REINSURANCE LAW UPDATE

From the 10th Annual Update

by Ian Hunter Q.C.

The task of reducing my speech at the Conference to publishable proportions means that inevitably this update will appear incomplete. For that I apologise in advance. I have thought it sensible to concentrate on what I regard as the most important recent cases but obviously views as to what is important are liable to differ.

Plea of non-disclosure that the reinsured's agent is defrauding the reinsured

This was the subject of consideration by the Court of Appeal in a judgment given on 31 July 1995 in the case of *The PWC Syndicates v. The PCW Reinsurers*. The claimants were members of a number of Lloyd's syndicates whose underwriting was managed over the relevant period by a PCW company. Reinsurance was placed with 24 reinsurance companies and a large number of other Lloyd's syndicates. Reinsurers sought to avoid cover on grounds of non-disclosure. The non-disclosure on which they relied was the fact that a number of individuals at the PCW company had over a number of years been misappropriating premiums intended for the benefit of the reinsured and diverting them for their own benefit. It was contended that this was information that reinsurers were entitled to receive on the basis, not that it would have had any direct effect on the incidence of the risks which they were invited to underwrite, but that it was relevant to the moral hazard. Similar issues arise in two actions currently before the Commercial Court, namely, that between *Deutsche Ruckversicherung AG v. Walbrook Insurance Company Limited* and the *Group Josi case*.

The Court of Appeal concluded that no relevant non-disclosure was involved. Staughton L.J. based his conclusion on the ordinary meaning of section 18 of the Marine Insurance Act, 1906 (which was agreed to represent the common law, this not being a marine case) where that section provides that:

> "The assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him".

The learned judge concluded that it was impossible to say that the dishonesty of representatives of the PWC company ought in the ordinary course of business to have been known to the PCW Insurers, i.e the Names on the PCW syndicates. Such

conclusion is entirely consistent with the general law which holds that while, as a general rule, a principal is affected by notice received by his agent, an exception to that rule applies if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud. Put in simple terms, if your agent is defrauding you it is highly unlikely that he will tell you what he is doing and it would be an affront to commonsense to attribute to you the agent's own knowledge of his own fraudulent activities intended to your disadvantage.

Any one claim/any one event

I have always been intrigued how reported cases tend to come in clusters. Many years go by with no reported case in a particular field and then suddenly there are a number of them. Such is the case this year with attempts, in one case, by primary insurers and excess reinsurers and, in the other two cases, by insurers and reinsurers to argue as to the proper application of clauses which seek to aggregate a series of losses arising from a single causative factor and to treat them as a single loss for the purposes of recovery under the contract of insurance or reinsurance. I propose to deal with them in chronological order.

Lo and Lo v. Worldwide Marine

On 5 January 1995 the Hong Kong Court of Appeal gave judgment in the case of *Lo and Lo v The Worldwide Marine and Fire Insurance Co Ltd* Civil Appeal No 53 of 1994 and No 185 of 1994. Lo and Lo were a local firm of solicitors who had the benefit of professional indemnity cover issued pursuant to the relevant professional rules of the Law Society of Hong Kong. I acted for primary insurers who provided cover up to $5,000,000 in two layers. The first layer was up to $1,000,000 with a $200,000 deductible on any one claim. The second layer was an additional $4,000,000 on any one claim. The firm also had excess cover in two layers. The first layer was up to $25,000,000 on any one claim, the second layer being up to $45,000,000 on any one claim. The dispute was between primary and excess insurers.

Claims arose as a result of the defalcations of an employee in the firm's probate department who over a period of three years stole money and shares belonging to two clients of the firm, known respectively as the Tsang Estate and the Tso Estate. He stole over HK$11,000,000 from the Tsang Estate and nearly HK$4,600,000 from the Tso Estate. In relation to both estates each identifiable defalcation represented a total

loss of less than $5,000,000. The argument for primary insurers was that there were just two claims, one in respect of each estate. On the other hand excess insurers contended that there were as many claims as there were defalcations and for this purpose each defalcation committed on a separate occasion constituted a claim. Calculations differed as to how many claims this represented but it ran well into double figures.

Clause 3(a) of the Insuring Clauses provided that the "Insurers shall indemnify the insured against all loss to the Insured from any claim(s) first made against the Insured during the Period of Insurance in respect of any description of civil liability whatsoever incurred in connection with the Practice". Then clause 3 (e) provided as follows:-

"(e) For the purposes hereof all claims against all or any of the Insured under this Certificate and/or under any other Certificate(s) issued under the Master Policies arising from the same act or omission shall be treated as one claim hereunder irrespective of the number of Insureds claiming indemnity under such Certificate(s) and/or Master Policy (ies)."

The Court concluded that there were just two claims, one in respect of each estate. The consequence was that excess insurers were held liable in respect of each estate for the total loss suffered by Lo & Lo in excess of $5,000,000.

The conclusion of the Court was that the question that it had to decide was largely a question of fact, namely, that of applying the words of the policy to the actual circumstances of the instant case. As explained by Godfrey J.A. :-

> *"In my judgment, the question which has to be decided here is not really a question of construction at all but a question of fact, or perhaps more accurately, a question of characterisation. Looking at the substance of the matter, was there here one claim against the insured by the Tsang Estate and one by the Tso Estate, or was there in each case a number of claims represented by each separately identifiable defalcation? The point does not admit of much elaboration, and the question in my judgment admits of only one answer. There was in each case, one claim and one claim only brought about' by [the employee's] dishonesty."*

Likewise Mortimer J.A. was of the view that whether the firm had a single claim in respect of each estate or as many claims as there were defalcations was in the ultimate analysis "a matter of impression."

Excess insurers have appealed to the Privy Council. It will be interesting to see whether this analysis is upheld in that forum.

Caudle v. Sharpe

On 11 August 1995 the Court of Appeal gave judgment in *Caudle v Sharpe* which is an appeal from Clarke J. The case involved the infamous "run - off" reinsurance contracts written between 1980 and 1982 by the Outhwaite Syndicate. Those run-off contracts resulted in enormous losses to the Outhwaite Syndicate as a result of which certain of the Outhwaite Names brought proceedings against Mr Outhwaite's company, R.H.M. Outhwaite Limited, as the Managing Agent of the Syndicate and against a number of Members' Agents who were responsible for placing them with the Outhwaite Syndicate. That action proceeded to trial but a settlement was reached during the course of the hearing under which a very large sum of money was to be paid by the defendants, albeit without admission of liability. One of the respondents to the appeal, Mr Sharpe, was the professional indemnity insurer of a number of defendants in the Outhwaite litigation. He was claimant in an arbitration on his own behalf and on behalf of certain members of the reinsured syndicate under which he sought to recover under certain contracts of reinsurance. His claim only lay if he could establish that the losses incurred by the original insured under the 32 run-off contracts could be aggregated under the contract definition of "each and every loss". The issue was referred to arbitration.

In their Interim Award the arbitrators concluded that the reinsured were "entitled to recover from the Reinsurers as a single loss arising out of one event their due proportions of the entire loss [they have] incurred arising out of the 'Outhwaite Settlement'." Each of the reinsurance contracts contained the following definition of "each and every loss":-

> "DEFINITION OF 'EACH AND EVERY LOSS'
> For the purpose of this reinsurance the term 'each and every loss' shall be understood to mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses and/or occurrences and/or catastrophes and/or disasters and/or calamities arising out of one event."

The arbitrators concluded that Mr Outhwaite was negligent in writing the original contracts by reason of his "failure to conduct the necessary research and investigation into the basic underlying problem of asbestosis and that such act of negligence was the occurrence giving rise to a series of losses under the policies". Accordingly, they concluded that Mr Outhwaite's failure constituted "one event"

within the "Definition of 'Each and Every Loss Clause'". The key passages in the reasoning of Clarke J. are as follows:-

> *"Once it is accepted that in the context of errors and omissions reinsurance an event can be either an act or omission there is, in my judgment, no difficulty in holding that it can be a state of affairs. Thus it seems to me that Mr Outhwaite's continuing failure to take proper steps throughout the period he wrote the 32 run off contracts was one event from which the negligent writing of each contract flowed."*
>
> *"... each and every loss was made up of a series of occurrences, namely the writing of 32 contracts, which arose out of one event, namely one continuing failure of Mr Outhwaite."*

The Court of Appeal were unanimous in rejecting this reasoning. The leading judgment was given by Evans L.J. who pointed out that the "Definition of 'Each and Every loss'" clause is in a form which is to be found in almost all contracts of the same general nature throughout the London reinsurance market. The concept of "one event" is one which the market has become "conditioned to regard ... as being one essentially involving physical loss or damage to property" but that is not to say that the clause cannot operate in the context of reinsurance of a liability policy. Evans L.J. was at pains to emphasise that the losses or series of losses envisaged by the clause must have "arisen out of" one event. He pointed out that the words "arisen out of" in this context "straightaway implies some causative element and some degree of remoteness, or lack of remoteness, which must be established in the circumstances of the particular case". Continuing, he observed:-

> *"In my judgment, the three requirements of a relevant event are that there was a common factor which can properly be described as an event, which satisfied the test of causation and which was not too remote for the purposes of the clause."*

The learned judge then turned to apply the three limb test, as thus formulated, to the facts of the case. The first question which he posed was whether Mr Outhwaite's "failure to conduct the necessary research and investigation into the basic underlying problem of asbestosis" could properly be described as an "event" within the meaning of the clause. As he perceptively pointed out, if it could be so described, it was a happening without beginning and without end. But he

concluded that, albeit Mr Outhwaite's failure was an omission on his part which was *capable* of constituting negligence, it did not in fact become a negligent omission until Mr Outhwaite underwrote a relevant policy of insurance. The essence of his reasoning was that Mr Outhwaite's general failure to inform himself before entering into the first of the insurance contracts was not in itself an "event" within the meaning of that word and that no relevant event occurred unless and until Mr Outhwaite entered into a contract which made his state of knowledge relevant.

Axa Reinsurance plc v. Field

This case came before Phillips J. and judgment was given on 27 July 1995. Like the *Caudle* case it concerned professional indemnity cover invoked in connection with another of the current insurance soap operas, namely, the Gooda Walker affair. In *Deeny v. Gooda Walker Ltd* [1994] CLC 1224 Phillips J, held that the manner in which underwriters of certain syndicates managed by two Gooda Walker companies had conducted excess of loss underwriting between 1988 and 1990 had rendered those companies, and a number of Members Agents, liable for breach of duty to the Names. Many of those agents had professional indemnity cover. The present case involved a claim by E&O underwriters to recover under their reinsurance arrangements.

The primary E&O cover had an automatic reinstatement clause in the following terms:-

> "Notwithstanding anything contained in the foregoing paragraph it is agreed that the insurers' total liability under this policy in respect of any claim or claims arising from one originating cause, or series of events or occurrences attributable to one originating cause, shall in no event exceed the sum stated in item 3(a) of the schedule."

In a case called *Cox v. Bankside Members Agency Ltd* Phillips J. had been asked by E&O underwriters to determine whether the liability established in *Deeny v. Gooda Walker* arose from more than one originating cause and, if so, how many. His answer was three.

Lloyds syndicate number 204, represented by the defendant Mr Field, had taken out excess of loss reinsurance cover for 1991 with the Plaintiff, Axa. The relevant provisions of the reinsurance policy were as follows:-

"INSURING CLAUSE"
This reinsurance is only to pay the excess of Ultimate Nett Loss to the Reinsured of £500,000 or US or C$1,000,000 each and every loss with a limit of liability to the Reinsurers of £500,000 or US or C$1,000,000 each and every loss.

DEFINITION OF "EACH AND EVERY LOSS"
[This clause is identical to that similarly described in the *Caudle* case. Phillips J. referred to it in his judgment as the "One Event Clause".]

LOSS CLAUSE
All loss settlements made by the Reinsured shall be unconditionally binding upon Reinsurers provided such settlements are within the conditions of the original policies and/or contracts and within the terms of this reinsurance, including compromise settlements, and the amounts falling to the share of the Reinsurers shall be payable by them upon reasonable evidence of the amount paid being given by the Reinsured".

Having obtained the ruling of the learned judge in *Cox v. Bankside* the syndicate paid claims and acknowledged a liability to Members' Agents on the basis that liability flowed from three originating causes. The Syndicate then called upon Axa to meet claims under the reinsurance policy on a similar basis. The Syndicate contended that the expression "series of events or occurrences attributable to *one originating cause*" in the E&O cover has the same meaning as "series of ... occurrences ... arising out of *one event*" in the reinsurance cover and that the effects of the follow settlements clause (i.e. the third of the three clauses just set out) precluded Axa from reopening the issue of one event or three.

The principal question which Phillips J. had to decide was whether the Originating Cause Clause in the primary cover was to be given a similar meaning to the One Event Clause in the reinsurance policy. He considered various authorities including the decision of Donaldson J. (as he then was) in *Forney v. Dominion Insurance Co Ltd* [1969] 1 WLR 928, *Caudle v. Sharp* [1995] CLC 642 in the Court of Appeal and the recent Court of Appeal decision in *Hill v. Mercantile & General Reinsurance Company* [1995] 2 Lloyds Rep. 60 on the effect and ambit of the "follow settlements" clause. Having then analysed the dictionary meaning of the words "event" and "cause" he emphasised that the meaning of these words is largely governed by the semantic context in which they arise:-

"Each word describes a particular attribute of a phenomenon. Each attribute is different. A phenomenon may have both attributes - it may be both an event and a cause, but this will not necessarily be the case. Neither word tells one much about the phenomenon. One can identify the phenomenon described as a 'cause' or an 'event' by the semantic context in which the word is used."

Counsel for Axa was concerned to make good the proposition that the Originating Cause provision and the One Event clause could not be equated. He submitted in particular that the Originating Cause clause indicated a longer chain of causation than that which links the event and the losses in the One Event clause. The answer provided by the learned judge was as follows:-

"I do not accept this submission. Each clause requires the application of a test of causation which is not expressly defined. In my judgment the requirement in the One Event Clause that the losses to be aggregated must arise out of one event could naturally be reworded so as to require the event to be the originating cause of the losses. In short I can envisage very many circumstances in which the 'cause' in the primary policy will prove to be precisely the same phenomenon as the 'event' in the reinsurance contracts."

Having concluded that there was no substantial difference between the two clauses it followed from that conclusion and the operation of the "follow settlements" clause that, as far as Axa was concerned, the decision in *Cox v. Bankside* had definitively determined both the number of originating causes and the number of relevant events for the purposes of the primary E&O insurance and the reinsurance. With the primary policy and the reinsurance effectively back to back, there was no obstacle to the operation of the "follow settlements" clause.

On 14 September 1995 judgment was given in an expedited appeal from the decision of Phillips J. The Court of Appeal dismissed the appeal. Staughton L.J., who gave the leading judgment, began with the "follow settlements" clause. The first question which he posed in this connection was whether reinsurers were bound not only by the result in *Cox v. Bankside* but also by decisions which the court reached on the way to that result. The answer which he gave to that question was that on the facts of the particular case before the Court reinsurers were so bound. His observations on the effect of the "follow settlements" clause are instructive:-

"Nevertheless good sense requires that the Reinsurers in this case be held bound by the decision of Phillips J. as to the meaning of the liability insurance

contracts. One can test it by supposing that the wording in the reinsurance contract as to a limit, instead of being different from that in the liability insurance contracts, had been precisely the same. In those circumstances it must have been intended that the Reinsurers would follow the conclusion reached as between the Liability Insurers and the Members' Agents. The huge capacity of the Lloyd's market to spawn litigation has become all too obvious in recent times. Where there is an attempt to restrict it, as in the follow settlements clause, it should receive full faith and credit from the courts. I would not for my part join in the accolade awarded by the court in ***Hill's*** *case to the insurance industry, in speaking of a carefully constructed system which Phillips J. in this case said was designed to avoid confusion. But I agree that there is here an attempt to avoid the proliferation of disputes, which should be given a wide rather than narrow construction."*

Having concluded that reinsurers were thus tied to the conclusion in the *Cox case* that all the claims were attributable to three originating causes, the second question which Staughton L.J. posed for himself was whether the meaning of the clause in the reinsurance contract was the same as that in the liability insurance contracts. Having concluded that it was and that there was no relevant difference between the two clauses, he concluded that reinsurers were bound to follow the decision in *Cox's case* and that the appeal failed. In a judgment to like effect Simon Brown L.J. observed that the judgment of Hirst L.J. in *Hill's case* supported the view not only that the "follow settlements" clause should generally be given a wide construction but also, with similar considerations in mind, that limiting terms in reinsurance policies should not readily be found to operate more stringently than those of the underlying policy.

Observations

As I indicated at the outset there has been this year a spate of cases concerned with the meaning of "one event" clauses where the Courts have been concerned to determine whether, and in what circumstances, under the terms of such clauses a series of occurrences which have certain features in common can properly be aggregated. No doubt many of us in this room today can think of a number of our own current cases where this is an important issue. I am also conscious of the fact that the decision in *Caudle* has given rise to very considerable market interest.

My own experience is that these cases are very difficult to determine as a matter of principle for a number of reasons. First of all, the wording of these clauses tends to

be in very general terms with the consequence that the result in any particular case is largely dominated by the Court's evaluation or characterisation of the particular factual situation before it. It is therefore not easy to derive from the conclusion of one case any guiding principles which will be of assistance in the next, always assuming the factual situation in the subsequent case to be different from that in the first. Secondly, in advising generally on the construction of clauses in insurance and reinsurance contracts and how such clauses are likely to be applied to the facts of a particular case one can usually derive very considerable assistance from the presumed intention of the parties as deduced from the clause itself and related provisions in the contract. However, in the case of "one event" clauses there is often very little guidance of this sort to be had. The reason is that, on the facts of one case, it may suit either party to the contract to argue for aggregation while on the facts of another case it may suit their purpose to argue the contrary. A not dissimilar point was well made by Stewart Boyd Q.C. in the *Caudle* case, as summarised in the judgment of Evans L.J.. He submitted that the insuring clauses in that case should be interpreted from a neutral standpoint and not approached on the basis that any particular purpose was sought to be achieved, other than that which the words of the contract themselves define, because, as he put it, there are circumstances where the reinsurer benefits from aggregation because its effect is to exhaust the cover thus leading to reinstatement under the reinstatement clause, just as there are cases such as the present where the reinsured claims the right to aggregate so as to exceed the lower limit of the cover.

I would agree with that submission. My own experience is that it is very often difficult, if not impossible, to ascertain any common intention of the parties which will offer guidance in the interpretation of such clauses. More often each party to the contract argues for an application of the clause in a particular way, the argument being entirely dictated by opportunistic considerations. However, in an area where factual considerations dominate and the terra firma of legal principle is hard to find, the judgment of Evans L.J. gives important guidance particularly on the obvious requirement of establishing a common factor which can properly be described as an event and also on the need to establish a causative link between the loss and the relevant event (with the added requirement that such loss not be too remote).

"Actually paid"

Here I wish to discuss the recent case of *Charter Re v. Fagan*, a decision of the Court of Appeal on the question whether reinsurers' liability to indemnify insurers only

arises when actual payment has been made. One of the regularly re-visited chestnuts in reinsurance law arises when the reinsured becomes insolvent. Where the reinsured has excess of loss reinsurance, the policy will incorporate the Ultimate Nett Loss Clause. The terms of that clause may differ from one contract to another but a typical clause is that which was under consideration in *Charter Reinsurance Company Limited v. Fagan.* The first paragraph of the Ultimate Nett Loss Clause in that case was in the following terms:

> *"The term 'Nett Loss' shall mean the sum actually paid by the reinsured in settlement of losses or liability after making deductions for all recoveries, all salvages and all claims upon other Reinsurances whether collected or not and shall include all adjustment expenses arising from the settlement of claims other than the salaries of employees and the office expenses of the Reinsured".*

The question that arose is whether it is a condition precedent to the reinsured's right to recover under the reinsurance policy that it should have paid the claims of its own assured.

It goes without saying that each case in which this, or a similar point, arises ultimately turns upon the proper construction of the particular words of the contract under consideration. Sometimes the Ultimate Nett Loss Clause provides that "Nett Loss" under the contract means "the sum paid by the reassured in settlement of loss, damage, liability or expense". In other words, no reference is made to *actually* paid.

The point has come up increasingly in recent years, particularly in arbitration. Until the recent decision of Mance J. and then the Court of Appeal there was little direct authority on the point. There are dicta of Hirst J. at first instance in *Home & Overseas Insurance Company Limited v. Mentor Insurance (UK) Limited* [1989] 1 Lloyd's Rep 47 to the effect that he would only have been prepared to uphold reinsurers' contention that payment was a precondition to their liability if the words of the agreement as a whole plainly excluded any other meaning as to which, on the facts of that particular case, he was not persuaded. There is also earlier authority such as In *re Eddystone Marine Insurance Company ex parte Western Insurance Company* [1892] 2 Ch. 423, and in *re Law Guarantee Trust & Accident Society Limited* [1914] 2 Ch. 617. On the wording in those particular cases, the contention that reinsurers' duty was conditional on satisfaction by the reinsured of incoming insurance claims was rejected.

The case is of the greatest market importance. Time does not permit an elaboration of the regulatory difficulties to which any other conclusion would give rise. Those interested in the subject may wish to refer to the letter dated 9 December 1994 sent by the DTI to all insurance companies authorised to carry on non-life business in which the Department seeks information as to the effect that exclusion of reinsurance recoveries, even in the event of the reinsured's insolvency, would have on the company's excess assets for the purposes of satisfying the DTI's requirement as to a minimum level of assets in excess of liabilities.

The market significance of the issue can perhaps be measured by the expedition which the case is receiving as it proceeds through the court hierarchy. Mance J. at first instance gave his decision on 28 June 1995. The Court of Appeal handed down their judgments on 25 October 1995. The case is going to the House of Lords and the hearing is fixed for February 1996. In all probability the decision of the House of Lords will be known before this article is read.

I therefore do not propose to dilate at length on the varying views of the Court of Appeal because the definitive opinion of the House of Lords will soon be available. Suffice it to say that so far three judges, Mance J and Simon Brown and Nourse L.J. have held that actual disbursement by the reinsured is not a condition precedent to his right to recover from reinsurers. Staughton L.J. has expressed the contrary opinion.

But when one examines the judgments of the Court of Appeal one finds that three distinct opinions were expressed, albeit by a margin of 2-1 the appeal was dismissed. If ever there were a case where a binding determination by the highest court is required, this is it. Staughton L.J. in the minority concluded that the wording of the clause was perfectly clear and payment by the original insurer in fact or in reality is a conditional precedent to its right to recover from reinsurers. In what is to my mind a compelling judgment Simon Brown L.J. concludes that the construction placed on the contract by Staughton L.J. represents a powerful argument and that the construction adumbrated by the reinsured is a "difficult construction". He nevertheless concluded that this difficult construction should prevail because the contrary construction (i.e. the Staughton view) would lead to plainly unreasonable results. That result was summarised by Simon Brown L.J. as follows:

> *"In reality, the only effect of introducing a condition of prior payment would be that sometimes it could not be satisfied in which event the entire object of the reinsurance contract would be thwarted and the reinsurers would receive a*

pure windfall gain. That cannot have been the mutual intention of the parties. I conclude therefore that such a construction of the clause is wholly unreasonable and that it must yield to business commonsense".

Nourse L.J. agreed in the result with Simon Brown L.J. but his process of reasoning was very different. He took the view, like Staughton L.J., that the construction of the material provisions of the contract was plain. However the plain construction advocated by Staughton L.J. is diametrically opposed to that preferred by Nourse L.J. The House of Lords will, I trust, bring much needed guidance.

The right to inspect documents and confidentiality

Space precludes a detailed consideration of two decisions of Colman J. during the last 12 months which are of some potential importance in the reinsurance field. The first is *Yasuda Fire & Marine Insurance Company of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] 4 Re L R 217. The plaintiff, Yasuda, participated in a pool operated by the defendants. Following termination of the underwriting agency agreement it was argued by the defendants that the agency agreement having been terminated for repudiatory breach, they were no longer under any obligation to permit inspection of documents or computer data. The contention was rejected by Colman J. who held that the plaintiffs were entitled to continuing access to the defendants' records notwithstanding the termination of the agreement.

Questions of confidentiality also arose in a case which is reported under the name *Insurance Company v Lloyds Syndicate* [1994] 1 Lloyd's Rep. 272. The case concerned the circumstances in which documents arising in the context of an arbitration between a reinsured and the lead reinsurer, and in particular the resulting award in that arbitration, can be shown to the following market without breach of the implied obligation of confidentiality. Colman J. concluded that the scope of qualifications to the duty of confidence falls to be determined by reference to considerations of business efficacy and that the scope of the qualifications does not extend to circumstances where it is merely helpful, as distinct from being necessary, to the protection of those rights to make use of prima face confidential material. Sed quaere in the very special circumstances of arbitration awards made against the lead insurer where it may reasonably be assumed that the award is of direct relevance to the following market.

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