JUDGMENT MR JUSTICE TOULSON: Commercial Court. 26th February 2004

1. The claimant ("Lincoln") appeals under section 69 of the Arbitration Act 1996 against part of an interim final award of Mr John Rowland QC, Mr Brian Wood and Mr Anthony Robinson ("the Lincoln arbitrators") by which they found that the defendants ("Sun/Phoenix") were entitled to be indemnified by Lincoln in respect of certain reinsurances known as the Unicover whole account reinsurances.

2. The appeal raises questions about the effect on the dispute between Sun/Phoenix and Lincoln of findings made in an earlier arbitration between Sun/Phoenix and Cigna Reinsurance Company of Europe SANV ("Cigna"). They matter in this case because the legal position between Sun/Phoenix and Cigna had an important bearing on the legal position between Sun/Phoenix and Lincoln. They also involve a question of law of wider interest.

3. The points of law on which permission to appeal was given were:
   (a) whether the Lincoln arbitrators were free to depart from the determination of rights and obligations between Sun/Phoenix and Cigna set out in an award of Mr Nicholas Legh-Jones QC, Mr Gordon Cornish and Mr Bryan Kellett ("the Cigna arbitrators") dated 14 March 2002;
   (b) whether in determining for themselves what rights Sun/Phoenix had against Cigna, the Lincoln arbitrators were right to conclude that the coverage provided by Cigna was to be found partly in writing and partly in an oral agreement.

4. Lincoln also seeks to challenge the award of the Lincoln arbitrators under section 68 of the Act on the ground of serious irregularity.

Background

5. In 1996 Mr John Cackett established an underwriting agency called Centaur Underwriting Management Limited ("Centaur") in Bermuda. Centaur acted as agent for Sun/Phoenix in respect of a portfolio of accident and health business, including workers compensation and occupational accident ("occ/acc") business.

6. The programme was protected by various layers of whole account reinsurance contracts. Lincoln underwrote a layer of US$90,000 in excess of US$10,000 in respect of risks attaching during the period from 1 October 1996 to 31 December 1997 ("the Lincoln reinsurance"). This was done by two slips. The only point of present importance is that the general conditions included the words "Net Retained Lines Clause". No particular form of wording was agreed, but before the Lincoln arbitrators the parties were content to proceed on a basis of one of the common forms, which the arbitrators set out as follows:

   This Agreement applies only to that part of the Original Policies which the Reinsured retained net for their own account and in computing the Ultimate Net Loss, only loss or losses in respect of such Net Retained part of the Original Policies shall be included.

   The amount of Reinsurers' liability in respect of loss or losses shall not be increased by reason of the inability of the Reinsured to collect from any other reinsurers whether specific or general, any amounts which may have become due from them whether such inability arises from the insolvency of such other reinsurers or due to the cancellation of such other reinsurance by the Reinsured or by such other reinsurers for whatever reason or for any reason whatsoever.

7. Shortly before the expiry of the Lincoln reinsurance, Centaur underwrote seven whole account reinsurances protecting the personal accident pool managed by Unicover Managers Inc. of New Jersey ("the Unicover whole account reinsurances"). They were placed with Centaur through Unicover's brokers Rattner Mackenzie Limited. They replaced earlier policies and were to run for three years from 1 December 1997.

8. There is no dispute that at the time when they were underwritten the Unicover whole account reinsurances formed part of Centaur's whole account protected by the Lincoln reinsurance.

9. By April 1998 Mr Cackett was aware that the premium income estimates for the Unicover whole account reinsurances were rocketing. He made various unsuccessful attempts to obtain specific reinsurance for them. Centaur already had a programme of occ/acc insurances protecting workers' compensation and occ/acc business introduced to Centaur by the brokers Stirling Cooke Brown ("SCB"). This programme had been arranged by SCB in October 1996 and renewed for twelve months from 1 October 1997. The broker at SCB was Mr Jeff Butler. The programme was in three layers. The lowest layer and 50% of the second and third layers were underwritten by John Hancock Mutual Life Insurance Co of Boston USA. The other 50% of the second and third layers was subscribed by Odyssey Re (London) Limited ("Odyssey").

10. Mr Cackett was not happy with Odyssey as security and in March 1998 had asked Mr Butler to replace it. Mr Cackett also had the idea of seeking to broaden the occ/acc reinsurance programme so that it would no longer be restricted to business placed through SCB but would cover all occ/acc business underwritten by Mr Cackett, including particularly the Unicover whole account reinsurances.

11. On 28 August 1998 Mr Butler had a meeting with Mr Paul Minter, the senior underwriter of Cigna. Mr Butler obtained Mr Minter's oral agreement to reinsure the defendants in respect of certain occ/acc business ("the Cigna reinsurance"). No slip was scratched at the meeting, and the Cigna arbitrators later commented in their award: *A clearer warning of the dangers inherent in departing from the traditional procedure of writing reinsurance business in reliance on written information and slip subscription can scarcely be imagined.*

12. At the meeting Mr Minter said that he wanted the business to be placed with Cigna under an existing lineslip held by SCB, under which personal accident risks were declared to Cigna by an employee of SCB, Mr Alan Bird, on

off slips for acceptance by a Cigna underwriter. On a later date or dates Mr Minter initialled four off slips presented to him by Mr Bird and a number of endorsements to Centaur's occ/acc programme. On their face, their effect was that Cigna agreed to reinsure the defendants under the occ/acc programme in place of Odyssey (for whom Cigna agreed to front) and the programme was widened to cover the defendants' portfolio of occ/acc business emanating from all sources.

13. The Lincoln and the Cigna reinsurances both contained arbitration clauses.

14. In December 1998 disputes arose between Cigna and Sun/Phoenix which were referred to arbitration and resulted in the Cigna award. The award was in two parts, a dispositive part and accompanying reasons. The dispositive part included the following:

    1. WE DIRECT that our REASONS for this Award are set out in the document annexed hereto and shall be considered as part of this Award.

    2. WE HOLD that in August/September 1998 [Cigna] became bound to the Occ/Acc Covers by becoming a party to four contracts of reinsurance, two with the Phoenix Claimants and two with the Sun Claimant.

    3. WE HOLD and DECLARE that [Cigna] has validly and properly avoided the contracts of reinsurance by which it participated in the occ/acc programme on the grounds of misrepresentation and non-disclosure in the placement of these occ/acc covers by SCB on behalf of the claimants.

    4. WE HOLD that, subject to our decision in (3) above, all the numbered risks in respect of which the claimants sought an indemnity under the occ/acc covers were reinsured by [Cigna] with the exceptions of risks numbered 132 and 191-192.

15. The Unicover whole account reinsurances were among the risks in respect of which indemnity had been claimed and were numbered 158-164.

16. In the Lincoln arbitration the main issue was whether Lincoln had been entitled to avoid the Lincoln reinsurance for misrepresentation and non-disclosure by Centaur. Lincoln failed on that issue and there is no appeal from the arbitrators' award in that regard. At a late stage of the arbitration Sun/Phoenix served a counterclaim for a declaration that Lincoln was obliged to indemnify them in respect of the Unicover whole account reinsurances. Lincoln contended that these were excluded from indemnity under the Lincoln reinsurance by the net retained lines clause.

17. There was some argument about the proper interpretation of that clause. Sun/Phoenix contended that recovery under the Lincoln reinsurance would not be precluded by the net retained lines clause in a case where the putative other reinsurance had been avoided. The Lincoln arbitrators rejected that argument. They held (at paragraphs 118 to 119) as follows: *The amount of [Lincoln's] liability in respect of losses under the 90 excess 10 whole account reinsurance is not to be increased by reason of [Sun/Phoenix's] inability to collect from another reinsurer amounts that would, but for a successful avoidance by that reinsurer, otherwise have become due…The issue in the present arbitration is whether, but for Cigna's successful avoidance, part of the losses under the Unicover reinsurances would have been recoverable from Cigna.*

18. There is now no challenge to the correctness of that approach.

19. Lincoln argued that the Cigna arbitrators had found that, subject to Cigna's avoidance of the relevant reinsurances, all the numbered risks in respect of which Sun/Phoenix sought an indemnity under the occ/acc covers were reinsured by Cigna (apart from immaterial exceptions), and that in consequence the Unicover whole account reinsurances were excluded from the Lincoln reinsurance.

20. The Lincoln arbitrators rejected that argument and found that the defendants were entitled to indemnity from Lincoln in respect of the Unicover whole account risks.

The first ground of appeal

21. The first question of law requires analysis (a) of the findings of the Cigna arbitrators and (b) of their relevance in the Lincoln arbitration.

22. Lincoln's argument is that the two awards were contradictory, because the Cigna arbitrators found that Sun/Phoenix's risks under the Unicover whole account reinsurances were reinsured by Cigna (subject to Cigna's right of avoidance) but the Lincoln arbitrators found the opposite; and that the Lincoln arbitrators were wrong not to follow the findings of the Cigna arbitrators as to the position between Cigna and Sun/Phoenix.

23. Sun/Phoenix's case is that there was no contradiction between the two awards, because on a proper understanding of the Cigna award either the arbitrators implicitly found that Cigna never reinsured the risks in respect of the Unicover whole account reinsurances or they left that point undetermined. If, however, the two awards were contradictory, it is Sun/Phoenix's case that the Lincoln arbitrators were not bound to follow the earlier award.

The findings of the Cigna arbitrators

24. In view of the way in which the arguments were presented, it is necessary to set out various parts of the Cigna award before considering the way in which the Lincoln arbitrators interpreted it.

25. In the recitals to the dispositive part of the award the Cigna arbitrators summarised the issues raised. They included the following:

J – [Cigna] sought Declarations that:

1) [Cigna] never became bound to the occ/acc Covers;

2) In the alternative to (1), that [Cigna] was entitled to, and did properly, avoid the four reinsurance contracts by which it participated in the occ/acc programme, on grounds of misrepresentation and non-disclosure;

3) In the alternative to (1) and (2), that [Cigna] was not liable to indemnify the claimants against losses in respect of their reinsurances of the Unicover Personal Accident Pool Whole Account Protections;

4) In the alternative, that, at the least, [Cigna] was not liable to indemnify the claimants against losses in respect of their reinsurance of the said Unicover Pool's "burning cost policies".

K – At the hearing the respondent also submitted that the following risks, over and above the Unicover risks, had never been validly ceded by Centaur to the occ/acc Covers, so that no claims lay in respect of them: -

Risks numbered by Centaur as 121, 124-125, 132, 191-192, 199-210 and 216-218.

26. Their reasons began as follows:

On 28 August 1998 Mr Jeff Butler, a director of the brokers Stirling Cooke Brown Reinsurance Brokers Limited (SCB), asked Mr Paul Minter, the senior underwriter of the respondent (Cigna), to do him a favour by agreeing to reinsure the claimants (Phoenix/Sun) in respect of certain occupational accident business. Mr Minter agreed orally to do so, later describing the transaction as a "big oblig. (favour) for SCB". The dispute at the heart of this arbitration concerns the scale of the favour which Mr Minter granted. Issues have arisen concerning the satisfaction of conditions precedent to the agreement becoming binding on Cigna, the right of Cigna to avoid the transaction for misrepresentation and non-disclosure and the scope of the business actually covered by the agreement to reinsure, assuming it to be valid and binding upon Cigna. In order to address these issues we have to refer to events preceding the critical meeting in August 1998.

27. After summarising the history of earlier events, the arbitrators came to the meeting on 28 August, which they described as being "at the very core of the parties' dispute in this arbitration". They said about it:

29 – Certain things are clear about this meeting. Mr Butler did not broke the risk as an attractive proposition on its merits. He said that SCB needed a favour from Cigna and he would not take no for an answer. He wanted Cigna to take over Odyssey Re's lines on certain low-level protections of Centaur's principals, one of whom, Sun Life, could not accept Odyssey as security. Mr Minter refused. Mr Butler then asked him to consider a variation to his proposal, namely, that Cigna should replace Odyssey's lines and front them for Odyssey, to whom the risk would be ceded on a 100% facultative retrocession. One or other of them mentioned Unicover, and Mr Minter was not happy about the prospects of reinsuring Unicover business. A sister company of Cigna, Connecticut General Life, was a member of the Personal Accident Unicover Pool, and Mr Minter knew enough about Unicover to be aware that Unicover's premium income was growing, and that Centaur had underwritten three year whole account reinsurance protections for Unicover as of December 1997 at what he believed to be a cheap rate. There was a discussion about Unicover…. The meeting ended with Mr Minter's oral agreement to write the Centaur reinsurances subject to a 100% facultative retrocession of the risk to Odyssey…

30 – Doubts and disagreements remain concerning what, if anything, was said about Centaur's EPI, and what was said concerning exposure to Unicover whole account protection…

28. After continuing with the history of events, the arbitrators set out the issues as follows:

39 – Against this factual background the broad issues which arose for decision were as follows: -

1) Was the fronting agreement concluded between the claimants and [Cigna] through SCB voidable for misrepresentation or for non-disclosure?

2) If not, was the condition precedent to Cigna's participation fulfilled, namely that there should be a 100% facultative retrocession on back-to-back terms concluded between Cigna and Odyssey?

3) If so, what business written by Centaur on behalf of Phoenix and Sun was reinsured by Cigna under the occ/acc covers?

29. On the question of avoidance, the arbitrators returned to what had been said about Unicover at the meeting on 28 August. They found as follows:-

44 – Mr Butler could not, however, avoid all mention of Unicover. Mr Minter had performed a review of the reinsurance protections of the Unicover pool in which Cigna's sister company was involved. He knew that the Unicover whole account protections had been placed with Centaur under a three year programme w.e.f. 1 December 1997. He believed that it was on advantageous terms for Unicover and he knew that Unicover were writing a lot of business. It was inevitable that he would want to know whether the occ/acc covers were exposed to Unicover business. Consistent with his "one step at a time" approach, Mr Butler was able to tell him that the occ/accs did not include Unicover business, because at that stage neither John Hancock nor Odyssey had accepted the expansion of the occ/accs to take the extra income (and potential exposure) generated by it. He assured Mr Minter that they did not reinsure Unicover protection. Mr Minter most probably did request an exclusion of Unicover business, but Mr Butler could not accept this as it would then have to be noted on the slip…He then had

to find a reason for rejecting an exclusion, and must have come up with a response on the lines that Centaur wished to retain the option to cede the odd Unicover facultative declaration to the occ/accs, adding that Mr Cackett was obtaining specific protections for his exposure to Unicover business.

30. The arbitrators went on to comment:

47 – To front for Odyssey on the basis broked to Mr Minter was not so big a favour as to agree to front them on a greatly increased premium income. Nonetheless it was still a favour, in Mr Minter's eyes. It was unusual for Cigna to front and to write retrocessional business, Mr Minter disliked the idea of reinsuring Cigna's leading competitors and especially Mr Cackett who had cost him money in the past. In waiving an over rider he had made it easier for SCB to put the front in place. He had trusted Mr Butler's assurance that only one or two facultative Unicover cessions might be ceded to the occ/accs.

31. Under the heading "Findings concerning the meeting of 28 August 1998", the arbitrators said at paragraph 48:

(3) – Unicover. Mr Butler had misrepresented the extent to which the occ/acc covers were intended by Centaur to protect Unicover derived business. The intention of Centaur was to use the occ/accs to reinsure the programme by which Centaur's principals reinsured Unicover's whole account. It was not just a question of the odd possible facultative reinsurance. In short, the business was misdescribed….

(6) – Mr Minter was induced to front for Odyssey by what Mr Butler said concerning estimated premium income, by his statement that the occ/acc covers did not involve exposure to Unicover at all (bar possibly one or two facultative reinsurances), and by his statement that Odyssey were keen to remain on the business. Had he known the true facts concerning Mr Cackett's intended use of the occ/acc covers and Odyssey's inability to accept further income on the business, he would have regarded the proposed business as too uncertain and risky to write. At the very least he would have insisted on a clear exclusion of all Unicover business or a maximum limit of premium.

32. Having concluded that Cigna was entitled to avoid its agreement to front for Odyssey on the occ/acc covers, the arbitrators said (in paragraph 49) that the other issues listed in paragraph 39 of their reasons (set out in paragraph 28 above) did not arise, but that they would record their decisions on them in deference to the detailed submissions presented.

33. In addressing the issue what business written by Centaur on behalf of Sun/Phoenix was reinsured by Cigna under the occ/acc covers, the arbitrators considered and rejected an argument by Cigna that in order for the defendants to be able to claim losses arising on a risk reinsured by the occ/accs, some act of allocation of that risk to the occ/acc covers was required. They held that prima facie it was sufficient that the defendants had internally coded a risk as part of their occ/acc business. However, they continued:

80 – We say "prima facie" because the coding cannot be conclusive. First, it must be a valid coding. A risk which was really wider than occupational accident or workers compensation would not qualify for protection, however coded. Secondly, good faith errors could be corrected under the generous E & O clause in the occ/acc contracts… Thirdly, it would be open to Centaur to agree with reinsurers on the occ/acc programme that a particular risk was not to be protected by the occ/acc or that business of a particular type falling within the general definition above was not to be protected under the covers.

34. Applying that analysis, the Cigna arbitrators concluded that certain of the risks in respect of which Sun/Phoenix had claimed indemnity were not protected by the occ/acc covers, but these exceptions did not include the Unicover reinsurances. Having identified those risks which they found not to fall within the occ/acc covers, they continued:

84 – Apart from the above risks we hold that all the risks listed in paragraphs 132 –133 of the respondent's outline final written submissions [i.e. including the Unicover whole account reinsurances] were protected by the occ/acc covers subject to the earlier issues decided in this arbitration. If we had found that Cigna were bound to the occ/acc covers subject to an exclusion of Unicover whole account protections, then we should have regarded that as constituting an agreement to exclude that particular business from protection from under them.

35. In the Lincoln arbitration there was a good deal of skirmishing about what materials from the Cigna arbitration should be disclosed to Lincoln. Ultimately the materials from the Cigna arbitration which were disclosed by Sun/Phoenix and placed before the Lincoln arbitrators comprised the award, the pleadings and redacted parts of the witness statements, transcripts of evidence and submissions. At the hearing Sun/Phoenix tendered Mr Minter for cross-examination, but he was not cross-examined. So the evidence before the Lincoln tribunal as to the meeting on 28 August 1998 was that which had been before the Cigna arbitrators (subject to any argument about whether any of it may have been redacted).

36. The approach of the Lincoln arbitrators to the Cigna award and to the issue whether, but for Cigna's successful avoidance, part of the losses under the Unicover reinsurances would have been recoverable from Cigna, appears from the following parts of their award:

104 – The Claimant's primary submission is that the Award of the tribunal in the Cigna Arbitration is binding upon the Respondents in the sense that the Claimants cannot now assert that the Unicover reinsurances were not covered by the occ/acc specifics including that part of the occ/acc specifics fronted by Cigna. This submission has much force. The Tribunal accepts that the claimant is bound by the decision of the Cigna tribunal. The difficult issue

which the Tribunal has to decide is what is the effect of that decision and how far does it take the Claimant in this arbitration.

105 – The Tribunal has reluctantly come to the view that it has to look beyond the Award and the Reasons for the Award rather than simply seek to interpret the decision of the tribunal in the Cigna Arbitration. It is plain that the tribunal in the Cigna Arbitration were not focusing on the issues that have arisen in this arbitration and were not concerned with analysing the evidence before them with a view to providing any insight into the issues that have to be decided in this arbitration. The Tribunal concludes therefore that it is necessary for it to reach its own view as to whether or not Cigna could ever have been bound to indemnify the Respondents in respect of losses arising from the Unicover whole account reinsurances.

109 – There is, as the Tribunal noted above, considerable difficulty in trying to discern from the Cigna Award and the Reasons for the Award answers to issues that are important in the context of the present arbitration but which were not apparent or important to the Cigna tribunal. Ultimately the Tribunal must determine for itself what was the nature and extent of the agreement reached between Mr Butler and Mr Minter at the meeting on 28 August in order to determine the central issue – whether or not Cigna thereby became bound to indemnify the respondents in respect of losses arising from the Unicover reinsurances.

110 – A good example of the dangers of determining the issues in this arbitration by construing the Cigna Arbitration Award and Reasons for the Award comes from one of the Claimant's central submissions on this part of the arbitration. For obvious reasons the Claimant relied heavily upon paragraph (4) of the Cigna Award:

"WE HOLD that, subject to our decision in (3) above, all the numbered risks in respect of which the Claimants sought an indemnity under the Occ/Acc covers were reinsured by the Respondent with the exceptions of risks numbered 132 and 191-192."

In its Closing Submissions the claimant submitted:

"Numbered paragraph 4 is important for present purposes. It identifies the risks which Cigna covered and for which they would have continued to be bound but for the fact that they were entitled to avoid. Certain risks were excluded, viz. risks numbered 132 and 191-2 but those are irrelevant for present purposes. What matters is that the Unicover risks were included in the Occ/Accs."

On its face this is a persuasive submission. However the Cigna tribunal's holding must be seen in context. At recital K) of the Cigna Award the Tribunal recorded what it was that they understood was the submission of Cigna concerning risks that had never been validly ceded by Centaur to the Occ/Acc covers:

"At the hearing the Respondent also submitted that the following risks, over and above the Unicover risks, had never been validly ceded by Centaur to the Occ/Acc covers, so that no claims lay in respect of them…"

Thus it would seem that the Cigna tribunal was not giving consideration to whether or not the Unicover whole account reinsurances had been validly ceded. Indeed the Cigna tribunal did not regard the issue as one requiring "cession" but rather whether the risks had been excluded or were wrongly coded. This approach may have developed because of the way Cigna chose to advance its case or because the Cigna tribunal had formed the view that Mr Minter did not agree to front the occ/acc specifics with the Unicover whole account reinsurances in them but whatever the reason, it reinforces the Tribunal's conclusion that it must decide these issues for itself and not try to discern what the Cigna tribunal thought or would have thought if it had been asked to determine the issues in this arbitration.

111 – The Tribunal accepts the submission of the Respondents that ultimately this is a question of substance rather than theoretical debate about legal labels. The Tribunal also accepts that the substance was that Mr Minter made it clear to Mr Butler that Cigna would only agree to front the occ/acc specifics and accept the all sources endorsement if the Unicover reinsurances were not covered…

112 – Accordingly the Tribunal concludes that Cigna never agreed to cover the Unicover reinsurances and could never have been required to pay losses arising from the Unicover reinsurances.

37. When the Lincoln arbitrators referred in paragraph 105 to the issues that had to be decided in the Lincoln arbitration, the critical issue was whether losses under the Unicover reinsurance would have been recoverable under the Cigna reinsurance, but for Cigna's avoidance of it; because on that issue depended the applicability of the net retained lines clause of the Lincoln reinsurance to losses under the Unicover whole account reinsurances.

38. On my reading of their award, the Cigna arbitrators addressed that issue and reached an unambiguous decision on it. They concluded that the Unicover whole account reinsurances were reinsured by Cigna but that the Cigna reinsurance had been validly avoided.

39. Mr Kendrick QC submitted on behalf of Sun/Phoenix, and I agree, that paragraph (4) of the Cigna award (by which the arbitrators held that, subject to Cigna's right of avoidance, all the risks in respect of which indemnity was claimed under the occ/acc covers were reinsured by Cigna, with immaterial exceptions) must be read in its context. The Lincoln arbitrators referred to recital K as supporting an argument that the Cigna arbitrators may not have considered whether the Unicover whole account reinsurances fell within the Cigna reinsurance, but for Cigna's successful avoidance. They did not refer to recital J (the recitals at J and K being a summary of submissions which had been advanced by Cigna in its pleadings and at the hearing) or more significantly to

paragraph 84 of the Cigna arbitrators' reasons. Paragraph 84 shows that in arriving at their holding in paragraph (4) of their award the Cigna arbitrators had considered but rejected the conclusion that there had been an agreement to exclude Unicover whole account risks from the scope of cover written by Cigna.

40. Mr Kendrick submitted that the sentence in paragraph 84

If we had found that Cigna were bound to the occ/acc covers subject to an exclusion of Unicover whole account protections, then we should have regarded that as constituting an agreement to exclude that particular business from protection under them should be read as meaning that if the Cigna arbitrators had not found that the Cigna reinsurance had been properly avoided, they would have found that there was an agreement to exclude Unicover whole account protections from the scope of cover. He also pointed out that in paragraph 80, where the Cigna arbitrators referred to the possibility of Centaur and Cigna agreeing that a particular risk was not to be covered by the occ/acc covers, they were considering an allocation argument in relation to risks other than Unicover whole account risks. That observation is correct, but it is not in my view a persuasive reason for reading paragraph 84 in the way that Mr Kendrick suggests. If the experienced Cigna arbitrators had intended paragraph 84 to mean what Mr Kendrick suggests, I am sure that it would have been worded very differently and that paragraph (4) of the award would have identified the Unicover whole account reinsurances among the risks excepted.

41. Paragraph 4 of their award and paragraph 84 of their reasons are also consistent with the Cigna arbitrators' findings about the meeting on 28 August 1998. As I read their reasons, they found that Mr Minter agreed to front for Odyssey on the occ/acc covers, amended to include business from all sources, without there being any exclusion of Unicover (which Mr Minter probably requested), because Mr Minter accepted Mr Butler's false representations about Centaur's intended use of the covers. Mr Kendrick made the point that in their reasons the Cigna arbitrators at times referred to this as an assurance (for example, in paragraph 47). The word "assurance" could mean either an assurance of intention (that is, a statement of intent) or a contractual promise. However, there would have been problems reconciling a contractual promise with a refusal to agree to an exclusion from cover, and paragraph 84 shows that the Cigna arbitrators had clearly in mind the question whether there was an agreement to exclude Unicover whole account risks from the cover.

42. I was referred to underlying documents, including extracts from the pleadings and submissions in the Cigna arbitration. In my view they do nothing to weaken the natural reading of the award. They tend, if anything, to confirm it. For they show that Mr Kendrick in his closing submissions canvassed with the arbitrators the possibility of a finding that there was an agreement between Mr Minter and Mr Butler to exclude the Unicover whole account reinsurances from the occ/acc covers, and so it was a live issue for the arbitrators to decide.

43. As to the alternative argument that there was a gap in the Cigna arbitrators' findings, Mr Kendrick put forward various forms of argument, which he says were not considered by the Cigna arbitrators, for holding that the Cigna reinsurance would not have protected Sun/Phoenix against losses under the Unicover whole account reinsurances; but they had the common element that there was an oral agreement between Mr Minter and Mr Butler that the Unicover whole account reinsurances were not to be covered by the Cigna reinsurance. Whether such an agreement, if there was one, was properly to be described as giving rise to an agreement to exclude or a collateral agreement or an estoppel by convention is a matter of legal labelling, about which there was discussion between Mr Kendrick and the Cigna arbitrators during his closing submissions. They considered whether there was an agreement to exclude the Unicover whole account reinsurances and, on my reading of their award, they concluded that there was not.

44. Mr Kendrick also submitted that if, as I conclude, the Lincoln arbitrators misinterpreted the Cigna award (in finding that the Cigna arbitrators had not directed themselves to the question whether the Unicover whole account reinsurances were within the Cigna reinsurance, subject to Cigna's avoidance), this was a purely factual error. I do not accept that submission. The interpretation of the Cigna award involved legal analysis.

The relevance of the findings of the Cigna arbitrators in the Lincoln arbitration

45. If the Lincoln arbitrators had interpreted the Cigna award as addressing and answering the question whether, but for Cigna's successful avoidance, losses under the Unicover whole account reinsurances would have been recoverable from Cigna, it appears from their award that they would have treated the Cigna arbitrators' answer as conclusive for the purposes of the Lincoln arbitration. They were reluctantly driven to look beyond the Cigna award in determining that issue because of the difficulty they felt in discerning an answer to it from the Cigna award. However, Mr Kendrick submitted that they would have been wrong to regard the Cigna arbitrators' conclusion as determining the issue. Rather, in determining the question as between Lincoln and Sun/Phoenix, the Lincoln arbitrators were bound to exercise their own independent judgement on the evidence before them. They were therefore free to determine the question as they did.

46. The relevance of the Cigna award in the Lincoln arbitration involves an interesting point of law, and I am grateful to counsel on both sides for their arguments on it. To set the scene, the stage so far reached can be summarised as follows:

1) The Lincoln arbitrators were faced with the question whether, but for Cigna's avoidance of its agreement to reinsure Sun/Phoenix, the Unicover whole account reinsurances were covered by Cigna.

2) In the Cigna arbitration issues had arisen between Cigna and Sun/Phoenix whether the Unicover whole account reinsurances were reinsured by Cigna and whether Cigna had a right of avoidance on grounds of misrepresentation and non-disclosure.

3) The Cigna arbitrators found that the Cigna reinsurance had been lawfully avoided.

4) It was not therefore necessary for the Cigna arbitrators to decide whether, subject to their decision on avoidance, the Unicover whole account reinsurances were reinsured by Cigna, but they found that they were.

47. Mr Kendrick submitted that this last finding was irrelevant to the outcome of the Cigna arbitration, and still more irrelevant in the Lincoln arbitration. Mr Kendrick accepted that the Lincoln arbitrators were bound by the outcome of the Cigna arbitration in the strictly limited sense that it was in his words "a legal fact" that Cigna had successfully avoided its reinsurance of Sun/Phoenix; but the Lincoln arbitrators were not bound by the reasoning of the Cigna arbitrators nor by findings of fact which did not determine the ultimate position between Cigna and Sun/Phoenix.

48. Mr Hunter QC for Lincoln submitted that if

(i) A and B contract on terms which provide that B is not liable to A for losses which may have become recoverable by A from C under a contract between A and C,

(ii) a dispute arises between A and B as to whether the losses which A seeks to recover from B were recoverable by A from C,

(iii)the issue of recoverability of those losses as between A and C is determined in C's favour by an arbitral award pursuant to an arbitration clause in the contract between A and C,

A is bound by that award in any claim he may make against B.

49. Mr Hunter argued that the result reached by the Cigna arbitrators should be treated as part of the contract between A and C and could be proved by B just as the contract between A and C could be proved.

50. He further submitted that no distinction is to be drawn in this regard between the Cigna arbitrators' findings about Cigna's right of avoidance and the scope of the cover (subject to Cigna's right of avoidance). It was within the jurisdiction of the Cigna arbitrators to decide whether the Unicover whole account reinsurances were reinsured by Cigna, because that was one of the issues argued before them; and their finding that those risks were reinsured by Cigna was as much a legal fact as their finding that the Cigna reinsurance had been lawfully avoided.

Hollington v F Hewthorn and Co Limited [1943] KB 587

51. In ***Hollington v Hewthorn*** Goddard LJ (at pages 596-597) stated the rules at common law about the effect of a judgment in personam as between a party and a stranger as follows:

A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the ***Duchess of Kingston's Case*** *(1776) 2 Sm LC, 13th ed. 644, "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore …. the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state of facts is in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay £x to C the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see* ***Green v New River Co*** *(1792) 4 Term Rep 589, and B can show, if he can, that the amount recovered was not the true measure of damage.*

52. ***Hollington v Hewthorn*** has been widely criticised. In ***Hunter v Chief Constable of the West Midlands*** [1982] AC 529, 543 Lord Diplock said that it was generally considered to have been wrongly decided. In ***Hall v Simons*** [2002] 1 AC 615, 702 Lord Hoffman said that the Court of Appeal was generally thought to have taken the technicalities of the matter much too far when it decided that in civil proceedings a conviction was res inter alios acta and no evidence whatever that the accused had committed the offence. The decision has been partially reversed by Parliament in relation to the admissibility of criminal convictions in subsequent civil proceedings, but it has not been overruled by the House of Lords and was treated as authoritative by the Privy Council in ***Hui Chi-Ming v R*** [1992] 1 AC 34.

53. The same general rules apply to the effect of an arbitration award: ***Hayter v Nelson*** [1990] 2 Lloyd's Rep 265, 271.

54. As Saville J observed in ***Hayter v Nelson***, parties may agree to be bound by a judgment or award given against (or in favour of) one of them in proceedings with a third party, but I doubt whether that is strictly an exception to the common law principles. For if parties enter into such an agreement, then the judgment or award (whether correct or incorrect) becomes a matter which of itself affects the mutual rights and obligations of the parties to the agreement. An obvious example is a professional indemnity policy which indemnifies the insured against any legal liability established against the insured. If the insured is held liable by a court of competent jurisdiction, that of itself triggers the right to indemnity.

55. Aside from wider criticisms of ***Hollington v Hewthorn***, interpretation and application of its principles can present problems in at least two respects. The first concerns the extent to which a judgment or award may be regarded

as establishing the existence of a "state of things" or "state of facts" relevant in subsequent litigation between a party and a stranger, because there may be room for a broader or narrower interpretation of the "state of things" or "state of facts" established. The second involves the question whether the first judgment or award is necessarily to be regarded in the subsequent proceedings as either conclusive or irrelevant, or whether it may have an intermediate status. Here, there is, with respect, some tension in the passage cited above from ***Hollington v Hewthorn.*** The statement that a judgment "is conclusive as against all persons of the existence of the state of things which it actually affects, when the existence of that state is a fact in issue" might imply that there is no half way house. However, in the example given by Goddard LJ of A suing B, alleging that owing to B's negligence he had been held liable to pay £x to C, it was expressly recognised that the judgment was conclusive as to the amount of damages that A had to pay C, but that it was open to B to show, if B could, that the amount recovered was not the true measure of damages. In other words, A could rely on the judgment against him in favour of C as prima facie, but not conclusive, evidence of his loss.

Other authorities

56. In ***Executor Trustee and Agency Company of South Australia Limited v Deputy Federal Commissioner of Taxes*** (1939) 62 CLR 545 a testator left land by his will on trust to various beneficiaries. The rights of the beneficiaries under the will were determined in proceedings which went to the Supreme Court of South Australia. Some years later the trustee was assessed to federal land tax on the basis that the beneficiaries' rights were as the court had held. The trustee challenged the assessment on the ground that the basis of assessment did not reflect the beneficiaries' true rights and that the decision of the Supreme Court was irrelevant since the Commissioner had not been a party to those proceedings. The High Court of Australia rejected the trustee's argument, not on the ground of res judicata or issue estoppel, but on the basis that the Commissioner was entitled and bound to take interests in land as he found them. Even if a particular decision of a court as to the interest of a person in land was wrong, it had the effect of determining what that interest was. Although the Commissioner was not bound by the order of the Supreme Court of South Australia in the way that the parties to the earlier proceedings were bound, the effect of the order as between those parties was to fix their rights and the Commissioner must take them as they actually existed between the parties.

57. In Spencer Bower, Turner and Handley on The Doctrine of Res Judicata, 3rd ed. (1996), paragraph 230, this case is cited as illustrating the proposition that *One who is not a party may find his rights affected by litigation between others. This is not the result of estoppel; it is a consequence of being compelled to accept the facts.*

58. In ***George Moundreas and Co SA v Navimpex Centrala Navala*** [1985] 2 Lloyd's Rep 515 the plaintiff shipbrokers arranged a number of ship building contracts between the defendants and third parties. For each ship building contract there was a written agreement between the plaintiffs and the defendants entitling the plaintiffs to payment of commission within a stated period after payment by the buyers of instalments under the ship building contract. The ship building contracts were mostly cancelled by the buyers before delivery of the vessels. It was held by Saville J that the commission agreements contained an implied term that the defendants would not break the ship building contract and thereby deprive the plaintiffs of commission which would otherwise have been due to them. In the case of one vessel the dispute between the defendants and the buyers went to arbitration, and the tribunal decided that the buyers were entitled to cancel the contract by reason of contractual breaches by the defendants. The plaintiffs asked the judge to treat the award as establishing that the defendants were in breach of the ship building contract. The defendants objected on the grounds that the award only represented the opinion of the arbitrators and was therefore inadmissible as evidence under ***Hollington v Hewthorn.*** Saville J said at page 520:

It seems to me that where the rights or obligations of the parties to a contract are determined by the contractual machinery of arbitration under that contract there is something to be said for the view that the result that the arbitrators reach can (in the absence of special circumstances) be treated in effect as part of the contract and thus established by third parties in the same way as any contract can be proved. Thus in the present case the arbitrators have concluded that the [buyers] had a right to cancel the contract and to claim damages as a result of the failure of the [sellers] to perform their obligations under the contract. As between the parties that is now the contractual position as determined by the contractual machinery of arbitration – and it is difficult to see why a stranger to the contract cannot prove the contractual position by simply producing the award as he can prove other contractual rights and obligations by simply producing the contract.

59. Saville J's proposition was expressed in terms of a suggestion rather than a ruling. It was unnecessary for him to decide the point because the plaintiffs in fact called evidence from which the judge reached the same conclusion as the arbitrators. However, the proposition has been adopted by Mr Hunter and strongly influenced the way he presented his argument.

60. On the contractual machinery point, I do not see a reason in principle to apply a different approach according to whether the previous decision was that of an arbitral tribunal or a court. In this respect I share the view of Clarke J in the **Sargasso** [1994] 1 Lloyd's Rep 412, 421, that it is desirable in principle for the same rule to apply both to judgments and to arbitration awards. Saville J also regarded the same rules as applicable to judgments and to arbitral awards in ***Hayter v Nelson.*** One might add that there is no reason why the contractual machinery should affect a third party unless there is some underlying applicable broader principle at work. Parties to a contract may agree on an arbitration clause, or they may agree on a clause giving either exclusive or non-exclusive jurisdiction to the courts of a particular state, or they may not include either type of clause. The results in each

case are in a sense a matter of contractual choice, positive or negative. Whether the jurisdiction of the first tribunal arose by the positive choice of the parties or by default, the effect to be given to it by a later court or tribunal hearing a dispute between other parties must depend on the rules of law governing the second tribunal.

61. It is instructive to compare the issues and the approach of the courts in ***Executor Trustee and Agency Company of South Australia Limited v Deputy Federal Commissioner of Taxes (South Australia)*** and in ***George Moundreas and Co SA v Navimpex Centrala Navala.*** In the Australian case the issue concerned the existing status and rights of the trustee and the beneficiaries. These matters were fixed between trustee and beneficiaries by the earlier judgment, and it was held that the Commissioner was entitled and bound to take account of those rights as they had been determined. The earlier judgment was not analysed as technically a judgment in rem (an expression which does not yield easily either to translation or to precise definition, but is described in Phipson on Evidence, 15th ed., paragraph 38–14 as "an adjudication upon the status of some particular subject matter by a tribunal having competent authority for that purpose"), although its effect was the same for all practical purposes.

62. In ***George Moundreas and Co SA v Navimpex Centrala Navala*** the plaintiffs sought to rely on the arbitral award to prove as a fact that the defendants had breached the ship building contract. Saville J did not consider whether a finding by the arbitrators should have been able to be deployed *against* a stranger to the contract (in the way that the Commissioner was both entitled and bound to treat the rights in the relevant land as established by the previous order of the court), for he was only concerned with the situation in which the award was relied upon *by* a stranger to the contract.

63. In the passage cited from ***Hollington v Hewthorn,*** Goddard LJ said that the reason why a judgment obtained by A against B should not generally be available as evidence against C was that C would have had no opportunity to influence the outcome of the case or to appeal against the judgment. That objection would not apply in the converse situation where C seeks to rely against B on a judgment obtained by A against B after a trial on the merits in which B had a full opportunity to present his case. I respectfully share Saville J's suggestion that it is difficult to see why as a matter of principle C should not be able to rely on such a judgment against B, at least as evidence. However, the ruling in ***Hollington v Hewthorn*** treated the two situations as indistinguishable, because in that case the plaintiff was seeking to rely against the defendant on a prior adjudication against him by another court.

64. Was the approach suggested by Saville J compatible with ***Hollington v Hewthorn***? In the context of a contract between C (the brokers) and B (the shipyard) under which C's rights against B depended on the position between B and A (the buyers) under the ship building contract, there is much attraction in the argument that C was entitled to rely on the arbitrators' award in favour of A against B as establishing, at least prima facie, the position (or "state of things") between A and B (that A was entitled to cancel the ship building contract because of breach by B). In ***Hollington v Hewthorn*** the court was not presented with circumstances of that kind. (In that case there was no structural inter-relationship between the civil and criminal proceedings comparable to the inter-relationship between the shipbuilding and the commission contracts.) It is not necessary to discuss further whether the plaintiffs should have been entitled to treat the award as conclusive in all circumstances or whether such a rigid rule might itself in some circumstances be productive of injustice. The problems associated with re-litigation of issues can be quite complex and may vary subtly according to the circumstances of the case.

65. In the ***Sargasso*** [1994] 1 Lloyd's Rep 412 the plaintiffs chartered a vessel from the defendants and sub-chartered her to a third party, Neste. In an arbitration under the sub-charter damages for cargo contamination were awarded against the plaintiffs. In a subsequent action the plaintiffs claimed an indemnity from the defendants. Clarke J found that the defendants were in breach of contract and that the defendant's breach had put the plaintiffs in breach of the sub-charter. The plaintiffs argued that they were entitled to recover as damages the amount awarded against them in the arbitration unless either they had failed to take reasonable steps to mitigate their loss in the conduct of their defence in the arbitration or the arbitration award was one which no reasonable arbitrators could have reached on the material before them. The defendants argued that the award was inadmissible except to cap the extent of their liability to the plaintiffs, or at most was prima facie evidence of the defendants' true liability to Neste.

66. Unlike the position in ***George Moundreas and Co SA v Navimpex Centrala Navala,*** in this case a party to a previous award was relying on the award against a stranger rather than the other way around.

67. Clarke J set out his approach as a matter of principle as follows, at page 417:

> *It seems to me that where the breach of the two charter-parties is proved to be the same and the arbitrators have held the charterer under a charter-party liable to a sub-charterer in a particular amount the better view as a matter of principle is to say that the cause of the liability so determined was the breach of the charter-party. Any other conclusion would or might cause injustice to the charterer because the charterer may not have available evidence which is available to the owner or disponent owner. On the other hand the conclusion which I have reached does not seem to me to be unjust to the owner or (in this case) disponent owner because if he had available relevant evidence which will assist the charterer in his defence to the sub-charter's claim he can make it available to him. If for some reason he does not and the charterer acts reasonably throughout, the charterer should in my judgment be able to pass his liability to the owner.*
>
> *That is in my judgment so even if it can later be shown that the arbitrator made an error of fact or law. It does not seem to me that such an error should be held to break the chain of causation between the breach of contract and the*

loss sustained by the charterer as quantified by the arbitrators unless the charterer has failed to take reasonable steps to mitigate his loss… or unless the arbitrators have acted perversely or have reached a conclusion which no reasonable arbitrators could have reached on the evidence before them. In any other case the breach of charter-party remains an effective cause of the charterers' loss even if it can be said that there was another cause of the loss, namely an error made by the arbitrators.

68. In other words Clarke J treated the matter as a pure question of causation of loss. Once it was proved that the defendants had breached the charter-party and thereby caused the plaintiffs to be in breach of their sub-contract, the amount of the damages awarded against the plaintiffs by the arbitrators was to be taken as caused by the breach, unless there had either been a failure to mitigate on the part of the plaintiffs or the arbitrators' decision was so egregiously wrong that it would be unjust to regard the defendant's breach as an effective cause of the plaintiff's loss.

69. Clarke J considered a number of authorities, including cases where the plaintiff had claimed to recover as damages an amount which it had been ordered to pay to a third party by a foreign judgment or which it had agreed to pay to a third party under a settlement. He concluded that there was nothing in them to prevent him from deciding the case in the way that he considered to be right in principle.

70. ***Sacor Maritima SA v Repsol Petroleo South Africa*** [1998] I Lloyd's Rep 518 also involved two contracts for the chartering of a vessel. Sacor chartered the vessel from her owners, Kosan, under a time charter. Repsol chartered the vessel from Sacor under a contract of affreightment. After one of the voyages under the contract of affreightment there was a failure properly to clean the tanks before loading the next cargo. The cargo receivers brought an action for cargo contamination against Kosan under the bills of lading. The action was settled, and Kosan brought arbitration proceedings against Sacor under the head charter. The arbitrator held Sacor liable to Kosan by virtue of failings on the part of Repsol's appointed surveyor, who was not called as a witness.

71. Sacor then brought arbitration proceedings against Repsol, claiming an indemnity against its liability to Kosan. Different evidence was given. The arbitrators (who included the sole arbitrator in the first arbitration) rejected the claim. They found that acts or omissions of both parties led to the ultimate loss, but that Repsol's shortcomings would not have mattered if Sacor had complied with the requirements of a clause in the contract of affreightment and did not break the chain of causation between Sacor's breach of that clause and the loss.

72. On appeal, Sacor argued that the second tribunal should have regarded itself as bound by reason of the findings of the first tribunal to treat the damage as solely caused by the acts or omissions of Repsol's surveyor. Mance J rejected this argument. He noted that the two tribunals, despite their overlapping constitution, had arrived at inconsistent factual findings, but he observed that they did so in disputes between different parties under different contracts and on different evidence. This was a risk inherent in separate arbitrations, where in the absence of consent there is no procedure (as there is in civil litigation) for combining proceedings or trying together common issues involving different parties with a view to avoiding inconsistent findings of fact. He could discern no principle on which the first tribunal's findings of fact or conclusions on causation on the evidence in the arbitration between Kosan and Sacor under the head charter fell to be regarded as binding in the context of the arbitration between Sacor and Repsol under the contract of affreightment.

73. Mance J distinguished ***George Moundreas and Co SA v Navimpex Centrala Navala*** because in that case the issue between the ship builders and the brokers was whether the ship builders had been in breach of the relevant ship building contract with the buyers. He acknowledged that it made sense to treat the award under the ship building contract as determining that issue. However, there was no dispute about Sacor's liability to Kosan. What was sought was to take findings of fact and conclusions of causation made in the first arbitration and transpose them into the second arbitration on the question whether Repsol incurred any liability to indemnify Sacor in respect of Sacor's unquestioned liability to Kosan; that was a matter for determination by the second tribunal.

74. Mance J distinguished Clarke J's decision in the Sargasso, which he noted was limited to situations where a breach of contract A has itself been proved and has, furthermore, been proved to have put the other party in breach of contract B, under which an award (or judgment) had been given in favour of the other party to contract B.

75. In ***Ali Shipping Corporation v Shipyard Trogir*** [1999] 1 WLR 314 the defendant shipyard agreed to build a ship identified as Hull 202 for the plaintiff company, which later became a wholly owned subsidiary of G. The defendants subsequently entered into contracts to build three more vessels, identified as Hulls 204 to 206, the buyer being in each case also wholly owned by G. The defendants having failed to complete Hull 202 in accordance with the contract, the plaintiffs brought arbitration proceedings in which they were awarded substantial damages. The defendant sought to defend the claim on the grounds that the buyers under the contracts for Hulls 204 to 206 had failed to pay the first instalments of the price and that the defendants' obligations to build Hull 202 had become contractually dependant on performance of the subsequent contracts. The arbitrator rejected this defence, holding that the defendants' obligation to build Hull 202 was not conditional upon performance of the buyers' obligations under the contracts for Hulls 204 to 206. In his award he said that the excuses raised on behalf of those buyers for not paying the first instalments under those contracts appeared to be bad; and that if, contrary to his view, it was necessary to make findings in respect of those matters he should be taken as having so concluded; but that he appreciated that nothing he said could bind the parties to those contracts.

76. In separate arbitration proceedings between the defendants and the buyers under the contracts for Hulls 204 to 206, the defendants sought to rely on documents from the first arbitration, including the award and reasons of the arbitrator. The plaintiffs responded by applying for an injunction to restrain the defendants from breaking their implied obligation of confidentiality in respect of the first arbitration. The defendants argued that they should be allowed to rely on the documents on the ground that it was reasonably necessary for them to do so. This argument was rejected by the Court of Appeal.

77. Potter LJ said that he could see no prospect of the defendants succeeding on a plea of issue estoppel, however formulated, given the terms in which the arbitrator's findings were couched in the first arbitration award.

78. In that case the parties directly involved in the dispute whether there were good grounds for non-payment of instalments under the contracts for Hulls 204 to 206 were the parties to those contracts. It is one thing to say that where the rights between A and B have been decided in proceedings between A and B, and those rights are relevant also in later proceedings between B and C, the second tribunal should treat the rights between A and B as fixed by the first tribunal. (This was the position in ***Executor Trustee and Agency Company of South Australia Limited v Deputy Federal Commissioner of Taxes (South Australia)*** and ***George Moundreas and Co SA v Navimpex Centrala Navala).*** It is quite a different matter to suggest that if the order of proceedings were reversed, and the tribunal hearing the dispute between B and C found it necessary for the purposes of that dispute to reach a conclusion about rights between A and B, the tribunal subsequently determining those rights directly between A and B should treat them as fixed by a decision of another tribunal in proceedings to which A and B were not both parties.

79. In ***Drake Insurance Plc v Provident Insurance Plc*** [2003] EWCA Civ 1834 the Court of Appeal had to consider an issue about the effect of an arbitral award between Provident and an insured in related proceedings brought against Provident by Drake. The circumstances were rather complex. K was driving a car belonging to her husband, S, when she hit a motorcyclist, causing him serious injuries. S was insured under a policy with Provident in respect of the car which K was driving, and K was a named driver on the policy. K was also herself insured under a policy with Drake. Drake's policy contained a rateable proportion clause which provided: *If at any time any claim arises under this policy, there is any other existing insurance covering the same loss damage or liability the Company shall not be liable to pay or contribute more that its rateable proportion of such claim.*

80. S made a claim on K's behalf under the Provident policy. After investigation, Provident wrote to S purporting to avoid the policy for non-disclosure. The facts were singular. The policy was in its second year. When it was originally written, S disclosed a previous accident involving K, in which she had been hit from behind. During the first year of the policy, two salient events occurred; the third party accepted responsibility for that accident and paid the amount of the loss, and S was convicted of speeding. Neither of those matters was disclosed on renewal. If S had disclosed the conviction (as he ought to have done) and had also disclosed the outcome in relation to the earlier accident, the policy would have been renewed on normal terms. If he had disclosed the conviction but not the outcome of the previous accident, Provident would have charged a higher premium on renewal. Provident decided to avoid the policy after learning of the conviction, but before learning of the outcome of the previous accident.

81. S referred his claim against Provident to arbitration under an informal scheme. S acted for himself without legal advice and the matter was dealt with on paper. The arbitrator held that Provident had been entitled to avoid the policy on the ground of non-disclosure of the conviction. S had pointed out to the arbitrator in correspondence that under Provident's underwriting criteria the effect of S's speeding conviction would have been offset by the establishment that the previous accident had not been K's fault, with the result that a normal premium would have been charged on renewal. It was, said Rix LJ in the leading judgment in the Court of Appeal at paragraph 61, a great pity that in his award the arbitrator paid no attention whatsoever to this factor.

82. As a result of Provident's avoidance of its policy, K claimed under the Drake policy. Drake took the view that Provident had been wrong to avoid, and there was correspondence between the two insurers, but Provident maintained its position. In those circumstances Drake agreed to meet the motorcyclist's claim, but brought proceedings against Provident for an equitable contribution on the ground that they were in truth co-insurers.

83. Provident resisted the claim on two grounds; first, that it had validly avoided S's policy, so that there was no double insurance; but secondly that, if it was wrong on the first point and there had been double insurance, Drake's liability by virtue of its own rateable proportion clause was limited to half the amount of the claim, so that in paying more than half it had acted as a volunteer and was not entitled to recover from Provident.

84. On the first point, it was common ground that it was for the court to decide whether Provident had in truth been entitled to avoid its policy. On that issue the judge at first instance held with reluctance that Provident had been entitled to avoid its policy, but the Court of Appeal held that there had been no valid avoidance.

85. Provident's second line of defence was founded on the decision of the Court of Appeal in ***Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*** [1992] QB 887, where Drake had successfully taken the point now raised against it by Provident. Drake sought to distinguish that case by arguing that it was the only insurer, as between K and itself, and therefore the rateable proportion clause did not apply. However, in order to have a right of contribution from Provident, it had to show that they were in truth co-insurers. This required an argument of some subtlety. Rix LJ described the problem as follows at paragraph 117:

In other words, in order to claim a contribution in equity from Provident, Drake must show that it was a co-insurer, but in order to escape from the decision in ***Legal and General v Drake****, Drake must show that it was not a co-insurer. Moreover, in order to show that it was a co-insurer, Drake must rely on the fact (which is common ground) that it is not bound by the arbitration award between Provident and [S]; whereas in order to show that it was not a volunteer and was bound to indemnify [K] against a hundred percent of her liability, Drake must rely on the fact (which is not common ground) that she would be defeated by the same arbitration award. It escapes being a volunteer on the ground that it is not a co-insurer and claims contribution on the ground that it is a co-insurer.*

86. The judge at first instance accepted Provident's argument, on the hypothesis that it was liable under its policy, that the effect of Drake's rateable proportion was clear; since on that hypothesis Provident was liable to indemnify K, it followed that Drake's liability to indemnify her was limited to its share of the loss.

87. Clarke LJ took a different approach. By agreement, the court had approached the question whether there was double insurance according to its view of the true position under the Provident policy. However, he did not consider that this was the proper foundation on which to approach the applicability of Drake's rateable proportion clause. Rather, it was necessary to consider whether, if Drake had advanced the rateable proportion clause as a partial defence to K's claim, she would have recovered against Drake on a 100 percent basis or only a 50 percent basis. Clarke LJ said at para 153:

In such postulated proceedings between [K] and Drake, Drake would have said that there was existing insurance covering the same liability between her and Provident, whereas [K] would have replied that there was no such existing insurance because Provident had avoided the policy and had been held to be entitled to do so. As I see it that defence would have succeeded. It would have been no defence for Drake to say that, as between it and Provident or indeed, as between it and [K], it was entitled to say that the policy had not been validly avoided because, in my opinion (as already stated), the question for decision was whether there was existing cover as between [K] and Provident and Provident had persuaded an arbitrator that there was not.

88. Clarke LJ therefore concluded that when Drake discharged the liability on a 100 percent basis by way of settlement it was not paying 50 percent as a volunteer. He added a proviso that the position might have been different if S had lost the arbitration through some fault of his own, but nothing of that kind was suggested.

89. Rix LJ expressed himself as perplexed by the problem. However, he said that he was inclined to agree with Clarke LJ's approach, describing the award (at paragraph 122) as "a fact in the world" binding as between K and Provident, to which K would have been entitled to point on the issue whether there was another existing insurance if Drake had sought to enforce the rateable proportion clause against her. Pill LJ did not express a view on the point, and Rix LJ did not consider it necessary to go further than to express his inclination to agree with Clarke LJ, because ultimately all three members of the court were able to distinguish Legal and General v Drake on another ground.

90. There are two matters of interest in the case for present purposes. The first is the recognition that if there had been proceedings between K and Drake involving an issue whether there was cover between K and Provident, K could have relied on the decision of the arbitrator as determining that there was no cover (whether the arbitrator's decision was right or, as the Court of Appeal considered, wrong). In those hypothetical proceedings the alternative would have resulted in a double injustice to K. The first injustice was the failure of the claim for indemnity against Provident. This injustice would have been compounded if she had then recovered only a half indemnity from Drake.

91. This leads to a second and broader point. The court was clearly concerned to reach a result which reflected the justice of the case and this influenced its reasoning. It could have held that, although K would have been able to defeat a point based on Drake's rateable proportion clause if it had been raised against her by Drake, as between the two insurers Drake could not be heard to assert that they were co-insurers for one purpose but to deny it for another. It seems a reasonable inference that the underlying reason why Clarke LJ rejected that approach, and Rix LJ was inclined to do the same, was that it would have produced an inequitable result. Clarke LJ put the matter in this way at paragraph 155:

For the reasons given earlier and by Rix LJ (with which I agree), Provident was not in fact entitled to avoid. Yet by its argument that Drake paid [K] as a volunteer, it hopes to achieve a result by which Drake remains liable for the whole claim, which in equity should be shared between them.

Conclusion on the first ground of appeal

92. It is probably only at the level of the House of Lords that the rules about the extent to which a judgment or award between A and B may be relied upon by or against B in proceedings between B and C, where those proceedings involve an issue about the rights between A and B, could be comprehensively reconsidered. The modern tendency when tackling the diverse problems of serial litigation involving a common issue has been to move away from technical rules towards a broader consideration of what is fair. Thus the rules of res judicata and issue estoppel have been supplemented by the court's jurisdiction to strike out claims or defences where the issue has been previously determined, not necessarily between the same parties, and it would be unfair in all the circumstances for the previous decision to be challenged in the later proceedings. In considering whether and to what extent the findings of a competent tribunal in proceedings between A and B should be able to be relied upon by or against B in proceedings between B and C, there is a strong argument for saying that the real considerations should be what is most fair to the parties and will avoid bringing the administration of justice into disrepute. The fact that C

was not a party to the earlier proceedings (and normally, although not invariably, will therefore have had no opportunity to influence them) would in many cases make it unfair that the earlier judgment should be relied upon by B, but not necessarily against B, although the cases to which I have referred show that circumstances can vary greatly. Among other things, one could imagine circumstances in which it might make a difference in terms of justice whether the earlier decision was the product of an informal arbitration, in which the arbitrator had not properly addressed the arguments, compared with proceedings in which the issues had been fully and properly investigated and addressed in a reasoned decision. Where the previous decision was an arbitration award, the confidentiality of the arbitration proceedings could also be a relevant factor.

93. The rules in ***Hollington v Hewthorn*** contain little flexibility on their face. However, even within the rules laid down in that case, the question whether a decision of the previous tribunal is to be regarded as res inter alios acta or in Rix LJ's words as "*a fact in the world*" involves a judgement which, as the cases show, may be influenced by a sense of what is fair and sensible.

94. In this case the scope of the cover under the Lincoln reinsurance was defined in part by the net retained lines clause. It therefore excluded whatever risks were insured under the Cigna reinsurance. It was open to Sun/Phoenix to retain whatever risks they wished. So initially the Unicover whole account reinsurances were protected by the Lincoln reinsurance. However, a time came when Sun/Phoenix attempted to obtain reinsurance from Cigna in terms which were intended to be broad enough to include those reinsurances. They claimed indemnity from Cigna in respect of those risks. The issue whether the Unicover whole account reinsurances were reinsured by Cigna was an issue directly between Sun/Phoenix and Cigna, but had a secondary impact on the scope of the Lincoln reinsurance. The Cigna arbitrators after a full hearing and in a reasoned award decided that they were reinsured by Cigna, but that the policy had been validly avoided. Their award determined the position between Sun/Phoenix and Cigna, on which the liability of Lincoln depended.

95. The fact that it was not necessary for the Cigna arbitrators to decide whether the Unicover whole account reinsurances were reinsured by Cigna, in view of their decision that the Cigna reinsurances had been lawfully avoided, is not in my view good reason for disregarding their findings on the point. It was a point which had been raised before them, and they decided it after they had heard all relevant evidence. They had been invited in Mr Kendrick's closing submissions to consider the possibility that the Cigna reinsurances did not cover the Unicover whole account reinsurances. They considered the point, but took a different view.

96. As a matter of fact, therefore, on the Cigna arbitrators' findings Sun/Phoenix would have succeeded in their claim for indemnity in respect of the Unicover whole account reinsurances but for Cigna's successful avoidance. If, for the sake of argument Sun/Phoenix had successfully appealed against the finding on the issue of avoidance, the finding that the Cigna reinsurances covered the Unicover whole account reinsurances would have entitled them to indemnity from Cigna, unless the Cigna arbitrators' finding on that issue had been successfully appealed by Cigna. That being the position between Sun/Phoenix and Cigna as determined by the Cigna arbitrators, it follows in my view that Lincoln was entitled to succeed in its defence based on its net retained lines clause.

97. The result is not unfair. Consider the position of Sun/Phoenix. They had the opportunity of putting their case on the scope of the Cigna cover fully and fairly before the Cigna arbitrators and there can be no suggestion that the Cigna arbitrators' decision was in any way perverse. (Sun/Phoenix may think it hard that the net retained lines clause should apply where the Cigna reinsurance was avoided ab initio, but that is a separate matter on which there is no appeal from the Lincoln arbitrators' award.) Consider on the other hand the position of Lincoln, if it had to prove the scope of the Cigna reinsurance without reference to the Cigna award. Sun/Phoenix had the advantage of first hand knowledge of all that had happened in the first arbitration. If Sun/Phoenix proposed (as they did) to try to show by reference to Mr Minter's evidence that it had been agreed at the meeting with Mr Butler on 28 August 1998 that the Cigna reinsurances should exclude the Unicover whole account reinsurances, the only contradictory evidence which Lincoln could (in theory at least) have placed before the Lincoln arbitrators about that meeting would have been the evidence of Mr Butler, who had been Sun/Phoenix's key witness in the Cigna arbitration (and whose evidence in that arbitration was that there was no misrepresentation or relevant non-disclosure). So if Mr Butler had been available to and called by Lincoln in the Lincoln arbitration, the result would have been in substance a rehearing of the central question in the Cigna arbitration (what happened at the meeting on 28 August 1998), in circumstances in which Lincoln would have faced procedural disadvantages (from having to rely, in effect, second hand on the previous evidence of Sun/Phoenix in the first arbitration in which it was not involved).

The second ground of appeal

98. At the hearing this point was advanced very much as a subsidiary argument. In my view it is ill founded. It was argued by Mr Hunter that the Lincoln arbitrators' findings offended against the principle that a contract of insurance placed by a slip in the London market cannot be made partly by word of mouth and partly in the slip. He relied in support of his argument on the judgment of Hobhouse J in the ***Zephyr*** [1984] 1 Lloyd's Rep 58, 69. The argument overstates what Hobhouse J said. He said that it is conceptually possible to make a contract which is partly oral and partly written, but that is not the practice of the market. In the present case the Cigna arbitrators were, as I have remarked, severely critical of the failure of Mr Minter and Mr Butler to follow market practice. If I were wrong on the first ground of appeal, I would see no ground for holding that the conclusions reached by the Lincoln arbitrators about the coverage provided by the Cigna reinsurance were not open to them in law.

Serious irregularity

99. I have referred in paragraph 35 to skirmishing about disclosed materials from the Cigna arbitration. It is unnecessary to go into the details except to say that on 5 March 2003 the Lincoln arbitrators ordered that Sun/Phoenix should disclose redacted copies of statements and transcripts of evidence in the Cigna arbitration of various witnesses including Mr Minter. The redactions were to be in respect of issues in the Cigna arbitration which were not issues in the Lincoln arbitration. No complaint is made about that order.

100. On 4 April 2003, shortly before Mr Minter was due to give evidence, Lincoln made an application for further disclosure on the basis that it believed that Sun/Phoenix had not properly complied with the previous order in the redactions which had been made.

101. The arbitrators heard from Mr Kendrick, who gave them his personal assurance that there had been proper compliance with the previous order. The arbitrators accepted his assurance and declined to make any further order. The complaint made against the tribunal is that this was a serious irregularity within the meaning of section 68.

102. I do not accept that this involved any irregularity, let alone serious irregularity. In the conduct of arbitration and litigation, arbitrators and judges habitually trust what they are told on procedural matters by the parties' legal representatives. The arbitrators were fully entitled to accept the assurance given to them by Mr Kendrick on the matter. I should add that Mr Hunter did not question the good faith of Mr Kendrick, but he suggested that there may well have been something in the redacted passages which Lincoln would have regarded as relevant to the issues in the Lincoln arbitration, although Mr Kendrick would have had no reason to appreciate this. If that argument is taken to its logical conclusion, the arbitrators should have put no limit on the disclosure order made on 5 March 2003; but they did, and rightly no objection is made that they did so. Just as the arbitrators were entitled to trust the Sun/Phoenix's lawyers to make the redactions properly, so they were entitled to trust Mr Kendrick's assurance that they had been properly made.

103. The arguments about disclosure of documents from the Cigna arbitration appear to have generated a good deal of heat, and I have some sympathy with Lincoln's anxiety to secure the fullest disclosure when it found itself facing a case opposite to that which Sun/Phoenix had pursued in the previous arbitration; but on cool reflection the allegation of serious irregularity on the part of the Lincoln arbitrators was not justified and should not have been made.

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