen in regard to the proposal for legislation? The answer is really quite simple: probably nothing will happen.*

But on this occasion I can understand the inaction of Parliament. There is a respectable argument that it is the type of reform which is best achieved by the courts working out sensible solutions on a case by case basis, e.g., in regard to the exact point of time when the third party is vested with enforceable contractual rights: see Consultation Paper, No. 121, para. 5.8. But that requires the door to be opened by the House of Lords reviewing the major cases which are thought to have entrenched the rule of privity of contract. Unfortunately, there will be few opportunities for the House of Lords to do so. After all, by and large, courts of law in our system are the hostages of the arguments deployed by counsel. And Mr. Furst for the council, the third party, made it clear to us that he will not directly challenge the privity rule if this matter should go to the House of Lords. He said that he is content to try to bring his case within exceptions to the privity rule or what Lord Diplock in Swain v. The Law Society [1983] 1 A.C. 598, 611D, described as "juristic subterfuges ... to mitigate the effect of the lacuna resulting from the non-recognition of a jus quaesitum tertio ..." (my emphasis).

74. These observations followed Lord Reid's concern expressed in ***Beswick v Beswick*** [1968] A.C. 58, where he said "if one had to contemplate a further period of Parliamentary procrastination, this House might find it necessary to deal with this matter" (see page 72C).

Privity of contract doctrine and developments in Australia and Canada

75. Mr. Robinson submitted that in the case of Safe Haven I should follow the developments in Australia and Canada but particularly those in Canada where the Supreme Court of Canada has developed the doctrine of principled exceptions to the privity of contract rule. He said that in the event that I concluded that Safe Haven was not a party to the contract between Dyoll and the reinsurers, I should say that it was the clear intention that Safe Haven was the intended beneficiary of the reinsurance contract. He said that the reinsurance contract, in the specific circumstances of Safe Haven, was intended to confer a benefit on Safe Haven. Although Mr. Robinson did not rely on ***Koken*** it is not doubted that his arguments have more in common with ***Koken*** than with Australian and Canadian cases.

76. The doctrine of privity states that only parties to the contract are able to sue on it. I need not recount its historical development. That has been done quite admirably by others (see *Simpson,* ***A History of the Common Law of Contract: The rise of the action of assumpsit,*** *1975 (Oxford); Palmer,* ***The Paths to Privity: The History of Third Party Beneficiary Contracts at English Law,*** *1992, (Austin & Winfield)* and *Flannigan,* ***Privity – The End of an Era (Error)*** 103 L.Q.R. 1987, 564 – 593). In light of the contribution of academic lawyers to this subject, there could not be many persons left in the common law world today, who would confidently assert that ***Tweddle v Atkinson*** (1861) B & S 393 provides robust support for Viscount Haldane's proclamation that only a person who is a party to a contract can sue on it (see ***Dunlop v Selfridge*** [1915] A.C. 847, 853). One cannot help but observe that Viscount Haldane provided no support for his declaration and completely ignored the mixed history on this subject that extended over some 250 years. If he had examined the history of the matter in his judgment it is seriously doubted whether in 1915 he could have stated his conclusions so unreservedly. A dogmatic announcement is always easy to make when the evidence is not examined contemporaneously with the statement. It could hardly be that Viscount Haldane was ignorant of the history on the subject. One possible explanation might be that it was because he was aware of the conflicting authorities that he decided to settle the matter by force of authority (the House of Lords) than by analysis. The "virtue" of his solution is that it has been accepted and applied ever since. ***Dunlop*** has been followed in England by ***Scruttons Ltd v Midland Silicone*** [1962] A.C. 446 and approved by the Judicial Committee of the Privy Council in ***New Zealand Shipping Co. Ltd v A.M. Satterthwaite & Company Ltd*** [1975] A.C. 154. Thus to that extent the matter has been settled.

77. The court in ***Tweddle*** omitted to examine in any depth previous cases in which third parties were allowed to enforce a contract. The court simply ignored two hundred years of learning on the subject. Privity of contract in its strictest form has come under serious attack within the closing twenty five years of the twentieth century. The time has now come for us to say that there is no legal, moral or logical reason a third party whom the parties intend to benefit should not be able to sue or receive a benefit under the contract. The arguments against third party beneficiaries have been set forth by Mr. Flannigan in his article (supra). All of them have been found inadequate. I adopt his analysis and conclusion.

78. Even an agile a mind as Professor Atiyah's has been confounded in his attempt to identify a cogent legal argument in support of the doctrine of privity in its current state (see *Atiyah,* ***The Rise and Fall of Freedom of Contract,*** Clarendon Press (Oxford) 1979). The supporters of the rigid doctrine of privity have now been left with simply relying on the repeated assertion of the existence of the doctrine. If this is the basis on which the doctrine can be supported today, that in itself, would be proof that the doctrine is in need of reform.

79. The highest courts of Australia and Canada have begun judicial reform of this doctrine. In ***Trident General Insurance Co Ltd v McNeice Bros Proprietary Ltd*** 165 C.L.R. 107 the High Court of Australia been prepared to give recognise the commercial realities in some kinds of insurance contracts.

80. The majority in the Canadian Supreme Court in ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.*** 97 D.L.R. (4^{th}) 261 relaxed the rule because in that case it stood in the way of justice and commercial reality. This view was applied by the same court in ***Fraser River Pile & Dredge v Can-Dive Services Ltd.*** 176 (4^{th}) 257. This reference to commercial reality resonates throughout the judgment of Leavitt J. in ***Koken***.

81. It is utterly futile to pretend that there has been a decisive shift in judicial and academic opinion that the strict privity of contract doctrine rests on shaky foundations. Only the obstinate would not agree that the courts of Australia, Canada and the United States have provided the straws from which the common law can begin to reexamine the strict privity of contract doctrine and disapply it in appropriate cases. We need not fear, like Chicken Little, that the sky will fall. It has not happened in the United States, Canada or Australia. I cannot see why it should happen in Jamaica.

82. The commercial reality in the cases of Safe Haven and the Coffee Trustees is that unless the parties concluded the type of reinsurance arrangements that they did they would have found themselves without insurance since no local insurance company was prepared to become true and de facto primary insurers for these two risks. I am prepared to say the cases before me warrant a principle exception to the strict privity of contract rule.

Estoppel

83. Mr. Robinson and Mr. Vassell both submitted that Dyoll should be estopped from arguing that it is now entitled to the proceeds of the reinsurance policies because all parties went into the arrangements on the understanding that the reinsurer would pay the proceeds directly to the insured. Support for this position can be found in the case of ***Amalgamated Investment & Property Company Ltd (In Liquidation) v Texas Commerce International Bank Ltd*** [1983] Q.B. 84. In that case, the documentation as executed by the parties, on their face, was at variance with the claim made by the bank. Eveleigh L.J. spoke of the transaction in that case in these terms at page 122H – 123C:

The obligations assumed by the plaintiffs and the defendants in my opinion clearly emerge from the correspondence between the parties. There would have been no problem had there *not been injected into their agreement a standard banking form which has been treated in argument as being the guarantee. The phrase "being the guarantee" would be more appropriate in the case where the guarantor has no other interest in the transaction than to guarantee the obligations of another. In such a case the document alone is treated as the agreement between the parties. As in all written contracts, however, it can embody terms previously agreed by other means. But to satisfy the Statute of Frauds 1677 it is put into writing as a written note or memorandum necessary for the enforcement of a contract of guarantee.*

Where the guarantee does not stand alone but is part of a larger transaction, even an oral promise of guarantee is enforceable: see Sutton Co. v. Grey [1894] 1 Q.B. 285. Not unnaturally, however, businessmen like to have written evidence of their agreements whether the Statute of Frauds requires it or not.

I make these preliminary remarks because at times it seemed that we were in danger of treating the bank's printed form as though it stood alone and was to be construed in isolation as if it required the strictness of construction appropriate to commercial documents such as bills of lading which have a universally recognised character which is of importance to a number of people other than those concerned in the original contract.

84. As Lord Denning M.R. in the same case explained at 122E:

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

85. Eveleigh L.J. at page 126F said:

> *Estoppel operates so as to prevent a party from denying a representation or an assumed state of facts in relation to the transaction supported by that representation or assumed state of facts. The estoppel does not go beyond the transaction in which it arose. The representation or assumed state of facts are not to be held irrefutable beyond the purpose for which the representation or assumption was made. In the present context the representation is not made for the purpose of establishing its own truth but as a part of the whole transaction. An assumption is not to be treated as having the effect of an assumpsit.*

86. I conclude that this case supports the position of the insured and as I shall demonstrate, it cannot be seriously contended that Dyoll was not a primary insurer but simply legitimised what would otherwise be unlawful. It would be wrong to allow Dyoll to resile from the position it took in reinsurance arrangements.

The principles

87. Having cleared much of the obstruction I can now state what I believe are the applicable legal principles to the matters at hand. They are:

a. in conventional insurance/reinsurance the original insured is not a party to the reinsurance contract and has no rights under such a contract because of the strict privity of contract principle;
b. in appropriate cases there may be a principled exception to the strict privity of contract principle that is to be established on a case by case basis;
c. the consequence of the conventional position is that reinsurance proceeds go to the reinsured and not the original insured if the primary insurer becomes insolvent unless there is statutory provision to the contrary or the contract provides otherwise;
d. there are limited instances in which the proceeds of reinsurance may be paid directly to the insured if the insurer becomes insolvent. This has to be established on a case by case basis after thorough examination of all the facts and the circumstance of each case;
e. in order for (d) to occur, the contract of reinsurance must show that was the intention of the parties to the reinsurance contract;
f. the contract may provide for (c) expressly;
g. in determining the parties intentions the court must look at all the circumstances and makes the determination objectively;
h. if the reinsurance contract in question is a fronting arrangement in which the original insured is claiming the reinsurance proceeds then the courts examine:
    i. the size and payment of fronting fees or commission;
    ii. how the reinsurance contract was concluded and the role played by the insurer;
    iii. whether the front actually took on the risk or whether it was a pass through entity which sought to increase profits more from the fees than by actually participating in underwriting the risk;

iv. the extent of the reinsurers involvement in the primary contract of insurance; and

v. the arrangements for the payment of premiums.

i. where the parties have contracted on an agreed factual basis then estoppel operates so as to prevent any party from denying a representation or an assumed state of facts in relation to the transaction supported by that representation or assumed state of facts

The Safe Haven case

88. I now say what the background to the 2004/05 insurance year for Safe Haven was. The insurance year ran from May 7 to May 7. It is not challenged that Safe Haven is such a large risk that it is difficult to be placed in the Jamaican market. Mr. Thomas Smith swore by affidavit that for the year 2004/05, Dyoll was not actively involved in (a) the placement of reinsurance; (b) payment of premiums or (c) setting the premiums. He added that after Hurricane Ivan struck, IIB Re made direct contact with the reinsurers.

89. The unchallenged evidence of Mr. Pragnell was that Dyoll received a fronting fee of US$2,000 for the reinsurers Munich Re and Wellington Re, the overseas insurers in respect of Safe Haven. Mr. Pragnell explained and I accept it as true that there was no policy issued by the reinsurers to Dyoll because the understanding was that because the reinsurance arrangements were facultative, the reinsurance coverage would mirror the insurance contract between Safe Haven and Dyoll except where special condition would apply only to the reinsurance. This I was told was a common practice in the reinsurance market.

90. Mr. Pragnell also swore that the premium paid to Munich Re and Wellington amounted to US$103,786.31 and US$20,000 respectively. These amounts were paid directly by Safe Haven through IIB Re to the reinsurers. The payment of US$103,786.31 directly is corroborated by Mr. Goldsmith, who gave evidence for the JLs, when he said in his first affidavit dated October 21, 2005, that on May 31, 2004, Dyoll was advised by IIB Re that the renewal premium for the Safe Haven risk was as has been given.

91. Mr. Owen Matalon illuminated the context of this fronting even further. He swore in his affidavit that the total premium for the entire insurance programme for Safe Haven in the year 2004/05 was US$335,744.24. He said other than paying Dyoll the premium for 22.5% all the reinsurance payments were made directly to the reinsurers, Munich Re, Wellington and British Caribbean Insurance Company ("BCIC"). All of what has been stated so far are unchallenged facts which I accept.

92. The history leading up to 2004 was given by Mrs. Saundra Bailey, Executive Director of IIB. She said that Dyoll approached IIB in 1997, to find facultative reinsurance for the Safe Haven risk. Dyoll indicated that it would be prepared to retain 10% of the risk but needed facultative support for the 90%. She testified that at that time the account was being handled by IIB Retail who had approached Dyoll to underwrite 100% of the risk. This was done. This arrangement continued in 1997/98, 1998/99, 1999/00 and 2000/01, that is, the insurance arrangements for the Safe Haven risk was that Dyoll retained 10% and IIB Re arranged for 90% facultative reinsurance support.

93. From 1997/98 to 2000/01 the arrangement for Safe Haven's insurance coverage was conventional insurance/reinsurance. The conventional arrangements ended in the year 2000/01 for reasons connected with a near breach of a premium payment warranty. Mrs. Saundra Bailey testified that at that time (2000/01) there was a very strict premium payment warranty imposed on the reinsurance placement which had the effect of exposing Dyoll to the full claim if the reinsurance premium was not paid on the due date. The effect of non-payment might have been that the reinsurers cancelled the reinsurance without informing Safe Haven or the broker. By this, she meant that if the premiums were late, the reinsurers would cancel the reinsurance coverage immediately, the effect of which was that Dyoll would be fully exposed and without any reinsurance support. It seems that the arrangement for the payment of premiums was that the money would be given to Dyoll and Dyoll passed on the premium for 90% reinsurance. In 2000/01 the money was late in getting to Dyoll and this almost caused the breach. It appears that although Dyoll would know of the near breach because the moneys were forwarded to it and then onwards to the reinsurers, Dyoll did not cancel its coverage. Mrs. Bailey's unchallenged evidence is that Dyoll was not prepared to take the risk of this kind of exposure in the future. Dyoll communicated this to IIB. This to my mind was a very significant development that precipitated a complete overhaul of Safe Haven's reinsurance programme.

94. For the year 2001/02 the risk was placed with West Indies Alliance as the lead insurer and not Dyoll. West Indies Alliance was a front for the overseas reinsurers. This was the first time fronting was introduced into Safe Haven's insurance coverage. Dyoll, for the year 2001/02, had 20% of the risk with Cayman General insuring 10%. West Indies Alliance took

0.4%. This left a gap of 69.6%. This was covered by a fronting arrangement with West Indies Alliance as the front. West Indies Alliance agreed to accept a fronting fee. Mrs. Bailey said that in 2002/03 Dyoll's future participation was reviewed. It was decided that because of the near breach of the premium payment warranty in 2000/01 if Dyoll was going to participate in future reinsurance plans of Safe Haven it would be on a fronting basis. I find that for the year 2001/02 Dyoll was not engaged in any fronting arrangements in respect of Safe Haven's insurance coverage.

95. Mrs. Sandra Bailey said that in 2002/03 the understanding was that Dyoll would issue a policy as lead insurer. In the arrangement for that insurance year Dyoll would retain 20%. Forty percent (40%) would be fronted. This was Dyoll's first year of fronting. I must emphasise that I find and accept that when Dyoll began fronting in 2002/03 Dyoll was participating on the basis that it did not want the same arrangement as it had in the year leading up to and including the year 2000/01, because it did not want to be exposed to being fully liable in the event that there was indeed a breach of the premium payment warranty. A necessary and inevitable conclusion of this is that Dyoll did not see itself liable for the 40% it fronted. Safe Haven and the overseas reinsurers understood this quite well and proceeded on that footing. This being so Dyoll cannot now resile from that patent and unequivocal understanding. I also find that this understanding prevailed in the insurance years 2003/04 and 2004/05. It is with this understanding that the documents generated must be examined.

96. According to Mrs. Bailey the terms of the renewal were not necessarily the same for each year as each year there was a separate arrangement. The terms of the renewal would be negotiated. For the year 2004/05 the arrangement was similar to the two previous years in that IIB Re on instructions of IIB would go to the international market and negotiate renewal terms and once those terms were agreed Dyoll would be approached to front. Dyoll retained 22.5% as direct insurance with 35% facultatively reinsured. It was Mrs. Bailey who arranged for Dyoll's fronting fee.

97. Exhibit RG 1 is the slip sent by IIB to IIB Re who sent it to Dyoll. Dyoll signed the slip. Mrs. Bailey said that the signing by Dyoll did not show that Dyoll agreed with what was being proposed. Her evidence on this point conflicts with Mr. Pragnell. I accept Mr. Pragnell's evidence on this point. He, to my mind has greater experience and was more convincing in his evidence. He said that the signing by Dyoll indicated that Dyoll had agreed to a minimum of 20% and a maximum of 22.5% of the risk at the rate of 0.9%. The word *treaty* appears on the document. Mr. Pragnell said that this reference to treaty was a method of distinguishing between treaty reinsurance and facultative reinsurance. This document was signed on May 5, 2004.

98. Mr. Goldsmith who testified on behalf of the JLs agreed that (a) Dyoll never paid any insurance premium; (b) Dyoll never paid any part of the reinsurance premium; (c) the premium for the reinsurance was paid directly by IIB Re to the reinsurers and (d) Dyoll was paid fronting fees. I have examined the two affidavits sworn by Mr. Goldsmith and read his cross-examination and there is no evidence contradicting much of the history given by Mrs. Bailey for the period 1997 to 2004. Mr. Goldsmith's first affidavit dated October 26, 2005, picks up the story at 2001. He accepts that Dyoll was fronting. What is conspicuous by its absence is the actual role played by Dyoll in the reinsurance arrangements. He does not say that Dyoll engaged in the negotiation of the terms with the reinsurers. The closest he gets to saying what Dyoll did was paragraph 26 of his first affidavit where he says that Dyoll concluded a reinsurance contract with the reinsurers on the same terms set out in the Cover note (exhibit RG 7). This statement by Mr. Goldsmith in paragraph 26 is not quite accurate. The slip signed by Wellington Re was stamped, initialled and bore the date May 17, 2004 (exhibit MP 3). This would indicate that Wellington Re agreed to provide reinsurance on May 17, 2004. British Caribbean Insurance Company's ("BCIC") reinsurance slip has the date June 10, 2004, written below its stamp and signature (exhibit MP 4). As far as evidence goes there is no indication that Dyoll was a front for BCIC. This would not be necessary because BCIC is registered to operate in Jamaica. The slip that Munich Re signed had the date May 15, 2004, at the end of each page (exhibit RG 3). Thus the only overseas reinsurers for the purposes of the reinsurance in the Safe Haven matter were Munich Re and Wellington Re. The evidence is that both these reinsurers signed their respective slips before June 9, 2004. The significance of June 9, 2004, is that that is the date of the cover note. What the cover note did was to reproduce what was already agreed between Safe Haven, acting through IIB, and the overseas reinsurers. Thus when Mr. Goldsmith said that Dyoll concluded a reinsurance contract with the reinsurers on the same terms as the cover note, he could only be referring to the assent Dyoll gave to the terms already agreed between Safe Haven and the overseas reinsurers. Dyoll had absolutely no input in negotiating those terms. This chronology makes it clear that Dyoll was not a true underwriter of the portion reinsured by

Munich Re and Wellington Re. This is why page 6 of Exhibit RG 6 speaks of Dyoll's fronting fee of US$2,000. This was not a premium for reinsurance but a fee to issue the documentation to legitimise Munich Re's and Wellington Re's participation in Safe Haven's insurance programme. This also explains why the reinsurance slips signed by Munich Re and Wellington Re were not first passed to Dyoll, that is to say, Dyoll was only sent the reinsurance slips after the terms were agreed.

Agency

99. I shall deal very briefly with the agency question at this point. The JLs submitted that IIB Re was the agent of Dyoll and when IIB Re concluded the arrangements with the overseas reinsurers it did so for and on behalf of Dyoll. The agency submission was made by Mr. Batts in order to support the theory that Dyoll participated in the reinsurance negotiations. According to this theory, IIB was Dyoll's agent, therefore when IIB concluded the reinsurance contracts they did not for and on behalf of Dyoll. The implication of this contention being that we have conventional insurance/reinsurance agreements.

100. The proposition is supported by the analysis of Phillips J. in ***Youell v Bland Welch*** [1990] Lloyd's Rep 431 who applied the analytical model adopted by Hobhouse J. in ***General Accident Fire and Life Assurance Corporation v Tanter*** [1984] 1 Lloyd's Rep. 58. Those decisions are good for what they decided on their facts. Those cases were not cases of fronting. They did not and could not decide that a reinsurance broker can never be the agent of the insured. Based on the evidence of what was actually done in the case of Safe Haven, IIB Re at all times acted on the instructions of Safe Haven once the fronting arrangements for reinsurance were introduced. It is possible to say that before 2000/01, when fronting was introduced in Safe Haven's programme for the first time, IIB Re was the agent of Dyoll because Dyoll was carrying 100% of the risk as normal underwriting and asked for 90% reinsurance to be arranged. The analytical model of Hobhouse and Phillips JJ. is appropriate for the pre-fronting era of Safe Haven's programme but it does not apply to the type of fronting introduced 2001/02 and it is definitely not applicable to Dyoll's reintroduction, as a front, into Safe Haven's insurance programme from 2002/03 to 2004/05. I therefore conclude that IIB Re was not Dyoll's agent for the year 2004/05.

101. Exhibit RG 5 is a letter from IIB Re to Dyoll informing them that the reinsurance arrangements were renewed with effect from May 7, 2004, to May 7, 2005. The letter enclosed two invoices in the sums of US$103,786.31 and US$20,000.00, respectively. Dyoll is told in the same letter that these invoices are enclosed for accounting purposes only since IIB Ltd will pay the reinsurers directly. Exhibit RG 7 has the same June 9, 2004, date. Mr. Batts relied on these documents, particularly exhibit RG 7 to say that IIB Re was Dyoll's agent and therefore it was Dyoll that concluded the reinsurance agreements. He places heavy reliance on the opening paragraph of the cover note that speaks to IIB Re effecting reinsurance on Dyoll's behalf. The paragraph asked Dyoll to read it carefully to ensure that it accords with Dyoll's instructions. In my view the documentation does not prove what Mr. Batts submitted. When the documents are examined in light of the totality of the evidence it is clear that the parties were simply generating documents so that the arrangements would assume the outward form of conventional insurance/reinsurance but the reality was that that was not the case. Fronting is not conventional insurance/reinsurance. Fronting is another way of arranging insurance coverage where it is likely that the effective insurer is the reinsurer. It is plain that Dyoll was not a true underwriter of the 35% coverage provided by Munich Re and Wellington Re.

102. The unchallenged evidence from Mr. Pragnell is that after Hurricane Ivan struck Munich Re and IIB Re discussed the claim without any reference to Dyoll. It is significant to note that after the hurricane Dyoll paid US$450,000.00 to Safe Haven which represented its liability on the retained 22.5%. BCIC has already paid its portion in full. The overseas reinsurers made interim payments to Safe Haven without Dyoll's permission or consent. Dyoll was simply informed that that had happened. All this in my view is consistent with Munich Re and Wellington Re being the effective insurers of Safe Haven and not de facto reinsurers of Dyoll.

103. The only question at this stage is whether there was any evidence to contradict the conclusion I have just stated. Mr. Pragnell, Mrs. Bailey and Mr. Thomas Smith who all testified for Safe Haven were cross-examined extensively on the documentation produced. As expected the answers produced under cross-examination were consistent with the view that Dyoll was in fact the primary insurer of Dyoll not only for the retained 22.5% but also for the fronted 35%.

104. Mrs. Bailey was cross-examined on the mathematical difficulties. She ultimately agreed with Mr. R.N.A. Henriques Q.C. that unless Dyoll was liable on the underlying insurance there would be nothing for Munich Re and Wellington Re to reinsure. She told the court that Dyoll was liable for 57.5%. However she also said and insisted that Dyoll only entered the picture after the reinsurance agreements were concluded. She insisted, and there is no evidence to the contrary, that unless Dyoll agreed to front for the overseas reinsurers on the terms already agreed, IIB would look for another front. This primary fact is crucial and I accept it as true and accurate. Mr. Goldsmith's evidence under cross-examination is consistent with this. He said Dyoll had no control over the wording of the reinsurance agreements concluded with the overseas reinsurers. He said that Dyoll wanted to include a cut through clause and that the overseas reinsurer were to tell Dyoll the precise wording of the reinsurance policy. Dyoll received neither of its requests. This response to Dyoll is not consistent with a negotiated contract. He accepted Dyoll was not under any legal obligation to pay the premiums referred to in exhibit RG 4. His precise evidence on the point was, "Exhibit RG 4 never had to be paid by Dyoll."

105. As far as Mr. Smith was concerned the cross examination was directed to exhibit RG 7 (the cover note). As I said the wording says what it says but what remains unshaken is Mr. Smith's evidence that IIB Re negotiated the terms of the reinsurance and put them to Dyoll for it to agree. He said that Dyoll had to agree the terms if they were going to front for the overseas reinsurers.

106. The final bit of evidence to which I shall refer in the Safe Haven case is the affidavit of Mr. Wilfred Baghaloo sworn on behalf of the JLs. He put before the court documents including a loan from Manufacturers Sigma Merchant Bank to Safe Haven for the purpose of paying premiums for the year 2004/05. The loan document refers to Dyoll as the insurer. What I say about this is that at the time the affidavit was sworn (i.e. February 14, 2006) he did not know of Mrs. Bailey's testimony concerning the history of Safe Haven's insurance programme and why it was configured in the way that it was since 2001/02 to 2004/05. The loan document is not sufficient to subvert my conclusion that Dyoll in 2004/05 was not a de facto primary insurer for the 35% coverage met by the overseas reinsurers.

107. Mr. Baghaloo says, in this affidavit, at all material times Dyoll recorded the premium income due from Safe Haven as gross income premium. He exhibits letters dated September 26, 2000 and September 28, 2000. Again had he the testimony of Mrs. Bailey he would have known that until between 1997/98 to 2000/01, Dyoll underwrote the Safe Haven risk totally and sought 90% reinsurance support. If that is correct then it would be quite appropriate for Dyoll to record the premium from Safe Haven as premium income. Also in the year 2001/02, when Dyoll insured 20% directly and West Indies Alliance was the front in that year, it would be quite correct for Dyoll to say that it was receiving premium income from the Safe Haven risk. There is no evidence before me indicating whether Dyoll recorded the premium for the portion it fronted, during any of the years it acted as a front for the overseas reinsurers, as premium income. Therefore no adverse inference can be drawn against Dyoll in this regard.

108. Mr. Baghaloo suggested in his affidavit that because the agreement of Dyoll was requested, in the 2003/04 insurance year, for Safe Haven's Corporate Centre to be deleted from insurance coverage that year that is evidence that Dyoll was intimately involved in Safe Haven's insurance programme. That however can prove no such thing because it does not take account of Mr. Pragnell's evidence that reinsurance cover and the insurance policy issued by Dyoll were expected to be mirror images of each other subject only to special conditions applicable only to reinsurance (see Pragnell's affidavit at paragraph 35). I believe that Mr. Baghaloo erroneously said that it was Mr. Pragnell who spoke about the removal of the Corporate Centre from insurance cover. That evidence is found in Mr. Owen Matalon's affidavit dated February 6, 2006 at paragraph 5.

109. Some emphasis was placed on the fact that Safe Haven filed a proof in the insolvency claiming the balance of the reinsurance proceeds. This it was said was proof that Dyoll was the insurer. This is not so. Filing the proof is equivocal. It would be highly imprudent not to do so since Safe Haven could not be sure how the courts would interpret the arrangements.

110. I now examine the reinsurance slips to see if they would cause me to alter my conclusion. I now set out the reinsurance slips.

The Munich Re reinsurance slip

111.

INTERNATIONAL INSURANCE BROKERS
REINSURANCE DIVISION
PLACEMENT SLIP

TYPE:	FIRE AND ALLIED PERILS AND CONSEQUENTIAL LOSS RESULTING THEREFROM AS ORIGINAL
FROM:	Slip policy 1779a or IUA6 and/or Company Equivalent
REINSURED:	DYOLL INSURANCE CO. LTD

INSURED:	SAFE HAVEN LTD. and/or SAFE HAVEN GOLF COURSE and/or WEST LAKE DEVELOPMENT and/or STRATA NUMBER 170 and/or subsidiary and/or affiliated and/or any other interested parties for their respective rights and interests as original
PERIOD:	12 months as at May 7, 2004, plus 30 days extension if required at terms to be agreed Leading Underwriter only.
INTEREST:	All real and personal property of the Insured or property of others in the care, custody or control for which the Insured is legally liable and Business Interruption following loss, destruction or damage to property insured all as more fully defined in the Original policy.

SUM INSURED:	Material Damage	US$28,457,037
	Business Interruption	US$ 4,491,000
Total sum insured		US$32,948,037

SITUATION:	As stated and described in the Property Schedule attaching and forming part of the Original Policy
CONDITION:	Subject to all clauses and conditions as Original and to follow the settlements of the Reinsured of whatsoever nature within the limits of the reinsurance

War and Civil War Exclusion Clause NMA or Companies Equivalent if applicable, unless War and Civil War Exclusion Clause no less broad contained in the original policy
72 Hours Clause
Taxes and Charges as applicable
Business Interruption: 12 months Indemnity period

Any fluctuation of values and additional locations within 10% of ingoing values deemed automatically agreed and to be advised
Leading Underwriter only
Reinsurers hereon agree to contribute up to 2.50% of slip premium for survey fees &/or risk management fees as incurred, subject to Leading Underwriter agreement only
Simultaneous Settlements Clause
Terrorism Exclusion (NMA 2921)
Exclusion of Ex-gratia Payments
120 Day Premium Payment Condition
LSW 1001 Several Liability Notice
Reinsurers hereon agree to net equivalent downwards if required.

Munich Re's terms unaltered except for:-
Munich Re's Conditions of Acceptance
Millennium Exclusion Clause
Cyber Exclusion Clause (NMA 2915)
Contingent BI Exclusion
Exclusion of Cut through Clause

DEDUCTIBLE: Hurricane, Volcanic Eruption } 2% of the Sum Insured
Earthquake, Windstorm & Flood } per item of the policy Schedule subject to .25% of the total sum insured per category per Location
All other losses except } 1% of claim each and
Fire & Lightning which is Nil } every loss per location to a minimum of US$1000

PREMIUM
CALCULATION: US$32,948,037 * .9% = US$296,532.22 (100%)
YOUR ORDER: US$74,133.08 (25% p/o 100%)
DEDUCTIONS: Approx. 19.44% (US$14,414.76)
INFORMATION: As per Retail Brokers Slip attached
Claims Experience
1992 to 2000 - Nil
2001 - One (1) on 27th April 2001 USD10,532
2002 – 7th May 2004 - Nil

112. The highlighted portions actually appear in that way on the exhibit tendered in this matter.

The Wellington reinsurance slip

113.

INTERNATIONAL INSURANCE BROKERS
REINSURANCE DIVISION
PLACEMENT SLIP

TYPE: FIRE AND ALLIED PERILS AND CONSEQUENTIAL LOSS RESULTING THEREFROM AS ORIGINAL
FROM: Slip policy 1779a or IUA6 and/or Company Equivalent
REINSURED: DYOLL INSURANCE CO. LTD
INSURED: SAFE HAVEN LTD. and/or SAFE H HAVEN GOLF COURSE and/or WEST LAKE DEVELOPMENT and/or STRATA NUMBER 170 and/or subsidiary and/or affiliated and/or any other interested parties for their respective rights and interests as original
PERIOD: 12 months as at May 7, 2004, plus 30 days extension if required at terms to be agreed ~~Leading Underwriter only~~.
INTEREST: All real and personal property of the Insured or property of others in the care, custody or control for which the Insured is legally liable and Business Interruption following loss,

	destruction or damage to property insured all as more fully defined in the Original policy.
LIMIT:	Full Value excess of US$1,000,000 each and every loss which in turn is excess of the local underlying deductibles
SUM INSURED:	Material Damage US$28,457,037 Business Interruption US$ 4,491,000
Total sum insured	US$32,948,037
SITUATION:	As stated and described in the Property Schedule attaching and forming part of the Original Policy
CONDITION:	Subject to all clauses and conditions as Original and to follow the settlements of the Reinsured of whatsoever nature within the limits of the reinsurance War and Civil War Exclusion Clause NMA 464 or Companies Equivalent if applicable, unless War and Civil War Exclusion Clause no less broad contained in the original policy 72 Hours Clause Taxes and Charges as applicable Business Interruption: 12 months Indemnity period Any fluctuation of values and additional locations within 10% of ingoing values deemed automatically agreed and to be advised ~~Leading Underwriter only~~ Reinsurers hereon agree to contribute up to 2.50% of slip premium for survey fees &/or risk management fees as incurred, subject to Leading Underwriter agreement only Simultaneous Settlements Clause 120 Day Premium Payment Condition LSW 1001 Several Liability Notice Terrorism Exclusion (NMA 2921) Average Clause (NMA 349) Electronic Date Endorsement (NMA 2915) Reinsurers hereon agree to net equivalent downwards if required.
UNDERLYING DEDUCTIBLES:	Hurricane, Volcanic Eruption } 2% of the Sum Insured Earthquake, Windstorm & Flood } per item of the policy Schedule subject to .25% of the total sum insured per category per Location All other losses except } 1% of claim each and Fire & Lightning which is Nil } every loss per location to a minimum of US$1000
LAYER PREMIUM:	US$210,000.00
ORDER:	10% = US$21,000,000

DEDUCTIONS:	19.77% (US$4,151.70)		
INFORMATION:	As per Retail Brokers Slip attached		
	Claims Experience		
	1992 to 2000	- Nil	
	2001 to date	- One (1) on 27th April 2001 USD10,532 Description: Floor tiles damaged by water leakage.	

114. Attached to Wellington's slip is a document headed, inter alia, *BROKERS' SLIP.* That document, which was also signed by Wellington, has other details which need not be set out. It gives details of the risk. This is an example of an excess of loss facultative reinsurance. Wellington has agreed to be liable for any loss in excess of US$1,000,000 up to a maximum of US$21,000,000. I should point out that the striking out in Wellington's slip appears on the exhibited slip. There is writing that is indistinct beside the words struck out in the section marked **PERIOD**.

The BCIC reinsurance slip

115.

INTERNATIONAL INSURANCE BROKERS
REINSURANCE DIVISION
PLACEMENT SLIP

TYPE:	FIRE AND ALLIED PERILS AND CONSEQUENTIAL LOSS RESULTING THEREFROM AS ORIGINAL	
FROM:	Slip policy 1779a or IUA6 and/or Company Equivalent	
REINSURED:	DYOLL INSURANCE CO. LTD	
INSURED:	SAFE HAVEN LTD. and/or SAFE H HAVEN GOLF COURSE and/or WEST LAKE DEVELOPMENT and/or STRATA NUMBER 170 and/or subsidiary and/or affiliated and/or any other interested parties for their respective rights and interests as original	
PERIOD:	12 months as at May 7, 2004, plus 30 days extension if required at terms to be agreed Leading Underwriter only.	
INTEREST:	All real and personal property of the Insured or property of others in the care, custody or control for which the Insured is legally liable and Business Interruption following loss, destruction or damage to property insured all as more fully defined in the Original policy.	
LIMIT:	US$1,000,000 each and every loss which in turn is excess of the local underlying deductibles	
SUM INSURED:	Material Damage	US$28,457,037
	Business Interruption	US$ 4,491,000

Total sum insured		US$32,948,037
SITUATION:	As stated and described in the Property Schedule attaching and forming part of the Original Policy	
CONDITION:	Subject to all clauses and conditions as Original and to follow the settlements of the Reinsured of whatsoever nature within the limits of the reinsurance War and Civil War Exclusion Clause NMA or Companies Equivalent if applicable, unless War and Civil War Exclusion Clause no less broad contained in the original policy 72 Hours Clause Taxes and Charges as applicable Business Interruption: 12 months Indemnity period	

116. I have set out the reinsurance slips because I wanted to demonstrate that even though the language of the slips and the other documentation in the case is consistent with conventional reinsurance the reality was that this reinsurance arrangement was not conventional reinsurance. Thus the form in which the agreement was captured cannot be accepted at face value and interpreted as such. These documents were generated in a context where two of the reinsurers Munich Re and Wellington were not licensed to sell insurance directly in Jamaica. The evidence in the case is that fronting was arranged because 100% of the Safe Haven risk could not be accommodated within the Jamaican market.

117. From the cases that I have read and the literature presented to me I have come to the conclusion that the documentation for fronting may very well assume the form of conventional reinsurance. This is so because it seems to be the way of the industry to capture the arrangements in the same form as conventional reinsurance. In the ***Koken*** case Leavitt J. acted on the oral testimony of one Mr. Arledge who testified about the arrangements between Legion, Syndicate 271 and American Airlines (see page 1218 of ***Koken***).

118. The cases on which the JLs rely in support of their submission (e.g. ***The Zephyr*** and ***Youell v Bland***) are all cases of conventional reinsurance agreements. They were not cases of fronting. My conclusion will not open the proverbial flood gates. As Leavitt J. said, each case has to be examined to see whether it falls within the conventional insurance/reinsurance framework.

The Coffee Trustees case

119. The Coffee Trustees had a problem. The problem was how to get insurance coverage for coffee farmers in Jamaica at a time when the local insurance industry did not underwrite large enough lines that the entire risk could be placed locally. To solve this problem the Trustees turned to a broker, IIB. IIB through its reinsurance arm located overseas insurers who were prepared to take the risk. The overseas insurers in the case of the Coffee Trustees are Munich Re, Hannover Re and Swiss Re. These insurers were not licensed to sell insurance directly in Jamaica. In order to link, legally, the willing insurer to the willing insured, a fronting company had to be found. Dyoll was the fronting company. There was yet another problem. It was how to document the transaction in such a manner that did not give the appearance that the overseas insurers were selling directly in Jamaica. The parties chose the format of conventional insurance/reinsurance. What this means is that if one looks at the reinsurance slips, the policy issued by Dyoll and the cover note you are not going to see anything showing that this is a fronting arrangement other than perhaps the small fronting fee that bears no relationship to premium what would be payable had there been a true underwriting of the fronted risk. To find this out the enquirer has to take into account oral evidence and other documentation.

120. The JLs say that the documents on which they rely are inconsistent with the oral and affidavit evidence of the witnesses for the Coffee Trustees. The JLs say that I must restrict my field of vision to the documents. I must cover my ears to the oral testimony. Mr. Batts has submitted that I should take the documents as they are expressed, that is, I am to look at the insurance policy between Dyoll and the Trustees, the reinsurance placement slips between the reinsurers and Dyoll, a facsimile transmission dated July 28, 2004, and the cover note. He also referred to other documents to make the point that these documents contradicted the oral evidence of the witnesses for the Coffee Trustees that Dyoll was not involved in the payment of reinsurance premiums. Mr. Batts also submitted that the same documents show that IIB Re placed the reinsurance at Dyoll's behest.

121. It is my view that these exhibits referred to by the JLs have not destroyed the central thesis of the Coffee Trustees which is that Dyoll's roll was quite minimal. Minimal to the point where it was not involved in things such as (a) setting the premiums for the reinsurance; (b) assessing the risk by going out into the field to identify and verify the number of coffee farms and farmers who were being insured and (c) negotiating the terms of the reinsurance. I now say why.

122. One of the documents relied on by the JLs to support the contention that Dyoll was involved in premium payments is an email dated July 30, 2004, from Mr. Renic

Goldsmith at Dyoll to Miss Beulah Campbell at IIB. That email reminded IIB Re that the reinsurance premiums should be paid. Also it is said the IIB should inform Dyoll if it would be paying directly to IIB Re on Dyoll's behalf. Mr. Batts then referred to five further documents. Of those five, four were dated 2001 and one 2004. The 2004 document is dated September 7, 2004. It is an internal memorandum from Mr. Goldsmith to the finance department telling it that IIB Re has sent an invoice for payment of outstanding premiums due to IIB. He asked that the amount be sent to IIB.

123. There is an important document from Miss Beulah Campbell of IIB to Mr. Renic Goldsmith of Dyoll dated July 30, 2004. It is captioned:

Coffee Industry Board – Crop Insurance.

It reads:

> *This serves to confirm the renewal of the captioned policy for the period July 1, 2004 to June 30, 2005, at a reduced sum insured of US$8,768,000.*
>
> *The attached Summary of Cover, outlines the renewal terms and conditions.*
>
> *The premiums for your 2.5% placement is US$11,754.60, less 12.5% commission. The fronting fee is confirmed to be US$7,000.00.*
>
> *Should you have any queries please do not hesitate to contact us.*

124. There is another document captioned ***Coffee Industry Board – 2004/5*** from IIB Re's Mr. Jeffrey Johnson to Mr. Goldsmith of Dyoll. It opens with these words

> *In conformity with IIB retail's (sic) instructions, we are pleased to confirm that we have completed 92.5% facultative reinsurance renewal order for 12 months effective July 1, 2004, based on the undernoted details:-*
>
> *....*

It ends with

> *The foregoing placement contemplates:-*
>
> ✓ *Dyoll's 2004/5 share: 2.5% of whole.*
>
> ✓ *Premium Payment Warranty: 15th September, 2004*
>
> *We trust the aforesaid is found to be in order; (sic) however should you have any queries, please give me a call to discuss.*

125. These are two contemporaneous pre-loss documents coming from the brokers to Mr. Goldsmith clearly stating that Dyoll's risk was 2.5%. If one looks at the document from Miss Campbell it shows that the fronting fee was agreed at US$7,000. The importance of that is this, if the premium due to Dyoll when it retained 2.5% of the risk was US$11,754.60, how could it be a mere additional US$7,000 if it was on risk for a further 92.5%?

126. Mr. Batts sought to place reliance on the fact that the Coffee Trustees submitted a proof in the insolvency for 92.5%. Not much weight can be placed on that because in an insolvency the unsecured creditors need to safeguard their position as best they can. The Coffee Trustees must have been aware that to secure payment of the reinsurance proceeds to them might prove problematic. It would be quite foolhardy not to submit a proof so that in the event that they are unsuccessful in these proceedings they have safeguarded the position of the coffee farmers. In my view if there is any post-loss document that is important, it is the cheque sent by Dyoll to IIB in the sum of US$47,234.04. That cheque represented Dyoll's proportion of the loss. This was done in November 2004, months before Dyoll was declared insolvent. There is nothing to indicate that this position represented by Dyoll was inaccurate.

127. The documents to which I have referred make it scrupulously clear that at the time of the insurance/reinsurance arrangement in 2004/05 Dyoll never agreed to underwrite the additional 92.5%. This explains why Dyoll's fronting fees were a mere US$7,000. It was not a premium payment. It was payment to lend its name to the transaction.

128. Another bit of evidence of importance to me is the email traffic between Munich Re and IIB concerning the assessment of the risk. Between 2003 and 2004, Munich Re and IIB wanted to identify all coffee farmers who were being insured. There is no evidence that Dyoll was involved in this process. The emails suggest that the adjusters went out into the field at the request of either IIB or Munich Re. There is no evidential basis for me to accept the bold assertion by Mr. Goldsmith that Dyoll assessed the coffee farmers' risk and decided to take it.

129. All the evidence before me shows that the premium was negotiated between IIB, Munich Re and the Coffee Trustees. Mr. Goldsmith's contention that IIB Re was agent for Dyoll and acted on Dyoll's behalf is not based on solid fact. He seems to be relying on legal arguments rather than facts. Mr. Goldsmith has been in the reinsurance business for some time. He knew, from his training, that reinsurance brokers are usually the agent of the insurer. He combined this knowledge with the wording of the reinsurance slips and cover note. These documents on their face follow the language and form of conventional reinsurance. Had those documents stood alone then Mr. Goldsmith's position might have been impregnable. However, the contemporaneous documents for the year 2004/5 put a different light on the entire transaction. The reasoning used in the Safe Haven matter on the agency point is applied here.

130. The representation in the case of Dyoll was that Dyoll was not on risk for the additional 92.5% and in the event of a loss greater than Dyoll's retention that money would be coming from the reinsurers. This explains why Dyoll raised no objection to IIB's version of the arrangement in the communication between Miss Campbell and Mr. Johnson. This understanding was confirmed when Dyoll paid only the loss representing 2.5% of the whole.

131. The premium payments were paid directly to the overseas reinsurers. The reinsurers in this case are not only willing to pay but have in fact paid the reinsurance proceeds into an interest bearing account. What is clear is that it was never the intention of the parties that Dyoll would accept the risk and then itself seek reinsurance. Dyoll was a pass through insurance company that provided the service of lending its name to the fronting arrangement so that the coffee farmers could secure coverage for their coffee without the taint of illegality.

132. Mr. Smith was pressed on cross examination about exhibit TS 6 at page 197. That is an email in which there is some discussion about reducing costs and since Dyoll is not a risk its fronting fee can be reduced. Mr. Smith denied that in that email he was referring to the risk of the overseas reinsurers failing. I do not accept Mr. Smith's answer on this point. I am prepared to agree with Mr. Batts that he was referring to the risk of the overseas reinsurers failing. That would tend to suggest that it was an implicit acceptance that Dyoll might be on risk for the 92.5%. In support of this contention Mr. Batts referred to correspondence between Dyoll and IIB Re about late premiums. While these instances are capable of supporting the JLs thesis they are insufficient to overturn the overwhelming evidence that all the impetus for the reinsurance came from IIB Re and the overseas reinsurers. Mr. Smith convincingly explained that the reason IIB Re referred the overseas insurers' offer to Dyoll was that the premium rate agreed with the reinsurers also applied to Dyoll's retained 2.5%. This is further evidence, in my view, that it was the reinsurers, the Coffee Trustees and the insurance brokers that controlled the reinsurance programme. Dyoll did not even set the rates for its own risk that it retained. Mr. Smith was then directed to documents that on the face of it say that the reinsurers were liable to Dyoll alone and no other entity.

133. Mr. Batts relied on Mr. Smith's testimony when he said that there was no contract or policy between the reinsurers and the Coffee Industry Board. Mr. Smith also said that there was a contract between Dyoll and the Coffee Trustees and a reinsurance contract between Dyoll and the reinsurers. According to Mr. Batts if this is correct then the reinsurance proceeds must be Dyoll's and not the Coffee Trustees. This is not the end of the matter in my view. In answer to the court Mr. Smith said that he does not know if documents captured the understanding but what he is not resiling from is that when he sat down with Coffee Trustees the desire was that the reinsurers pay the Coffee Trustees directly in the event of a loss. Dyoll would pay its retention. I would add that this has to be read along with his affidavit evidence in which he said that Dyoll's financial status did not put it in a position to underwrite this particular risk (see paragraph 6 of Smith's affidavit dated February 10, 2006).

134. Under cross-examination Mrs. Bailey conceded, despite her affidavit to the contrary, that Dyoll was reinsured by the overseas insurers and that Dyoll's insurable interest in the case of the Coffee Trustees was its potential liability on the contract or policy between Dyoll and the Coffee Trustees. Mrs. Bailey, under further cross examination by Mr. Batts, accepted that when she uses insurance jargon she is using the jargon to express the intention she wishes to convey. In other words, when she used words such as ceding, cedant, insurer, reinsurer, those words carry the usual meaning as understood in the industry. She was not using them in any unusual way. Mr. Batts submitted that these answers destroy the case of the Coffee Trustees. I do not agree. One has to look at all the evidence in the case. Mr. Thomas Smith was unwavering in his answer that the agreement between the parties was that the Coffee Trustees would get the reinsurance proceeds.

135. The total premium for the 2004/05 year was US$723,800. Out of this Dyoll received its premium for the 2.5% and US$7,000 as fronting fees. Mr. Batts would have us believe that rational thinking business men who have already decided that Dyoll's capital base and balance sheet would make it unlikely to underwrite substantial percentages of the risk would in the next breadth pay US$7000 for 92.5% coverage. The documentation captures the agreement using the form and language of a conventional insurance/reinsurance agreement. I conclude that documents do not represent the entire agreement between the parties.

136. If I had any lingering doubts about Dyoll's role in this reinsurance they were certainly removed by Mr. Goldsmith when he was cross-examined. He said that there was something known as classical fronting. This was not defined by him but was illustrated by an example. He testified that in classical fronting an international insurer, who insures business on behalf of a global client which operates in Jamaica, would contact a local insurance company and tell it that it (the international insurer) wishes the local company to front a policy on behalf of the global client. Having said this Mr. Goldsmith accepted that because of the nature of the Coffee Industry Board risk Dyoll never gave instructions to IIB Re to seek reinsurance. According to him the method of renewal had been established over time so that by 2004/05 there was no need for Dyoll to instruct IIB Re. He also said that he was prepared to accept Mr. Thomas Smith's evidence (which could only be the affidavit because Mr. Smith had not yet given evidence) about the Coffee Trustees account. Mr. Smith's affidavit evidence was to the effect that Dyoll had no role in the placement with the overseas reinsurers. Mr. Smith also said in his affidavit that the risk assessment was conducted by the overseas reinsurers. The premium rates and extent of the indemnity were all settled without reference to Dyoll. Mr. Goldsmith tried to explain away this by saying that because IIB Re knew the reinsurers there was a gentleman's agreement that IIB Ret would pass on the information directly to IIB Re who would pass on the information to the reinsurers. I do not accept Mr. Goldsmith's evidence here. I prefer that of Mr. Smith on this point.

137. Mr. Goldsmith in re-examination was directed to two documents (page 235 and 236 of the Coffee Trustees bundle). This was in an attempt to show the involvement of Dyoll. Those two documents are dated 2001 and in any event having said in cross-examination that he agrees with Mr. Smith's affidavit evidence it is hard to see how both positions are compatible.

138. The commercial reality was that in 2004/05 Dyoll did not have the balance sheet strength to take on the coffee risk completely. It took for itself only 2.5% for which it would be directly liable. The crucial roles in settling reinsurance for 2004/05 were played by the Coffee Trustees, IIB, IIB Re and the reinsurers. Dyoll accepted all that was presented to it for a fee of US$7,000.00. In these circumstances it cannot be contended that Dyoll was a genuine underwriter for the additional 92.5%. Mr. Batts in a last gasp effort submitted that the fee of US$7,000.00 cannot be questioned because in law, the courts cannot look at the adequacy of consideration. Therefore if the parties chose to pay only US$7,000.00 for 92.5%

coverage but US$11,754.60 for 2.5% that must be accepted. This submission is too restricted and is looking just at documents without examining the wider picture.

139. I am prepared to apply the Canadian position outlined earlier to this arrangement. This situation must qualify as a principled exception to the privity rule. The overwhelming weight of evidence is that all the parties, including Dyoll (for I do not accept Mr. Goldsmith's attempt to suggest otherwise), knew and accepted that with regard to the 92.5% the money was to be paid directly to the Coffee Trustees. It was known that the arrangement was the way the parties chose to provide insurance coverage. That portion that Dyoll was expected to pay was placed directly with them and they were paid the premiums accordingly. I also apply the position outlined in the section headed, *The United States Position*.

140. IIB Ltd, whether IIB Re or IIB Ret, did not act as agent of Dyoll in this reinsurance programme. When it paid the premiums it did so for and on behalf of the Coffee Trustees. I find that the Coffee Trustees paid Dyoll to lend their name to the arrangement. If I am wrong on this and the Coffee Trustees paid the fee on behalf of the reinsurers it does not alter the conclusion that Dyoll was being paid to lend its name not to assume any risk.

141. I have not ignored the documents from the overseas reinsurers. Those documents when examined do not override the agreement that I have found. I have before me the testimony of persons who actually secured the reinsurance. I do not doubt their word. It may well be that the overseas reinsurers, like Dyoll, issued documents that would be consistent with conventional insurance/reinsurance. I need not decide this point one way or the other since, as I have said, the reinsurers are prepared to pay and have paid over the money which is being held in an interest bearing account. This makes it unnecessary to consider the meaning of the documents they issued.

Conclusion

Safe Haven case

142. My conclusions are:

a. Dyoll was not the de facto primary insurer in respect of the 35% of the risk reinsured by Munich Re and Wellington Re;
b. The arrangement was not a conventional insurance/reinsurance arrangement;

c. All arrangements for reinsurance were concluded by IIB and IIB Re and then Dyoll was asked to front the 35% for a fronting fee;
d. If Dyoll did not accept the terms already concluded by IIB Re and the overseas reinsurers then IIB Re would look for an insurance company willing to front for the reinsurers;
e. Dyoll played no active roll in the procurement of the reinsurance or the settlement of claims;
f. the evidence from all the participants is that Dyoll would not be liable for the premium for the insurance year 2004/05, despite the wording of the documents;
g. the reinsurance slips, cover note and brokers' slip do not capture the entire arrangement between the parties;
h. it was the clear intention of all concerned that Munich Re and Wellington Re would pay their portion directly to Safe Haven;
i. the principles extracted from the fronting cases from the United States of American particularly the ***Koken*** case are applicable here. The factors at (a) to (h) make the case an appropriate one to apply these principles and I so do.
j. the facts are appropriate for the application of a principled exception to the strict privity of contract doctrine as explained by the Supreme Court of Canada, assuming that Safe Haven was not a party to the contract between Dyoll and the reinsurers;
k. Dyoll is estopped from denying the factual basis on which it went into the agreement. Dyoll knew that it was never the intention that the conventional insurance/reinsurance principles would apply to the particular arrangements for the insurance year 2004/05.

Coffee Trustees

143. I have concluded that

a. Dyoll was not a true insurer but was lending its name to legitimise the transaction between Safe Haven and the overseas reinsurers;
b. Dyoll was never paid any premiums for the additional 92.5% that the documents suggested that it underwrote. It received a fronting fee;

c. without Dyoll lending its name to the transaction the overseas reinsurers would be unable to take the risk;
d. a deliberate decision was taken to have a fronting arrangement, if not before, but certainly for the year 2004/05 because Dyoll's capital base and surplus balance did not enable it to underwrite such a large risk;
e. the type of insurance required by the Coffee Trustees was not available generally in Jamaica and even on the international market there were very few companies that offer crop insurance for the magnitude required by the Coffee Trustees;
f. this case too calls for a principled exception to the strict privity of contract doctrine as determined by the Supreme Court of Canada. I apply the principle here;
g. I also apply the principles deduced from the cases from the United States of America and in particular the ***Koken*** case. The factors identified at (a) to (e) permit the application of the ***Koken*** principle.
h. I would also apply the estoppel principle to prevent Dyoll resiling from what it obviously agreed, namely, that the Coffee Trustees were the intended beneficiaries and that in the event of a loss the reinsurance proceeds would be paid to the Coffee Trustees

Final comments

144. The ultimate point on which the JLs have failed is their dogmatic insistence that the court looks only at the documents generated. On the facts of these two cases, this would not be the correct approach since it is as clear as can be that unless one heard the oral evidence it would not be immediately clear, at least in the case of Safe Haven, why the fronting arrangement arose. Had I just looked at the documents I would not have had the benefit of Mrs. Bailey's evidence in which she outlined the history of Safe Haven's insurance arrangement with Dyoll. I would not have known why there was the shift to West Indies Alliance and then a return to Dyoll. I would not have known why fronting was introduced in Safe Haven's insurance programme. The documents in neither case tell the whole and complete story.

145. In the event that I am wrong in concluding that documents in both cases do not reveal the total picture and I am wrong in saying that the oral evidence provides additional contractual terms, I would use the oral evidence in this way: the oral evidence provided background facts against which the documents are to be interpreted. The fallacy of the JL's position is that their approach would reduce the court to looking at the documents and trying to interpret it by pure internal linguistic considerations. In rejecting the JL's approach I am reminded of Lord Wilberforce's wise words in ***Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamships Co*** [1976] 1 W.L.R. 989, 995 - 996

> *No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.*

146. It is always critical for a court to know the commercial context in which a contract is concluded and what I am saying is that the affidavit and oral evidence have provided the commercial context which led me to the findings that I have made.

147. Despite the fact that the documents and the oral evidence do not fit together in a neat whole, that did not and should not prevent the court from identifying the core agreement between the parties. Once that core agreement is found then documents that tend to go against that core understanding are not to be ignored but have to be construed, if necessary, against the backdrop of the core agreement.

148. I have not addressed the question of whether these payments constitute a preference. The subject was broached but the submissions did not develop the point.

149. The attorneys are to submit an appropriate draft order for approval within the next fourteen days.