Neutral Citation Number: [2007] EWCA Civ 710

Case No: A3/2006/1071

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE LANGLEY
1999 Folio 1248, 2000 Folio 40, 2000 Folio 268 & 2000 Folio 1120

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th July 2007

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE MAY
and
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE

- -

Between :

HIH CASUALTY & GENERAL INSURANCE LIMITED	**Appellant**
- and -	
JLT RISK SOLUTIONS LIMITED (formerly LLOYD THOMPSON LIMTED)	**Respondent**

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Mr Julian Flaux QC & Mr Simon Picken QC (instructed by **Holman Fenwick & Willan**) for the **Appellant**
Mr Tom Weitzman QC, Mr Jonathan Davies-Jones & Mr Adam Kramer (instructed by **Eversheds**) for the **Respondent**

Hearing dates : 26th, 27th & 28th March 2007

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Judgment

Lord Justice Auld :

Introduction

1. This appeal concerns the post-placement duty of an insurance broker, on learning of a potential coverage risk to an insurer with which it has placed insurance and on whose behalf it has placed "back-to-back" reinsurance cover, that is, on the same terms. It arises in circumstances in which the insurer has paid claims of the insured without indemnity from the reinsurers, and seeks to recover from the broker damages for the loss of availability of the indemnity through failure to alert it timeously to that potential risk.

2. The transactions, though in part structured as insurance and reinsurance, were in reality a form of joint venture between a number of commercial bodies for financing production and marketing of films. They were known in the market as film finance insurance (or, more specifically "Pecuniary Loss Indemnity Policies" ("PLIPS")). Typically, as here, the insurer "fronted" for reinsurers in providing what was intended to be a form of guarantee to potential investors against the risk of failure of the film investments so covered. Such a scheme was a new "high risk, high premium insurance product" introduced to the market in the mid 1990s for financing film production. It was so described by Lord Hoffmann in the following passage in his speech in *HIH Casualty & General Insurance v Chase Manhattan Bank* [2003] 2 Lloyds Rep 61, at 70:

> "The risk insured against is that a party who has advanced money for the production of a film against the security of a defined share of future revenue will fail to recoup his advance within a specified period. It is high risk, first, because the commercial success of a film is notoriously difficult to predict and, secondly, because a good deal will turn upon how the lender's revenue entitlement is defined. If all expenses have first to be paid, the lender will be subject to unpredictable cost overruns, fees, commissions, royalties, overriding payments to director and stars and similar skimming may also deplete the lender's share of gross revenue. And in any industry where possession of the money tends to be nine tenths of the law, much will depend upon who banks the money and keeps the books. It is a form of insurance in which the players need to have their wits about them."

3. The insurance period of film finance insurance usually extended over a number of years, in order to allow the insured film or films to be produced and marketed. It was not, therefore, until the late 1990s that claims were made. By late 1999 film finance insurance business was making heavy losses, and by 2000 the market for it had largely disappeared.

4. The schemes in question were to support the provision of finance by investors in the latter half of 1997 in the production of 3 lots, "slates", of low budget films identified as H1, H2 and H3 ("H" standing for "Hollywood"), supported, in the case of each slate, by insurance supported by back-to-back reinsurance against it not generating sufficient revenue to repay the finance.

5. There were five main entities involved:

   i) Flashpoint Ltd ("Flashpoint"), a Jersey company engaged in the structuring and financing of the production and marketing of slates of low budget films;

   ii) Law Debenture Trust Corporation (Channel Islands) Limited ("LDT"), a trust company acting on behalf of investors engaged in the business of financing production of low budget films;

   iii) JLT Risk Solutions Limited ("JLT"), the defendant/respondent, insurance broker, which, on behalf of LDT, placed the insurance and, on behalf of the insurer, placed the reinsurance;

   iv) HIH Casualty & General Insurance Limited ("HIH") the claimant/appellant, the sole insurer and reinsured, with which JLT placed the insurance and on whose behalf it placed the reinsurance; and

   v) A number of reinsurers, prominent among which were and New Hampshire Insurance Co ("New Hampshire"), Axa Reinsurance SA ("Axa") and Independent Insurance Co ("Independent"), with which JLT placed reinsurance on behalf of HIH ("the Reinsurers").

6. In August 1997 JLT placed with HIH a slip policy in respect of six films, comprising H1, and in December 1997 slip policies in respect of ten films comprising H2 and five films comprising H3. Shortly after the placement of each slip policy, a wording was agreed containing a waiver of rights clause, clause 8, by which HIH agreed "to the fullest extent permissible by applicable law" not to seek or avoid or rescind the insurance:

> "or reject any claim hereunder or be entitled to seek any remedy or redress on the grounds of invalidity or unenforceability of any of its arrangements with Flashpoint Ltd or any other person … or non-disclosure or misrepresentation by any person or any other similar grounds. The Insurer irrevocably agrees not to assert and waives any and all defences and rights of set-off and/or counterclaim … which it may have against the Assured or which may be available so as to deny payment of any amount due hereunder in accordance with the express terms thereof."

7. HIH's reinsurance of the risks of the slips, placed on its behalf by JLT with the Reinsurers, was as to 80% in the cases of H1 and H2, and 87.5% in the case of H3. Each of the slip policies contained the following condition:

> "This Reinsurance is subject to all terms, clauses and conditions as original and to follow that placement in all respects."

Mr Steven John Mitchell, the underwriter at HIH who underwrote this insurance and, through JLT, placed the reinsurance, described the arrangements as "co-insurance masquerading as reinsurance".

8. In addition, HIH and Flashpoint entered into side agreements in respect of the three slates under which HIH appointed Flashpoint its risk manager, obliging it to provide it with details of the use of the invested funds, to procure the production of the films within budget and to schedule, to apply certain restrictions on disbursement of revenues received from their sale, to exploit the films commercially, to be responsible for collecting revenues, to inform HIH about sales "to enable HIH to evaluate its potential exposure" and to provide "status reports" on the films and revenues. In due course, as will appear, Flashpoint provided those reports to JLT from time to time in the form of "risk management reports", and JLT distributed them to LDT, HIH and the lead Reinsurers.

9. The purpose and scheme of the finance insurance were, as I have said, to meet any shortfall on projected revenue from the making and marketing of the films. It is common ground that, in order to secure the necessary finance for the businesses, the intention and understanding of all parties was that the cover would be as close as possible to that of a guarantee, with no let-out for HIH or the Reinsurers – hence the waiver of rights clause and the side agreements between HIH and Flashpoint.

10. As I have indicated, the films had first to be made and marketed and revenues collected before it would be known whether there was a shortfall in projected revenues in respect of which LDT might have occasion to claim under one or other of the policies. This took about two years, in the course of which HIH learned, from a series of risk management reports of Flashpoint distributed through JLT in late 1998 and early 1999, that less than the projected number in each slate of films were being produced. For H1, the figure was five instead of six; for H2, six instead of ten; and for H3, four instead of five.

11. The reductions were indicated in the risk management reports by a list of the films produced or still in production, with brief comments on their prospects, and, as time wore on, increasingly disappointing accounts of progress and/or returns earned. In one instance, in relation to H1, the reports indicated that the budgeted sum for the original six films in the slate had been expended on the reduced figure of five. In another, in relation to H3, there was reference to the securing of a prominent actor to star in one of the originally projected five films, suggesting that it would be a better box-office draw as an offset to the reduction of the slate to four films. In another, as to H2, the 5th report, dated January/February 1999, the reduction from ten to eight was said to have resulted from under-estimation of production costs.

12. The critical issues, as the case turned out, were the extent to which JLT and HIH should each have appreciated at the time that those changes in placement amounted to a potential risk to the insurance coverage and hence also to the reinsurance coverage, whether JLT had a duty to alert HIH to that risk and, if so, whether JLT was in breach of it.

13. In late 1999 and early 2000 it became clear that each of the three slates was not successful and that each of their returns fell substantially short of the projected revenues.

14. In July 1999 LDT made a claim in the case of H1 in respect of which, in August 1999, HIH paid it US$15,611,008; in November 1999 LDT made a claim in the case of H2, in respect of which HIH paid it US$14,679,473; and in May 2000 LDT made a claim

in the case of H3, in respect of which, in June 2000, HIH paid it US$25,092,303 - a total of US$55,382,784.

15. HIH then sought against the Reinsurers an indemnity to the extent of the reinsurance in respect of its payment of the H1 and H2 claims. Some of the Reinsurers with small lines of cover paid. Others, New Hampshire, Axa and Independent, did not, and HIH issued proceedings against them. The Reinsurers relied on a number of defences, but one in particular came before Steel J for determination viz whether the insurance and reinsurance contracts contained warranties as to the number of films to be made and, if so, whether the insured and reinsured could rely on the waiver of rights clause to negate any defence of breach of warranty. If the waiver of rights clause could not be relied on then, by reason of the reduction in the number of films, the breach of warranty would have provided HIH with a complete defence of LDT's claims and would provide the same defence to the reinsurers in those proceedings. Steel J and the Court of Appeal upholding his judgment held that there were such warranties and that the waiver of rights clause did not provide HIH with an answer to the Reinsurers' reliance on its breach of them; see *HIH v New Hampshire Insurance Co & Ors* [2001] 1 Lloyd's Reports 378, and [2001] 2 Lloyd's Reports 161.

16. In consequence, the Reinsurers sought and obtained summary judgment for the dismissal of HIH's claims in respect of H1 and H2 because of breach of warranties ([2003] LRIR 1), and HIH subsequently abandoned its claim against them in respect of H3.

17. The legal effect of all that, as it turned out, was that HIH had paid the claims of its insured, LDT, in respect of all three slates when the contracts of insurance and reinsurance had been discharged respectively by LDT's and HIH's breach of warranty as to the number of films to be made in each slate. Thus, HIH, as insurer, was held to have been released from liability to pay LDT's claims, and correspondingly disentitled, as reinsured, to recover from the Reinsurers the money, over US$55m, it had unnecessarily paid to LDT.

18. Given that unfortunate turn of legal events from HIH's point of view, in February 2004 it turned its attention in these proceedings to its reinsurance broker, JLT. Its case against JLT, as pleaded at the start of the trial, was for fraud and/or misrepresentation by JLT in the placement of the risk, in addition to post-placement negligence. It abandoned the fraud and misrepresentation allegations early in the trial. The post-placement case in negligence was in respect of its payments to LDT under all three slates for loss of reimbursement from the Reinsurers. The basis of its claim, as developed at trial, was that, if JLT had alerted it to the potential increase in coverage risk for it in such reductions, it would have instructed JLT to seek the Reinsurers' agreement to maintain coverage notwithstanding the reductions or at least to take their views with a view to resolving any uncertainty on the matter.

19. JLT's case was that:

    1) it owed HIH no duty to alert it to a potential risk to coverage, or
    2) if it did, it did not breach it, or
    3) if it did, the breach did not cause HIH's loss, since it paid LDT when its liability to do so had been discharged by LDT's breaches of warranty and/or, in the case of H1 without having ascertained

whether the non-paying Reinsurers would indemnify it, and, in the case of H2 and H3, when it knew that the non-paying Reinsurers would not indemnify it, and/or

4) HIH was, in any event, contributorily negligent: (i) in failing to appreciate for itself, when it learned of the film reductions, the potential risk to coverage, and (ii) paying LDT's claims without first obtaining the agreement of the Reinsurers to indemnify it in respect of them.

20. On the Judge's unchallenged findings of fact on the evidence before him

> 1) In the case of all three slates, HIH knew, before it paid LDT's claims, of the film reductions and that each was a change from the information provided on placement;
> 2) In the case of H1, HIH paid LDT's claim without first having sought legal advice and without having ascertained whether the Reinsurers accepted the validity of the claims;
> 3) In the case of H2 and H3, HIH paid the claims after having obtained legal advice, the nature of which in the case of H2 it did not disclose or fully disclose in these proceedings, and when it knew that the Reinsurers, on their legal advice, disputed the validity of LDT's claims on the ground that the film reductions amounted to breach of unwaivable warranties in the contracts of insurance and reinsurance.

21. The Judge held that:

> 1) JLT owed HIH, as the reinsured, a continuing post-placement duty to alert it to any potential issues of coverage that could arise from the making of less films than those specified in the placements by JLT of the insurance and the reinsurance of each slate;
> 2) JLT was in breach of that duty; but
> 3) the breach had not caused HIH loss because, although the film reductions raised potential coverage issues to which, if JLT had drawn them to HIH's attention, HIH would have sought the views of the Reinsurers, that would not have made any difference to the Reinsurers' later rejection of liability to indemnify HIH in respect of LDT's claims; and
> 4) if, contrary to his view, the breach had caused HIH loss, HIH would have been contributorily negligent to the extent of 70%, made up as to 20% by its own failure to appreciate the risk to coverage on learning of the film reductions, and, as to 50%, in paying the claims without first securing the agreement of the Reinsurers to indemnify it in respect of them.

22. HIH appeals the Judge's conclusion as to want of causation and/or his contingent finding of 70% contributory negligence. JLT, by a Respondent's Notice, challenges his findings as to duty, breach, part of his findings on causation, and his contingent apportionment of 70% contributory negligence, maintaining that it should have been 100%.

23. For the purpose of the appeal, it is common ground that:

1) HIH was or should have become aware of the film reductions on and from its receipt from JLT of the Flashpoint risk management reports;
2) the reductions potentially increased the risk of loss and reduced the benefits of "cross collateralization" between the fortunes of the films within each slate; and
3) the reductions amounted to changes in the risk by reason of being changes in the placement terms.

The Facts

24. Flashpoint was, as I have said, at all material times engaged in the structuring and financing of the production and marketing by others of slates of low budget films. In the late 1990s it began to support the financing that it sought from investors, against estimates of revenues from the films, by insurance against failure to achieve those estimates – a form of insurance-backed guarantee. To that end Flashpoint identified and vetted suitable films, and sought and obtained financing for them. Once it had accumulated a number of films to make up a slate, it prepared documentation, including information about the number and nature of the films and estimated revenue for each of them, to enable an approach to be made through a financing vehicle – in this instance LDT – to the insurance market to provide the "guarantee" to enable it to secure the finance.

25. LDT, in turn, employed JLT, with the assistance of the documentary information provided by Flashpoint, to place the insurance. JLT did that with Mr Steven John Mitchell, an underwriter at HIH responsible for promoting and underwriting this and other film finance business, and, with his agreement, placed the reinsurance with the Reinsurers. Before formally concluding the transactions, HIH obtained and circulated a "draft" written advice of 29th July 1997 that the waiver of rights clause (see paragraph 6 above) would deny it any let-out in the event of, among other things, breach of warranty or condition by the insured:

> "We are sure that you are aware that by these provisions you are, inter alia, and in effect guaranteeing the financial success of the projects. … A contract of insurance may be void or voidable on four grounds: mistake, misrepresentation, non-disclosure, breach of warranty or condition. We take the view that the …[waiver of rights clause] will effectively prevent insurers from raising such arguments."

26. Once the insurance and reinsurance were placed so as to provide the necessary "guarantee" for investors, and their funds were committed, Flashpoint monitored the progress to and of production of the films and the collection of revenues. From time to time it provided JLT for distribution to LDT, HIH and the Reinsurers, "risk management reports", summarising the progress of the film making and marketing and any revisions in estimated revenues. JLT duly distributed copies to all of them. An important factual issue at the centre of all or most of the issues in the case is whether JLT, through its provision of those reports and otherwise, alerted HIH to the potential implications for its reinsurance cover of the film reductions disclosed in them.

27. It is common ground that Mr Mark Drummond Brady of JLT had responsibility on its behalf for such post-placement duties as it owed to HIH in the monitoring of the

progress towards and production and marketing of the films, including dissemination to HIH and the Reinsurers of the risk management reports. Although he had made a witness statement in support of JLT's case and it had been disclosed to HIH and was before the Judge, JLT did not call him as a witness. JLT did not do so, ostensibly, because, following HIH's abandonment of its case on pre-placement fraud and misrepresentation, it no longer considered his evidence to be of any relevance in the case. JLT called no other evidence as to what passed between it and HIH with respect to the risk management reports.

28. As a result, the only pointer for the Judge as to when JLT, through Mr Drummond Brady, first learned of the film reductions or their significance, if any, to the insurance and reinsurance coverage, was a meeting, referred to by him in his witness statement and averred by JLT in its defence. This was not a meeting between him and anybody at HIH, but a meeting between him and Mr Mitchell, who had originally underwritten the risk on behalf of HIH, but who, by this time, had left its employ. The meeting took place shortly after distribution of the first risk management report in September 1998. Mr Drummond Brady's account of the conversation, as pleaded in JLT's defence, in his witness statement and as put to Mr Mitchell in cross-examination, was that Mr Mitchell had said that he did not regard the reduction in the number of films as material and that he did not think it needed to be raised with the market generally.

29. There was a similar dearth of evidence from HIH about any contacts there might have been between it and JLT about the risk management reports or about its appreciation, or lack of it, at the material time of the significance of film reductions disclosed in them. HIH called only on this issue Mr Mitchell and Mr Peter Thompson, the former Deputy Managing Director of HIH's Australian parent company.

30. Mr Mitchell had left HIH in February 1998, that is, over six months before the first of the risk management reports and the September 1998 meeting pleaded by JLT and referred to by Mr Drummond Brady in his witness statement. Mr Mitchell's evidence was that, although he had seen Mr Drummond Brady sometime in 1998, he had no recollection of the meeting or of any discussion about a risk management report. He added that, if there had been such a discussion in which he had been informed of the reductions, he would have been relaxed about them. But he said that he would not have said anything to suggest that he regarded the film reductions as immaterial; in particular, he would not have said that he did not think the matter should be raised with the market generally. However, he would have regarded the reductions as an important change to the placement that would have required the agreement of the Reinsurers.

31. Mr Thompson had spent the whole of his working life - over 45 years - in insurance and reinsurance. His evidence was that he had had no direct involvement with the risk management reports, but had later become actively involved in HIH's consideration of whether to pay LDT's claims. He gave evidence of a general nature, which the Judge found to be supported by the documents, that HIH had become concerned shortly after Mr Mitchell left in February 1998 – that is, before the first of the risk management reports in September of that year - about the film finance business written by him and had decided to withdraw from that market. He said that Mr Simon Bird, Director of Underwriting until sometime in 1999, and Mr. Harvey Simons, the Chief Executive Officer and an experienced underwriter, had responsibility from late 1998 for the three H slates, and that Mr Simons took a close

interest in them until he left HIH in September 1999 on its discontinuance of underwriting from its London branch.

32. Mr Thompson said that Mr Bird and/or Simons would have read the risk management reports shortly after their receipt and would have had access to the files. As to their likely reaction, his witness statement, in paragraphs 19 and 20, to which he adhered broadly in his oral evidence, contained the following passages:

> "19. … as the Reports simply gave a brief account of the projected outturn of the business, it is my view that a distribution of these Reports by JLT was not an appropriate way to seek underwriting approval of a reduction in the number of films for each slate. JLT should have presented the matter properly to HIH and its reinsurers for agreement. … JLT should have arranged to see a member of the underwriting personnel, explained and discussed the change, completed the same process with reinsurers, and secured the agreement of HIH and reinsurers. If HIH had required a variation in terms such as an increase in premium, then JLT should have informed the insured of this and secured agreement. Had JLT presented the matter properly at the time that JLT first learned of the reductions, the matter would have been brought to the attention of Simon Bird, Harvey Simons or myself and, subject to matters such as Flashpoint's support and approval and reinsurers' agreement, any agreed change would have been correctly documented by way of endorsement to the insurance slip and the reinsurance cover note. The risk should always be clearly described in the documents in order to avoid any dispute in the event of a claim.
>
> 20. If reinsurers had been consulted in relation to the reduction in the number of films per slate, at the time that JLT first learned of the reductions, and had said 'no', I would have expected JLT to have advised HIH accordingly and would have advised them that, as HIH was only fronting the risk, HIH would not continue to do so if the changes were unacceptable to HIH's reinsurers. HIH would have conferred with JLT, not … [LDT] in relation to this issue. HIH's minimum position would have been to ensure that the basis for continuing cover (i.e. revised terms) was agreed between HIH and reinsurers so that we were all of one mind. … "

33. Whilst much of that expression of views was directed at the possibility of having secured acceptance by the Reinsurers or agreement by them to a variation of the risk, its core was that HIH should have been sufficiently alerted to the variation in order to enable them to take the matter up with the Reinsurers with a view to protecting its own position one way or another.

34. On the strength of that evidence, the Judge found that: 1) HIH learned of the film reductions shortly after distribution of each of the relevant risk management reports, but not, given the absence of any alert from JLT, of their potential significance to the

insurance and reinsurance risks covered; and 2) if JLT had alerted HIH to those potential risks, it would have taken steps to take the views of the Reinsurers.

35. HIH also called Mr Jean-Michel Guillot, a senior underwriter for Axa, the lead reinsurer of H2 and H3, who had taken a prominent role on its behalf in accepting the lead placement, but who, by the time he gave evidence, had left Axa and had been engaged in litigation against it for unfair dismissal. His evidence was that neither Mr Drummond Brady nor anyone else at JLT had alerted Axa to the potential coverage risks disclosed by the risk management reports, and if they had done, he would have wanted to consider the potential impact on the risk for Axa before agreeing it, but would have agreed it if possible.

36. The significance of the meeting in September 1998 between Mr Drummond Brady and Mr Mitchell, if it occurred as Mr Drummond Brady described it in his witness statement, was that it went to the knowledge of JLT of the risk and thus to the duty it owed to HIH, and also, arguably, to the likely degree of appreciation of the risk by HIH, as an experienced and reasonably competent underwriter, from a mere reading of the risk management report at the time. The Judge's express findings as to HIH's state of mind on this point absent any such meeting, given the meagre evidence put before him by both sides, were as follows:

> "94. …I conclude … that HIH … knew of the reduction in the number of films shortly after the relevant Reports were received. …
>
> 95. I think it is also reasonable to conclude (as I do) that neither HIH nor AXA considered the reduction to be a matter of moment. JLT did not raise it with them; they did not raise it with JLT; and no-one thought in terms of warranties or breach of contract because of their belief in the nature of the cover (akin to a financial guarantee) and the Waiver of Rights Clause.
>
> 134. … The fact that HIH has called no evidence from those who read the Reports has contributed to my conclusion that HIH was aware of the reductions in the number of films and did not consider them a matter of moment. …"

37. Mr Tom Weitzman QC's primary submission, on behalf of JLT, was that the Judge was not entitled to find there had been such a meeting and/or a discussion, based as it was on no firm evidence from Mitchell and the lack of any formal evidence about it from Mr Drummond Brady. And he maintains that, even if there was, the Judge wrongly found on the material before him that Mr Drummond Brady, and through him JLT, appreciated at the relevant times that the film reductions gave rise to potential concerns as to coverage.

38. As to whether there was a discussion between Mr Mitchell and Mr Drummond Brady as described by the latter in his witness statement and as to its significance, the Judge found that there was such a meeting, that it demonstrated Mr Drummond Brady's concern about the risk to coverage and that Mr Mitchell indicated that he would have been relaxed about it. He dealt with this part of the case in paragraphs 77 to 90 of his judgment, and concluded in paragraphs 89 and 90 as follows:

> "89. I am entirely satisfied on the totality of Mr Mitchell's evidence that there was an occasion, after Mr Mitchell left HIH (end of February 1998) and probably shortly after receipt by JLT of the first, September 1998, Risk Management Report but before the Report was sent to HIH, at which Mr Drummond Brady talked to Mr Mitchell about the reduction in the number of films on H1 and Mr Mitchell was relaxed about it.
>
> 90. It has, therefore, been established that Mr Drummond Brady and so JLT appreciated the number of films in H1 (and H3) had been reduced no later than upon receipt of the first Risk Management Report. In the absence of any evidence from Mr Drummond Brady, it is necessarily a matter of inference to determine how he viewed the reduction. However, the view of underwriters … that it was not a matter which could be relied upon to avoid liability was derived from discussions with Mr Dawson and the opinion of Ince & Co. I think, therefore, it is reasonable to infer that Mr Drummond Brady would have shared that view. On the other hand, I also think that the fact (as I find) that he raised the matter with Mr Mitchell, even if informally, is sufficient to justify the conclusion that he was concerned about it."

The expert evidence

39. The parties' experts agreed in a joint memorandum that JLT should have read the risk management reports, and should have highlighted any important matters of concern, and that HIH also should have read them.

40. The expert evidence called on behalf of HIH consisted of Mr Julian Radcliffe, an insurance broker with long and wide experience of various classes of insurance, though not of film finance risks, and Mr Roger Day, an experienced underwriter in the financial risk insurance market.

41. Mr Radcliffe's evidence was, as recorded by the Judge, at paragraph 123 of his judgment, that:

> 1) all brokers regarded it as routine and proper after obtaining reinsurance to act in the reinsured's best interest to ensure that the reinsurance remained valid;
> 2) a broker had a post-placement duty to inform his clients, here LDT and HIH as insured and reinsured respectively, and underwriters, here HIH as insurer and the Reinsurers respectively, of any significant change to the broking information or wording and to obtain agreement to the changes if, by not doing so, he risked prejudicing the cover or its suitability;
> 3) any competent broker in this field of insurance would have understood that the number of films being insured was an important element of the cover; and
> 4) mere distribution of the risk management reports was not an appropriate way to obtain agreement to a variation in cover.

42. On the basis of those propositions, Mr Radcliffe criticised JLT's conduct as broker for not reading the risk management reports with an eye to identifying inconsistency with

the placing materials and/or not alerting the three parties concerned to the potential of the reductions in films for prejudicing the insurance and/or reinsurance coverage. He acknowledged that the relevant staff at HIH should have received the risk management reports, but added that JLT, as broker, still had a duty to highlight to them such important information and its significance, if any, to the risk.

43. Mr Day's evidence was to similar effect. His starting point, with which Mr Philand, JLT's underwriting expert agreed, was that the number of films in a slate was material to the risk. In his witness statements he said that, though HIH should have read the risk management reports carefully with a view to considering whether it had to take some action, mere distribution by JLT of the risk management reports was an insufficient measure of notification to HIH of such a material change - the broker had a post-placement duty to the insured or reinsured that was more than that of a post-box. His view was that JLT should have consulted with and obtained agreement of HIH and the Reinsurers to the variation in risk represented by the reductions.

44. The expert evidence called on behalf of JLT consisted of Mr Kit Brownlees, another very experienced insurance broker, with considerable and recent experience of political and credit risks, but not film finance insurance, and Mr Paul Philand, an underwriter who had specialised for some time in surety and analogous financial guarantee risks with a similar financial structure to film finance risks.

45. Mr Brownlees, with whom Mr Philand substantially agreed, said that brokers did not as a matter of normal practice read post-placement documents, such as risk management reports with an eye to identifying inconsistency with the placing materials. He considered that JLT was under an obligation post-placement to inform HIH of the reductions in the number of films, but that was all it was, "an informational duty" because, by then, the risk had "crystallised". He also considered that provision of the risk management reports, clearly indicating the reductions in the films, was sufficient notification by JLT to discharge that informational duty. He added that, if Mr Drummond Brady had been sufficiently concerned to contact Mr Mitchell about the reductions, he should have contacted HIH direct.

46. The Judge, in paragraph 127 of his judgment, helpfully summarised the main strands of evidence from the experts as 1) Mr Radcliffe – a duty to highlight any matters reasonably considered to be material to the risk and to seek agreement between all the parties if possible; 2) Mr Day – a duty to highlight any information that might be of material concern to underwriters; and 3) Mr Brownlees and Mr Philand – to act simply as a post-box passing to insurers and reinsurers any information relevant to risk that came its way. As will appear, on balance, the Judge preferred the evidence of Mr Radcliffe and Mr Day to that of Mr Brownlees and Mr Philand.

Duty of care

i) Failure to plead

47. Before the Judge, HIH put its case in negligence in two main ways, one clearly pleaded, and the other not so. Its much amended pleaded case at trial was that JLT owed it: i) a duty to ensure the Reinsurers' agreement to any reduction in the number of films making up each of the insured slates or waiver of any breach of warranty that

such reduction would entail, or ii) in the event of not securing such agreement or waiver, a duty to inform HIH of that fact.

48. However, during the trial Mr Julian Flaux QC, on behalf of HIH, gradually dropped HIH's sights as to the nature of the duty averred against JLT. And, in his closing submissions, he made plain that the main thrust of HIH's case on that issue had changed from a duty on JLT to secure the Reinsurers' agreement to the film reductions to a duty to alert HIH to the potential risk they posed to the insurance and reinsurance coverage. The Judge acknowledged this late change in paragraph 59 of his judgment:

> "59. Thus the thrust of the case of HIH changed from alleging that the agreement of Reinsurers should have been obtained and reporting back to HIH if it was not, to a case that JLT should have specifically drawn to the attention of HIH the reduction in the numbers of films and its materiality."

49. In his closing submissions, Mr Weitzman complained to the Judge that this was an alternative and unpleaded basis for HIH's case on duty. Mr Weitzman did not press the matter, either by requiring Mr Flaux to amend HIH's pleadings or by asking the Judge to direct amendment, and the Judge did not do so. And both counsel went on to make closing submissions to him on the new case.

50. The Judge, while acknowledging the change in the thrust of HIH's case on duty and breach of duty, was of the view that he could, fairly to both parties, deal with it on the evidence and submissions he had heard. This is how he put it when he came to deal with the pleading point, at paragraphs 61 and 134 of his judgment:

> "61. … I do think the thrust of HIH's case has changed from the case it pleaded and opened … the court has no evidence from those at HIH who were responsible for receiving and reading the risk management reports. Mr Thompson was not involved and said, and I accept, that he was unaware of any reduction in the number of films before HIH was pressed to pay claims. Those who were involved appear to have been Mr Simon Bird who was Director of Underwriting at HIH, and Mr Harvey Simons who was the CEO of the UK Branch of HIH from July 1998. …"

> "134. … I … think it right to address the case as finally put forward by HIH. That case was, I think, readily to be gleaned from the expert evidence. It has been fully addressed in argument; and I cannot discover any significant prejudice to JLT in permitting it to be put forward. The decision by JLT not to call any factual evidence cannot, I think, have been affected and the contrary has not been suggested. The fact that HIH has called no evidence from those who read the Reports has contributed to my conclusion that HIH was aware of the reductions in the number of films and did not consider them a matter of moment. … As will be seen, moreover, my conclusion does not affect the overall outcome of the case. It

> must also follow that insofar as JLT sought to expand on its case of contributory negligence in this context it should be permitted to do so."

51. On appeal, Mr Weitzman maintained that the Judge wrongly allowed HIH to advance "the new case", and had wrongly relied upon it in finding in his judgment that JLT owed HIH a duty of care. He submitted that the Judge had wrongly concluded that HIH's new case was "readily to be gleaned from the expert evidence", since HIH's two experts in their reports had addressed HIH's pleaded case on duty, not that on which the Judge found in its favour. He acknowledged that parts of HIH's experts' reports had dealt with matters that had relevance to its case before the Judge and that Mr Brownlees had dealt with it in cross-examination. But he maintained that the full relevance of it had not become evident before Mr Flaux deployed it in his closing submissions.

52. Mr Weitzman also maintained that the Judge, in allowing HIH to argue its unpleaded case, caused significant and irremediable prejudice to JLT in two main respects. The first was to deprive it of the opportunity to investigate the factual basis for the new case before trial and to explore it with its expert witnesses before trial. He acknowledged that HIH's expert broking witness, Mr Brownlees, had had an opportunity to deal with it in cross-examination, but said that, because of the lack of any pleaded notice of it, he had not been fully prepared. The second prejudice, submitted Mr Weitzman, was that he would have presented JLT's case at trial in a different way as to HIH's understanding of the risk management reports. When pressed by the Court as to how he would have approached it differently, he said initially, probably not by further evidence, but rather in his opening and closing submissions and cross-examination of HIH's witnesses.

53. Mr Flaux maintained that there was nothing new about this way of putting its case on duty. The "duty to alert" issue had been foreshadowed in Mr Radcliffe's witness statement, highlighted as a matter of concern in a joint memorandum of the experts prepared for the trial, canvassed by Mr Weitzman in cross-examination of Mr Radcliffe, and anticipated in the course of the trial by JLT in amending its defence to plead contributory negligence by HIH in failing to appreciate the significance of the film reductions referred to in the risk management reports.

54. In my view, there is nothing in Mr Weitzman's complaint of prejudice to JLT based on HIH's unpleaded case on duty. As the Judge observed, the change in the thrust of HIH's case towards the end of trial did not turn on any change in the factual evidence as to what had passed between JLT and HIH, for there was no such evidence. And, as Mr Weitzman acknowledged, he had not asked the Judge to direct amendment of HIH's pleading nor require to Mr Flaux to re-plead his case on the issue, and he had addressed the Judge on it in his closing submissions.

55. As to prejudice to JLT, the Judge was best placed to assess whether there was any prejudicial consequence for it in the change of thrust in HIH's case. It had been fore-shadowed in Mr Radcliffe's evidence and identified in the "joint experts' report, explored by Mr Flaux in cross-examination of Mr Brownlees and was the subject of closing submissions by both counsel. Moreover, Mr Weitzman failed to put before the Court any convincing argument as to what he would have done to advantage JLT's case if HIH's closing case had been explicitly pleaded from the start. He

suggested that he might have wanted to call further evidence, but, as I have said, was initially unable to indicate what evidence he had in mind. Eventually, he mentioned as possibilities calling Mr Simons and/or Mr Bird of HIH, "who might have given evidence favourably to JLT" and/or an underwriting expert on this issue. He suggested that he might have wanted to cross-examine certain of HIH's witnesses differently, notwithstanding that, as the transcripts show, he cross-examined Mr Radcliffe, HIH's principal expert witness, on this very point.

ii) The duty

56. On the substantive issues as to the nature and existence of the duty, the Judge held that JLT had owed a duty to HIH, post-placement, to alert it to the potential risk to the insurance and reinsurance coverage arising out of the reductions in the number of films making up the slates. His reasoning in summary was that, although the insurance and reinsurance cover remained back-to-back, HIH and the Reinsurers might have had different views as to whether and how the coverage was affected by the reductions and that, if JLT had raised the matter at an early stage, it would have enabled resolution of any issues between them before they became disputes. This is how, in paragraphs 132 and 134 of his judgment, he reached that conclusion:

> "132. I do not find it an easy question in the circumstances of this case to decide what, if any, relevant duty JLT owed to HIH after placement. The material factors are, I think, the following:
>
> i) JLT continued to play the role of disseminating information about the films and their production status and earnings after placement, as well as presenting claims when they arose;
>
> ii) JLT were … fully aware that the reinsurance was to be back-to-back with the insurance and that it was critical to HIH that it should remain so, …
>
> iii) although in a real sense JLT had worked with Flashpoint to establish the insurance scheme and looked upon Flashpoint as the client, the structure of the insurance itself was the usual one with LDT as insured, HIH as insurer and reinsured;
>
> iv) the reduction in the number of films was … seen as a concern by Mr Drummond Brady; he was well aware of the importance to insurers of the sales estimates which themselves were based on the stated number of films in each slate;
>
> v) none of those whose views are known or can be deduced considered the reduction in the number of films provided either insurers or reinsurers with a basis for avoiding payment, albeit I do not think Mr Mitchell or Mr Guillot gave the matter deep consideration;

> vi) if JLT owed post-placement duties to HIH it did so as the reinsurance broker; as insurance broker it also owed a duty to LDT to act in the best interests of LDT but it would not necessarily follow that LDT would want HIH alerted to a concern;
>
> vii) I think Mr Drummond Brady ought to have appreciated that the attitude of insured, HIH, and Reinsurers might not be the same to the reduction in the number of films; the fact that covers are back-to-back does not mean that there may not be different views as to how they would apply in given circumstances and thus disputes and difficulties, which if raised earlier, might be resolved or addressed.
>
> 133. I cannot in the circumstances I have sought to summarise, accept the opinion that JLT were obliged only to act as a mere postbox. I prefer the opinion of Mr Day and Mr Ratcliffe, that JLT should have read the Risk Management Reports carefully and if any of the information was or ought to have been thought to be a matter of at least potential concern on coverage issues then JLT, in the interests of both their clients, should have alerted HIH and Reinsurers to it. It was not enough to alert Mr Mitchell who was no longer employed by HIH. Nor do I accept (which is JLT's primary submission) that JLT was under no duty to act on behalf of HIH as regards reinsurers unless instructed do so. The question is whether or not, in effect, JLT should have sought instructions or at least ensured that insurers were sufficiently aware of the potential concern to assess what, if any, instructions to give.
>
> 134. Mr Weitzman painted a picture of the 'the whole market seizing up' if brokers were under a duty of the type described. I do not agree. The duty is specific to this case and it is a duty to exercise care and not absolute in its terms. …"

Submissions

57. Mr Weitzman attacked this reasoning, in summary:

> 1) on account of its novelty;
> 2) because such duties as JLT owed to HIH, it owed only as reinsurance broker to it as the reinsured, and there was, therefore, no duty on JLT to advise HIH as insurer;
> 3) JLT's only duty to HIH was to effect back-to-back reinsurance, which it had done, and such cover remained throughout;
> 4) the Judge should have relied on the evidence of Mr Brownlees rather than that of Mr Radcliffe and Mr Day, that brokers do not normally examine post-placement documents, such as risk management reports, with an eye to

> identifying inconsistencies with the placement materials, especially where they have placed effective and continuing back-to-back insurance and reinsurance;
> 5) any potential coverage issues affecting the reinsurance did so only because it was back-to-back with the insurance, potentially creating conflicting interests for JLT if it were to alert LDT as well as HIH and thereby engender rather than avoid a dispute;
> 6) the duty of JLT to HIH found by the Judge, in effect, required JLT, in alerting HIH to any potential coverage risks, to anticipate that HIH's lawyers, who had drafted the insurance terms, might not have successfully excluded them by the insertion of the waiver or rights clause, and to have anticipated that, if the matter were tested, a court might so find; and
> 7) whether HIH accepted or denied cover, there was no need to impose such a duty upon JLT to protect HIH's interests, protected as they were, by the back-to-back reinsurance unless it chose, as it did, to pay the insurance claims of LDT without the agreement of the Reinsurers in respect of which, in the event, they had rightly taken the view they were not liable to indemnify it.

58. In short, Mr Weitzman submitted that the only purpose of the putative duty found by the Judge was to protect HIH from the consequence of paying a claim under the insurance that it was not liable to pay, a purpose that could not sensibly fall within the scope of any duty owed by JLT to HIH. He added that any such duty could only be "informational". In relation to the insurance, it was owed only to LDT. In relation to the reinsurance, it was a contingent duty to HIH to alert it as the reinsured to matters that might affect the back-to-back nature of the reinsurance cover. And, in either case, JLT sufficiently discharged it by the provision of the risk management reports.

59. Mr Flaux submitted that the Judge was entitled in the circumstances to find that JLT owed a duty to HIH to alert it, as reinsured, to the potential risk to coverage occasioned by the film reductions. He relied on the following propositions:

> 1) a broker, which has placed both insurance and reinsurance cover,
>
> may owe a duty of skill and care, post-placement, to the reinsured in respect of the maintenance of the reinsurance cover, citing and adopting the reasoning of Phillips J, as he then was, in *Youell & Ors v Bland Welch & Co Ltd & Ors (The "Superhulls Cover" Case) (No 2)* [1990] 2 Lloyd's Rep 431, at 447.
>
> 2) It is common-place in the insurance and reinsurance markets for a broker to act for both an insured and its reinsured, and the fact that that may give rise to a potential, or actual, conflict of interest does not prevent it from owing a duty to each; see *North and South Trust Co v Berkeley* [1971] 1 WLR 470, per Donaldson J, as he then was, at 486B-D;
>
> 3) accordingly, if a broker may owe a duty to a reinsured which is in potential conflict with its duty to the insured, it is no answer, as the Judge pointed out in paragraph 137 of his judgment, to a claim by the reinsured against the broker for breach of duty that the insurance and reinsurance cover remained back-to-

back throughout, or that reinsurers deny liability when the reinsured come on risk:

> "… It is of course true that for the cover to remain effective a change to its terms was required (as the Court of Appeal held) or that (as most, if not all, parties believed) it was not, but it does not follow that the matter was so certain that it could be left to later resolution nor that all the parties would take the same view about it. As Mr Radcliffe put it, it could prejudice insurers if 'you let it all hang out … without a proper agreement'."; and

4) Here, the duty on JLT to alert HIH to the coverage problem arose when it appreciated, or should have appreciated, that there was cause for concern, as the Judge held in paragraph 141 of his judgment (see paragraph 69 below);
5) The Judge was entitled to prefer the evidence of Mr Radcliffe and Mr Day to that of Mr Brownlees.

Conclusion

60. The role of an insurance broker is notoriously anomalous for its inherent scope for engendering conflict of interest in the otherwise relatively tidy legal world of agency. In its simplest form, the negotiation of insurance, the broker acts as agent for the insured, but normally receives his remuneration from the insurer in the form of commission; he may, in certain circumstances, act for both. Where there is reinsurance of an insured risk, the same broker may act on behalf of the insured in placing the insurance and on behalf of the insurer in placing the reinsurance.

61. The broker may, as JLT did here, effectively devise, structure and establish a scheme, acting together with the insurer and reinsurers in which the insurer is little more than a "front" for the reinsurers who shoulder the bulk of the risk. The evidence before the Judge showed that JLT, in so acting, did so nominally on behalf of the financiers, LDT, but in reality on behalf of Flashpoint. The whole scheme was, as I have said, a form of joint venture between a number of commercial bodies for a new, and seemingly short-lived commercial product in the insurance market, aptly described by Lord Hoffmann in *HIH v Chase Manhattan Bank*, as "high risk" and "high premium", and one in which "the players need to keep their wits about them". Where a broker has been at the centre of devising and structuring a risky scheme of that sort for insurers and reinsurers, as JLT was, it is plainly a strong candidate for post-placement monitoring obligations of the sort alleged here.

62. The fact that JLT effectively placed the insurance and reinsurance largely back-to-back – a matter on which Mr Weitzman relied so heavily on the issue of duty as well breach and causation – does not, in my view, remove the scope for identifying a duty of care on behalf of JLT to alert HIH, as reinsured, to potential problems to the reinsurance risk as the film slate investments began to go bad. On the contrary, it underlines the need to consider such a duty, since a potential risk to the reinsurance cover would necessarily reflect a corresponding risk to the insurance cover, which HIH, in its own interests, might want to do something about. The fact that JLT, if it were to alert both LDT and HIH to the problem, might find itself in a conflict of interest between LDT's concern to maintain the insurance cover and HIH's possible concern to reduce or shed it, does not necessarily exclude such a duty by JLT to HIH. And, as May LJ observed in the course of the submissions, if LDT had raised a

coverage issue with JLT, JLT would have had a duty to LDT as insured and to HIH as reinsured.

63. There is ample authority for such an outcome.

64. First, in *Superhulls,* brokers broked both insurance and reinsurance on the same risk, namely, placement of insurance for shipbuilders against construction risks and of reinsurance for the insurers which, unlike the insurance cover and unknown to the insurers, restricted the period of cover of the reinsurance to 48 months. On a claim by the insured in respect of the discovery of serious defects in the construction of the ships when the original cover was in force, but when the reinsurance had expired, the reinsurers denied liability. In proceedings by the insurers against the brokers, following failure of their claim against the reinsurers, Phillips J held the brokers in breach of duty, not only for failing to inform the insurers of the 48 month restriction on the reinsurance when placing their reinsurance, but also in failing to inform them of it after placement and, when the reinsurance cover looked likely to terminate before completion of the construction, to take steps to obtain extension of it. However, he also held the insurers to have been 20% contributorily negligent in failing to carry out customary checks on the reinsurance cover placed by their brokers. Phillips J, at page 447, cols 1 and 2, of his judgment, approached his consideration of a conflict of duty and the possibility of post-placement duties on a broker on a principled basis, not by confining himself to the terms of the particular contract between reinsured and broker:

> "I propose first to consider the duty of the brokers without reference to the terms of the order letter. This requires consideration of the duties customarily performed by Lloyd's brokers. The particular facts of this case are without precedent. No witness had experience of a building risks reinsurance cover with a cut-off that did not reflect a similar clause in the original cover. It is thus not possible to examine market practice in relation to the position that arose in this case... It is, however, possible to consider more generally the role that brokers customarily play where, as often happens, they have broked both original insurance and reinsurance. In such a case there are many activities which require to be performed in relation to both the original contract of insurance and the contract of reinsurance. Some purely administrative such as accounting for premium. Others may be steps that are essential if cover is to bind, such as making declarations under a facultative/obligatory cover. The evidence of the insurers' witnesses on market practice in such circumstances was consistent and unchallenged. The brokers would be expected automatically to take such steps as were necessary to ensure that, if insurers came on risk under the original cover, the reinsurers came on risk under the reinsurance cover. This led the witnesses to express the firm view that if, in the present case, the original insurance was extended beyond the period of the reinsurance cover, it was the duty of the brokers to take steps to procure extensions of the reinsurance cover. They made the point that the majority of the insurers would not even

> be aware the original insurance was extended beyond 48 months as only Green, PCW and Orion would receive notice of this. If the brokers did not act to protect their interests they would find themselves unwittingly exposed."

65. Secondly in *North v South Trust*, Donaldson J held, at 486B-C, that where a broker acts in breach of his duty to an insured by acting also for the insurer, he may yet owe a duty to the insured:

> "… [The brokers] wore the … [insured's] hat and the underwriter's hat side by side and in consequence, as was only to be expected, neither hat fitted properly. The … [insured] had a legitimate complaint on this account and can claim damages if and to the extent that the partial dislodgement of their hat has caused them loss or damage."

Hobhouse J, as he then was, followed that reasoning in *General Accident Fire & Life Assurance Corporation & Ors v Tanter (The "Zephyr")* [1984] 1 Lloyd's LR 58, at 84; see also *Kelly v Cooper* [1993] AC 205, PC, in which the Judicial Committee acknowledged that estate agents may act for competing principals and keep confidential the information obtained from each principal. As Longmore LJ observed in the course of submissions, there is no reason why a broker should be treated any differently from a solicitor so as to exclude him from a duty to ensure that the insured should not be put into a position of risk.

66. The Judge, in setting out the material factors, as he saw them, in paragraph 132 of this judgment (see paragraph 56 above), clearly had in mind the *Caparo v Dickman* (*Caparo Industries plc v Dickman* [1990] 2AC 605, per Lord Bridge at 617-8) so-called three-stage test of fairness, justice and reasonableness. Not least among the factors that he mentioned were: the role that JLT undoubtedly played, post-placement, in disseminating information, through the risk management reports about the production status and revenues of the films; the evidence of Mr Radcliffe and Mr Day, which he accepted, that the film reductions indicated in the risk management reports represented a potential risk to the insurance and reinsurance coverage; Mr Drummond Brady's concern about the film reductions leading him to approach Mr Mitchell, though the latter was no longer in the employ of HIH; and Mr Drummond Brady's likely appreciation that, notwithstanding the back-to-back nature of the insurance and reinsurance, HIH and the Reinsurers, if alerted to the risk, could take different views on the matter that they would want to resolve sooner rather than later.

67. Given those and the other factors to which the Judge referred, I am of the view that he was entitled to find, as he did in paragraphs 133 and 134 (paragraph 56 above) on the evidence before him, including that of Mr Radcliffe and Mr Day in preference to that of Mr Brownlees, that:

> 1) there was a post-placement duty on JLT to HIH;
> 2) it was to do more than to act as "a mere post-box", for which Mr Weitzman had contended; and
> 3) JLT had a duty of care "specific to this case" "to have sought instructions or at least ensured that … [HIH] were sufficiently aware of the potential concern to assess what, if any, instructions to give".

Breach

68. The question for the Judge was whether HIH had established that JLT had failed to use the proper skill and care of an insurance broker in discharging the duty he had found, namely to alert HIH, post-placement, to any potential concerns as to risk to coverage arising out of the reduction of films in each slate. Put another way, should JLT have appreciated that there was a potential coverage issue to which it should have alerted HIH, and, if so, did it discharge that duty by simply providing it with the risk management reports?

69. The questions fell to be considered against the evidence, accepted by the Judge, that the risk management reports, prepared and provided by Flashpoint to JLT and forwarded by JLT to HIH, had clearly indicated the film reductions, that Mr Drummond Brady, of JLT, had read them and had been aware of the reductions and the possible resultant coverage issue, but had not alerted HIH to it. The Judge, in accepting, as he did at paragraphs 89 and 90 of his judgment (see paragraph 38 above) that Mr Drummond Brady had been sufficiently concerned to talk to Mr Mitchell about the matter, held that, through him, JLT must have appreciated that the reductions were matters of potential concern in relation to HIH's reinsurance coverage, and, should, in addition to forwarding the risk management reports to HIH, have specifically alerted HIH to that concern. In so concluding, he relied mainly on his finding of the meeting between Mr Drummond Brady and Mr Mitchell after the latter had left HIH, the risk management reports themselves and the expert evidence of Mr Radcliffe and Mr Day. This is how he put it, at paragraphs 135, 136 and 139 to 142 of his judgment:

> "135. The question which arises, as HIH sought to put their case in closing, is whether or not JLT did sufficient to alert HIH to the significance, or possible significance, of the reduction in the number of films and whether or not JLT should have taken the initiative to seek the instructions of LDT and HIH and done so face-to-face or at least by doing more than distributing the Risk Management Reports.
>
> 136. I have described the duty … as one requiring JLT to 'alert' HIH to any matters of at least potential concern on coverage issues. I think the reduction in the number of films fits that description. It was material information and I accept Mr Radcliffe's opinion that brokers do not and should not think in terms of warranties and the like but rather in terms of alerting insurers to matters which insurers may think material to the cover.
>
> 139. Mr Drummond Brady did know that Mr Mitchell had left HIH and must have appreciated that other people at HIH would be addressing the Reports who could be expected to have much less knowledge about the nature and background to the business than Mr Mitchell but who would now be responsible for making decisions about it.

> 140. There are … two questions, albeit the second belongs more to the issue of causation. …:
>
> i) Did the distribution of the Risk Management Reports, without more, suffice for JLT to perform the duty they were under; and
>
> ii) Did HIH itself in fact focus on what was said about the number of films and reach its own conclusions upon it which would not have been affected by anything more JLT should have done even if such was the case."
>
> "141. As to the first question, although I think the Risk Management Reports, especially as regards H2 and H3, were explicit as to the reduction in the number of films and Mr Drummond Brady was entitled to believe that they would be read carefully by experienced people at HIH, I also think that he did appreciate (and should have appreciated) that the information was a matter for concern, called for an explanation, and merited being drawn explicitly to the attention of those now handling the matter at HIH who might need to discuss and understand the implications of the reductions. There is no evidence that anyone had considered the possibility before placement that the stated number of films might not be made nor the consequences if that occurred. For that reason alone I think the matter should have struck Mr Drummond Brady as one of at least potential materiality. I accept Mr Radcliffe's evidence that the Reports were not, in context, an appropriate way of themselves in which to ensure that HIH was alerted to the potential issues.
>
> 142. As to ii) …, I do not think, even in the chosen absence of evidence from those at HIH who were concerned, that it would be right to conclude that HIH were fully alive to the issues and made up their own minds that nothing either could or should be done about them as regards the reinsurers. Whilst I have concluded that the reduction in the number of films was known to HIH shortly after the Reports were received and did not in fact strike those concerned as a matter of moment or worthy of mention, had the matter been raised directly by JLT I think the focus would have been sharper."

Submissions

70. Mr Weitzman submitted that it is important to keep in mind whether the film reductions were of such significance as to give rise to a potential coverage issue, which - looking at it with the hindsight given by the Court of Appeal's ruling in *HIH v New Hampshire* - could only be if it was a potential breach of warranty as to the number of films projected on placement. He said that the effect of *Wisniewski v Central Manchester Health Authority* [1998] LLR Med 223, per Lord Justice Brooke at 240, para 3, was that the onus lay on HIH to establish that it did not appreciate there

was such a potential coverage issue, and there was no such evidence, if anything the risk management reports and the presence of competent staff at HIH at the material time constituted evidence the other way calling for an answer.

71. Mr Weitzman also submitted that the Judge's findings as to what Mr Drummond Brady and, through him, JLT appreciated at the time should be tested against his reasonable ignorance of the Court of Appeal's ruling yet to come of the vulnerability of the insurance and reinsurance cover to the film reductions. One way of testing whether JLT should have appreciated that there was a potential coverage issue, he submitted, was to be found in the Judge's treatment of the matter, in paragraph 147 of the judgment, in the context of causation. There, he said, when looking for "clues", that if Mr Drummond Brady had alerted HIH to possible concern over the film reductions, he would also probably have advised it "that the cover was still intended to respond and any remedy lay under the Flashpoint agreements" and that "it would not have been negligent for … [him] to give that advice". Mr Weitzman submitted that, if it would not have been negligent for Mr Drummond Brady to give such advice, it would not have been a breach of duty by him to have concluded that the film reductions would not affect coverage. Putting JLT's case at its lowest, he submitted, it would not have been unreasonable of JLT in the circumstances to have taken that view.

72. Mr Weitzman maintained that, in any event, JLT could reasonably have taken the view that it was sufficient to rely on the provision of the risk management reports to HIH in order to alert it to the potential of the film reductions to affect the coverage, and, therefore, that there was no reason for it to take any further steps to draw HIH's attention to that potential. He relied on the Judge's findings in paragraphs 91 and 141 that the reports had clearly indicated the reductions and that JLT had been entitled to assume that HIH had employed experienced and competent staff who would have read and carefully considered their contents. It followed, he submitted, that JLT was not in breach of the duty found by the Judge to alert HIH to the film reductions and their possible significance to the cover, since, if it had been required to do any more than provide HIH with the risk management reports, it would, in effect, have required JLT to protect HIH from the incompetence of its own staff.

73. Mr Flaux's response to those contentions was short. He maintained that the Judge was entitled to find on the material before him, including that evidencing the discussion between Mr Drummond Brady and Mr Mitchell, that JLT had been concerned at the material time about the possible effect on the cover of the film reductions and that HIH was not. He asked rhetorically why, if Mr Drummond Brady had considered there was enough in the risk management reports to alert HIH to the potential problem, he did not seek to draw it to HIH's attention direct, rather than go to its ex-employee, Mr Mitchell?

Conclusion

74. In my view, given the Judge's finding, with which I agree, that JLT owed a duty to alert HIH to the coverage issue by drawing specific attention to the film reductions indicated in the risk management reports, it is difficult to fault his finding on the evidence - and the lack of it - before him that JLT was in breach of that duty. Mr Drummond Brady was sufficiently concerned to seek out Mr Mitchell on the point, knowing that, as the original underwriting officer at HIH, he could be expected to be

familiar with the nature and possible vulnerability of the risk, regardless of the precise contractual position. Why should he have expected any more of such staff at HIH as had then become responsible for Mr Mitchell's underwriting, but who, as the Judge said, could have been expected to be much less familiar than he was with the business? The Judge's view was that, although they could have read the reports as well as Mr Drummond Brady, his familiarity with the film finance business was such that, if he had specifically highlighted his concern, it would have given them a salutary "sharper focus" on the matter.

75. There was undoubtedly a fine margin of decision for the Judge on this issue, and, for that reason, I am not inclined to venture any different decision of my own. On the material before him, I am of the view that his conclusion on it is tenable and should not be disturbed.

Causation

76. HIH claimed that JLT's failure to alert it to potential risk to its reinsurance from the film reductions had caused it damage because it thereby lost the opportunity to seek early agreement with the Reinsurers to adopt a common stance to any potential claims by LDT, in turn leading to HIH's inability to recover an indemnity from the Reinsurers in respect of its payment of LDT's claims when made.

77. There was, as the Judge observed in paragraph 140 of his judgment (see paragraph 69 above), some overlap between the issues of breach of duty and of causation. However, the essential questions for him on the issue of causation were:

> 1) whether HIH appreciated at the material times that the film reductions raised potential issues as to the coverage on the insurance and reinsurance, to which the Judge's answer was no - challenged by JLT in a Respondent's Notice;
> 2) what, if anything HIH would or could have done if JLT had alerted it to such potential issues, to which the Judge's answer was that HIH would have instructed JLT to ascertain the views of the Reinsurers - challenged by JLT in its Respondent's Notice; and
> 3) whether any such action by HIH would have enabled it to avoid the loss resulting from its inability to recover its reinsured interest in respect of the payments it made to LDT - to which the Judge's answer was that that HIH had not proved that the Reinsurers' response would have led to their indemnifying it for its payment of LDT's claims when made - challenged by HIH in the appeal.

78. Mr Weitzman's central point on the issue of causation was that it had been for HIH to prove its case on all the three questions making up the issue of causation, and that it had called no, or no cogent, evidence to support the Judge's answers in HIH's favour on the first two.

79. I take each of the issues in turn.

1) Whether HIH appreciated that the film reductions raised potential issues as to coverage on the insurance and reinsurance

80. As the Judge acknowledged in paragraph 140(ii) of his judgment (see paragraph 69 above), this issue overlaps with part of his treatment of the issue of breach. He dealt

with it in two places in his judgment, first, in paragraph 142 expressing, in the context of breach, the view that had JLT raised the matter direct with HIH the focus would have been sharper. Secondly, when dealing with the same hypothesis as a matter of causation in paragraphs 147 – 149, and acknowledging that he was entering the realm of "inference, if not speculation", he said that there were nevertheless certain "strong clues" to which he could give weight, namely:

> "147. …
>
> i) it is probable that HIH … would have learned from Mr Drummond Brady (and the opinion of Ince & Co) that the cover was still intended to respond and any remedy lay under the Flashpoint Agreements;
>
> ii) it would not have been negligent for Mr Drummond Brady to give that advice … which would have applied equally to reinsurers;
>
> iii) HIH would readily have appreciated that the insurance and reinsurance remained back-to-back and so the position was safeguarded in the most important respect whether or not anything further was done."

Submissions

81. Mr Weitzman contrasted the Judge's treatment of the matter in those observations in paragraph 147, with his earlier reasoning in paragraph 142 that, without specific alert from JLT, HIH would not have appreciated the potential risk to coverage from the film reductions. He criticised that reasoning as speculative and without support from any hard evidence. He maintained that it took insufficient account of Mr Thompson's account of the developing concern in HIH about its film finance business long before sight of the first of the risk management reports, and the presence of competent staff who would have read them carefully when they came. He added that it did not sit easily with the Judge's contingent finding of contributory negligence in this respect. And he submitted, in reliance on the observation of Brooke LJ in *Wisniewski*, that the Judge should, in the circumstances, have drawn an adverse inference against HIH that, if it had called any of its employees to give evidence on this issue, they would not have supported its case.

82. Mr Flaux submitted that the Judge's thinking on this question going to HIH's state of mind as to potential risk from the film reductions absent some alert from JLT had to be read with his earlier overlapping reasoning in paragraphs 140 - 142 (see paragraph 69 above) anticipating his conclusion on this aspect of causation, namely, that the provision of the risk management reports without more was insufficient performance of the duty to alert HIH to potential issues of coverage common to the insurance and reinsurance.

Conclusion

83. It is a matter for judgment whether a judge draws an adverse inference against a party in the absence of any evidence on his part sufficient to meet a case to answer on the

other side. *Wisniewski* does not require a judge to draw such an adverse inference; it allows him to do so if, in his view, the circumstances justify it. Here, the Judge took account, as he said, of HIH's starting point of likely reliance on the advice, given to them at the outset by Ince & Co, that changes in the risk capable of amounting to breaches of warranty or condition would not provide them or the Reinsurers with a let-out and the fact they would stand or fall together under the back-to-back cover. However, without some further alert from JLT of the possible risk to that back-to-back cover as a result of the film reductions, the Judge's conclusion, for the reasons he gave, was simply that HIH was not alive to the risk. I can see no basis for re-opening his conclusion on that issue. He was not bound to do draw an adverse inference as to HIH's state of appreciation or otherwise of the significance of the film reductions, and gave tenable reasons for not doing so.

2) What, if anything, would HIH have done if JLT had alerted it to the potential issues of coverage?

84. The Judge held that the commercial, as well as legal, reality was that, given the back-to-back nature of the insurance and reinsurance, HIH and the Reinsurers would want to act in the same way and that, to that end, HIH would have instructed JLT to alert the Reinsurers to take their views. The only evidence he had was that of Mr Mitchell and Mr Thompson, neither of whom had been party to any communication on the matter between HIH and JLT.

85. As I have said, Mr Mitchell's evidence was that, if he had still been at HIH at the material time, he might well have agreed to the reductions, but only if a valid reason had been given for the change, appropriate assurances had been given as to the budgets and anticipated revenue and the Reinsurers had agreed. He added that it was unlikely that he would have been unduly concerned if the reductions were small in proportion to the number of films originally proposed for each slate.

86. Mr Thompson's evidence was, as I have indicated, directed mainly to his likely reaction to the contractual requirements if his attention had been drawn to the matter at the time, but he also expressed the firm view that he would have insisted on steps being taken to ensure that HIH and the Reinsurers acted as one in relation to any perceived risk to their respective coverage.

87. The Judge held that if JLT had raised the matter with HIH at the material time it was, "on a fine balance", probable that HIH would have requested it to take the views of the Reinsurers. This is how, at paragraphs 148 – 150 of his judgment, he reached that conclusion:

> "148. Mr Thompson said, and of course I accept it, that if HIH had been asked to agree to a change in the contract of insurance it (or those concerned) would not have done so without reinsurers agreeing to the same change. … either by first approaching reinsurers or HIH itself the matter would have been raised with all parties and their reaction to it known.
>
> 149. The evidence is very thin and does not come from those who would have been involved. I do not think it reasonable to suppose that the matter would (or should) have been raised in the context of

the need for an agreement to a change in the terms of the covers. It is, I think, quite possible that, after discussion, it would have been agreed that it was not necessary or sensible to risk setting the dogs barking by even raising the matter with reinsurers as HIH was protected whichever way it might develop. This also I find a difficult issue to resolve, particularly so because of the lack of evidence. But on a fine balance, I do think that had Mr Drummond Brady raised the matter direct with HIH, and granted the undoubted concerns HIH had at the time about the film finance business written by Mr Mitchell, and despite the lack of any reaction to the Reports themselves, HIH would at least have wanted to know the views of reinsurers and would have asked JLT to ascertain them.

150… what would then have happened. There is even less evidence … But, again, the evidence there is provides some significant clues:

> i) There was every reason, both legal and commercial, for HIH and reinsurers to act in the same way as regards the efficacy (or otherwise) of the insurance; HIH had no need to seek any agreement from reinsurers so long as the insurance and reinsurance remained back-to-back as they did;
>
> ii) it would have required the agreement of all reinsurers (and probably their retrocessionaires, if any) before HIH could itself agree to the reductions in the number of films;
>
> iii) whilst both Mr Mitchell and Mr Guillot considered the reduction the number of films did not affect the covers, and Mr Drummond Brady would have agreed with them, both Mr Mitchell and Mr Guillot also said their view depended on whether the revenue projections were adversely affected …
>
> iv) the fact is that when, not that long after the Risk Management Reports, claims were made, some reinsurers were quick to raise and question the reductions and to involve, in the case of New Hampshire, their own retrocessionaires;
>
> v) there is no evidence about the effect on the revenue estimates apart from what was said in the Risk Management Reports themselves, but it is certain that actual receipts into the Collection Accounts would have been minimal at all relevant times and Mr Guillot was very concerned about that when he read the September 1998 Report;
>
> vi) HIH would have been made aware of the views of reinsurers, but in the event, … it did not know those views (or did not enquire about them in the case of H1) before it nonetheless decided to pay the claims."

Submissions

88. Mr Weitzman pointed out that, as on the first question, HIH called no evidence from its staff responsible at the material time for responding, if necessary, to the risk management reports. He suggested that the Judge's conclusion that HIH would at least have wanted to take the views of the Reinsurers was inconsistent with its subsequent conduct in paying LDT's claims without first instructing JLT to check with the Reinsurers or in disregard of their known stance. He suggested that it was also inconsistent with the evidence of Mr Guillot. As I have indicated, Mr Guillot's evidence - which the Judge appears to have accepted on this aspect - was that, given the low level of returns on the films, if approached at the time, he would have looked closely at any request for a reduction in the number of films, and would only have agreed it if there were acceptable revised sales estimates for the reduced number.

89. The result, submitted Mr Weitzman, was that HIH had failed to discharge the burden of proof on this stage of the claimed causation, and the Judge should have drawn an adverse inference against HIH for choosing to call no evidence in this respect also, especially given the "fine balance" to which he referred. In the absence of such an inference, the result, he said, was that the Judge had nothing but speculation to help him on his way. He accordingly criticised the Judge for his conclusion in paragraph 149 that "HIH would at least wanted to know the views of reinsurers and would have asked JLT to ascertain them". He pointed to the "strong clues" pointing the other way to which the Judge had earlier referred, at paragraph 147(i) and (iii) of his judgment, that HIH would have felt reassured by the back-to-back nature of the insurance and reinsurance and its remedies under the Flashpoint side agreement. And, doing some speculation of his own, Mr Weitzman invited the Court to consider other possibilities pointing to HIH taking no action of the sort envisaged by the Judge. He also emphasised, as he did throughout his submissions, that JLT owed no duty to the Reinsurers or to HIH as insurer, only to LDT as the insured and to HIH as the reinsured, an analysis, he suggested, that the Judge had not always kept in mind in his judgment.

90. Mr Flaux, on the other hand, submitted that the Judge had demonstrated his consciousness of the correct analysis in paragraphs 132(vi) and 133 of his judgment (see paragraph 56 above) when dealing with duty. Here, he pointed out, the Judge, having found JLT to have been in breach of duty, was concerned with what HIH would have done at the time if JLT had alerted it to the coverage issue. His answer was that HIH, as the reinsured, would have asked JLT, its broker for that purpose, to take the views of the Reinsurers so that at that early stage, it could, if possible, take the same line. The fact that HIH acted differently much later, when the cover was engaged and the claims were made, provided little insight as to what it would have done earlier when the risk was only potential and just beginning to emerge.

Conclusion

91. In my view, the Judge's anxious, but careful, analysis of the circumstances and his reasoning are reasonable and tenable on the slender evidence that each side chose to put before him. They are, moreover, broadly consistent with his approach to the issue of duty and breach that HIH, while having as its starting point the reassurance of the back-to-back reinsurance cover, would, nevertheless, at the time when the potential risk to it first surfaced, have wished to take the views of the Reinsurers. Put at its

lowest from HIH's point of view, I do not feel able, on the undoubtedly fine balance available, to say that the Judge got it wrong.

3) Whether any action taken by HIH would have enabled it to avoid its claimed loss of inability to recover indemnity for the Reinsurers in respect of its payments to LDT?

92. The answer to this question - on which the Judge found in favour of JLT - turned on what HIH would or could have achieved in protection of its interest if alerted adequately to the potential risk to coverage. On that, the Judge's only "factual" evidence was that of Mr Mitchell and Mr Thompson of HIH and Mr Guillot of Axa as to what HIH and the Reinsurers would or might have done if involved and properly alerted by JLT at the time.

93. The Judge dealt with this issue in paragraphs 151 - 153 of his judgment:

> "151. I can see no compelling reason why the attitude of reinsurers would have been different if the issue had been raised with them earlier. The business was novel; the sums involved were large; the evidence of receipts was hardly encouraging. Even if it was thought not to give grounds for refusing cover, the natural inclination would be do nothing and rely on whatever rights the wording might be held to give. I can see no incentive or reason for either HIH or reinsurers to agree to change the terms of the covers or to waive any rights there might be in respect of the number of films. …
>
> 152. In my judgment, … even had Mr Drummond Brady raised the reduction in films explicitly with HIH and reinsurers, HIH has failed to prove that reinsurers would have agreed to the reduction in any of H1, H2 and H3 in any manner which would have resulted (assuming of course the correctness of the first decision of the Court of Appeal) in their being legally bound to indemnify HIH if HIH paid LDT. Insurance and reinsurance would have remained as they were.
>
> 153. There remains the question whether or not, had the views of the reinsurers been known at or shortly after receipt of the Risk Management Reports, HIH itself would not have paid the claims as it in fact did and so would not have suffered loss. But I do not think HIH has come close to establishing, even if it had advanced, such a case. The fact is that the claims were paid in circumstances where the reductions in the numbers of films were fully appreciated as was, at least in the case of H2 and H3, the contention of the non-paying reinsurers that the reductions entitled both they and HIH not to pay the claims. I do not think the earlier knowledge of the likely attitude of reinsurers would have made any material difference to HIH's decision to pay the claims. There would have been no reason for the legal advice to have been different, nor the advice of the loss adjusters. The pressures arising from HIH's financial status would have been present as they were. HIH and reinsurers were in the same

> contractual position at all times. HIH decided to pay when it could have no possible complaint about the information available to it, and was aware that it had not, nor had reinsurers, agreed to the reduction in the number of films. Whether or not Mr Thompson is right that HIH would not have paid had the legal advice it received have been different, or Mr Weitzman is right that the involvement of S&P was decisive, neither can be laid at JLT's door."

94. Mr Flaux attacked the reasoning as unclear and the Judge's over-all conclusion of no causation as inconsistent with the evidence and/or of matters that were common ground and/or as contrary to the Judge's findings of duty and breach of duty. He complained also that it overlooked LDT's likely attitude and the question of timing.

95. As to inconsistency with the evidence, Mr Flaux relied on the evidence – largely accepted by the Judge - of Mr Mitchell (paragraphs 30 and 89 above), Mr Thompson (paragraph 32 above) and Mr Guillot (paragraph 35 above), which, broadly speaking was that, if JLT had properly alerted them to the potential risk, HIH and the Reinsurers would have reviewed it and, if possible, reached accord as to a common front on the matter.

96. As to the claimed inconsistency with what was common ground and the Judge's own findings, Mr Flaux referred to the Judge's finding, in paragraph 149 of his judgment (paragraph 91 above), that, given HIH's concerns at the time about Mr Mitchell's introduction to its insurance portfolio of the film finance business, if Mr Drummond Brady had raised the matter of the film reductions with HIH, it "would have wanted to know the views of the reinsurers and would have asked JLT to ascertain them".

97. As to LDT's likely attitude, Mr Flaux, like Mr Weitzman, stressed the role of JLT as broker to it, the insured, as well as to HIH, the reinsured, and the common nature of its duties to each. But he did so to make a different point. His point was that it would have been of concern to both to sort out at the earliest possible stage any possible difficulty with the insurance and corresponding reinsurance cover. He added that, if JLT had consulted LDT as it should have done, LDT would have wanted to know the stance of its insurer, HIH, just as HIH, as reinsured, would have wanted to know that of its Reinsurers. In short, LDT, given its financial exposure turning on the success or failure of the films, would obviously not have been prepared to leave the matter – one of coverage - in the air.

98. As to timing, Mr Flaux emphasised that all these putative exchanges would have taken place over late 1998 and early 1999 during the flow of the risk management reports, a year or so before LDT first made its claims on HIH. At that earlier stage when the potential risk had not yet matured into actual exposure to loss, the parties would at least have had some leeway to consider alternatives, for example, requiring Flashpoint, through LDT, to attempt to secure replacement films or agreement to revision of the level of cover.

99. The significance of all this to the Judge's rejection of the third limb of HIH's case on causation, Mr Flaux submitted, is that HIH would have had to take a common stand with the Reinsurers either to maintain its respective back-to-back cover, subject possibly to some modifications, or repudiate it. Either way, HIH would never have

been left in the position of having to decide whether to meet LDT's claims unsupported by the reinsurance.

100. Finally on this question, Mr Flaux turned to the Judge's reliance, in paragraph 153 of his judgment (see paragraph 97), on HIH's eventual payment of LDT's claims when, as the Judge put it, HIH "fully appreciated" the Reinsurers' stance that, as a result of the reductions in at least two of the three slates of films, it was not liable to meet the claims. Mr Flaux submitted that the Judge's reasoning is flawed if he was seeking to rely on the payment of the claims when made, as distinct from merely treating it as confirmatory of his conclusion, in paragraph 152 of his judgment, of what would have happened if an earlier attempt had been made to resolve the matter. He said that the two contexts – pre and post claim – were different and could not be equated, with the result that the Judge could not assume that the attitude of the Reinsurers pre-claim would have been the same post-claim, by which time HIH's and the Reinsurers' respective stances would have hardened.

101. Mr Weitzman's main point, as on the other two causation questions, was that the Judge correctly found this time that HIH had failed to prove its loss. More particularly, he submitted that HIH had failed to prove, as the Judge put it in paragraph 152 of his judgment, that the Reinsurers "would have agreed to the reduction in any of H1, H2 and H3 in any manner which would have resulted … in their being legally bound to indemnify HIH if HIH paid LDT". And he dismissed Mr Flaux's various suppositions as to what would have happened as pure speculation, which, in any event, did not accord with HIH's understanding at the time, on advice it had received from its solicitors, Ince & Co, that there was no waiver of rights clause let-out. He pointed to the lack of any evidence that LDT, if alerted, would have wanted to draw attention to the matter by seeking HIH's agreement to the reductions, or that if HIH had instructed JLT to alert the Reinsurers, they would have agreed to the reductions or some alternative, such as requiring replacement films.

102. In the end Mr Weitzman's most powerful point on causation - though it also overlapped with questions of the scope of the duty and remoteness - was that HIH, when paying all three claims, deliberately chose to run the risk that it might not be able to recover an indemnity in respect of them from the Reinsurers, with the result that any breach of duty by JLT in late 1998 and early 1999 when it provided the risk management reports to HIH had lost its potency by late 1999 and early 2000 when HIH paid the claims and ran that risk.

Conclusion

103. The question for the Judge and this Court on the third causation question is what would have happened if JLT had complied with its duty to HIH. What would have happened if JLT had complied with its duty to LDT might well, depending on LDT's response, have triggered some approach by HIH at the material time to the Reinsurers. But, as Mr Weitzman submitted, there was no evidence of what LDT would have done and what, if any, effect it might have had on properly alerting HIH and/or the Reinsurers. And, regardless of any input from LDT – and save for the theoretical evidence of Mr Guillot – there was no evidence of what the Reinsurers might have done if alerted at the material time. Certainly, there is nothing in the evidence of Mr Mitchell, Mr Thompson or Mr Guillot inconsistent with the Judge's conclusion that HIH had failed to prove that the Reinsurers would have agreed to the film reductions

or would have acted in some other way so as to render them legally liable - in the light of the Court of Appeal's later ruling in *HIH v New Hampshire* - to indemnify HIH in respect of its eventual payment of LDT's claims. True, as Mr Flaux argued, some reconsideration at the risk management reports stage might have led to a response from the Reinsurers that could have forestalled any such claims or have secured a common front on the matter from HIH and them. But, as Mr Weitzman put it, at best for HIH, its evidence on the matter was inconclusive.

104. In my view, the true cause of HIH's loss is that expressed by the Judge in paragraphs 152 and 153 of his judgment, and to which he returned in paragraph 155, when dealing contingently with the issue of contributory negligence – HIH paid LDT's claims when it had no legal liability to do so and when, in the case of H1, it had not ascertained the view of the Reinsurers, and, in the cases of H2 and H3, it knew that the Reinsurers – correctly as it later turned out – disputed the validity of the claims. As the Judge put it at paragraph 153:

> "… HIH decided to pay when it could have no possible complaint about the information available to it, and was aware that it had not, nor had resinsurers, agreed to the reduction in the number of films."

105. Accordingly, I would uphold the Judge's critical finding against HIH on this third question of causation that HIH has not proved that its claimed loss was caused by JLT's breach of duty.

Contributory Negligence

106. The Judge, as I have said, went on to indicate how he would have ruled on the issue of contributory negligence, if it had been necessary to do so. He said that if he had found for HIH on the claim, he would have found it guilty of contributory negligence to a total of 70%, - as to 20%, by analogy with a similar award in *Superhulls* (see paragraph 64 above) for its failure to appreciate the significance of the film reductions mentioned in the risk management reports, and as to 50%, for paying the claims without agreement of the Reinsurers when it knew, in the case of H2 and H3 slates, that they would refuse to indemnify HIH.

107. I need not spend very long on this issue, not only because it was contingent, but also because the degree of its overlap with the breach of duty and causation issues made it a very artificial exercise.

108. That was apparent from the way in which Mr Weitzman put the matter to the Court. He said that, whether as a matter of causation or contributory negligence, HIH was the author of its own misfortune and that, if it is to be looked as a matter of contributory negligence, the appropriate proportion is 100%, to be achieved by raising the 20% to 50%. He maintained that *Superhulls* was a very different case from that here where JLT had secured back-to-back cover throughout and HIH was in as good a position as the broker to assess the coverage risk.

109. Mr Flaux submitted that, in the light of the Judge's findings on duty, breach and the first two causation questions, it was unnecessary and inappropriate for him to consider, even contingently, the issue of contributory negligence and that its

negligence, if any, in paying LDT's claims did not contribute to its loss, which was the unavailability of reinsurance cover caused by JLT's breach of duty. However, if driven to it, he said he would not challenge the contingent apportionment of 20% for HIH's failure to appreciate the significance of the film reductions, relying on the approach of Philips J in *Superhulls*. However, he firmly challenged the further 50% apportionment attributed by the Judge to its payment of the claims without first ensuring that the Reinsurers stood behind it.

110. In my view, *Superhulls* is of little application to the facts of this case in the context of a *contingent* finding of contributory negligence. In that case there was not the same degree of overlap between all the issues in the case, and there was a clear breach of duty by the brokers in failing pre and post placement to inform the insurers that the period of the reinsurance it had placed did not correspond with that of the insurance. That was a breach, which when coupled with an *actual* finding of 20% negligence, led, without more, to the insurer's loss when facing a claim outside the 48 months reinsurance cover. It did not have the added element, so large in this case, of speculation as to what might have happened if the insurer had prompted the broker about the different periods of cover at an early stage, or of payment by the insurer of claims that, in law, it was not required to make and regardless of the contrary stance of the Reinsurers.

111. In the circumstances, I consider that the Judge should not have ventured a contingent view on the issue of contributory negligence against the possibility that he may have been wrong in denying HIH recovery on the issue of causation. It so cut across his reasoning on that issue as to render such a consideration highly artificial and confusing if the matter were to go further and the terrain of causation had to be traversed again. If I were forced to express a view on the matter, that artificiality would drive me, for the reason given in paragraph 104 of this judgment, further towards a 100% contingent finding of contributory negligence, as sought by JLT in its Respondent's Notice.

112. Accordingly, I would dismiss the appeal of HIH on the third of the Judge's three findings on causation, and that of JLT in its Respondent's notice on the issues of duty, breach and the first two of the Judge's findings on causation.

Lord Justice May:

113. I agree that the appeals of HIH and of JLT in their Respondents' Notice should be dismissed for the reasons given by Auld LJ and in the terms in paragraph 112 of his judgment. I also agree that the issue of contributory negligence is contingent only, but that, if a decision were necessary, I should incline towards 100%.

114. I was at one stage in the argument inclined to think that HIH had not established that JLT were in breach of a duty owed by them to HIH as reinsurer, not least because the terms of the insurances and the reinsurances were relevantly back to back. If the insured were able to recover against HIH under the insurances, HIH would be in a position to recover from reinsurers under the reinsurances. There was no commercial need for HIH to promote consideration of a modification of the reinsurances if the numbers of films was reduced, and, perhaps, no corresponding need for JLT to raise the matter explicitly with HIH. JLT may or may not have owed duties to other parties in this respect, but that is not in point. However, I am persuaded, for the reasons

given by Auld LJ, that the judge's findings here, finely balanced and on somewhat meagre primary evidence, were open to him on the evidence as a whole and should not be disturbed.

115. As to causation, the outstanding point, in my view, is that which Auld LJ has addressed in paragraph 104 of his judgment. HIH chose to pay LDT's claims when they had no legal liability to do so, when they had not ascertained the view of reinsurers in the case of H1, and when they knew that reinsurers disputed the claims for H2 and H3. As the judge said, HIH decided to pay when they could have no possible complaint about the information available to them. This was the true cause of their loss, not any antecedent breach of duty by JLT. For the insurances and the reinsurances were at all times relevantly back to back.

Lord Justice Longmore:

Duty

116. I agree with the judge and my Lords that an insurance broker who, after placing the risk, becomes aware of information which has a material and potentially deleterious effect on the insurance cover which he has placed is under an obligation to act in his client's best interest by drawing it to the attention of his client and obtain his instructions in relation to it.

117. To the extent that JLT argued that their only duty with regard to post-placing information was to act as a post box, merely passing on such information as and when they received it, the judge rightly rejected the argument at paragraph 133 of his judgment. Indeed, as between a lay client unversed in insurance matters and his insurance broker, I would think that the existence of such a duty should be comparatively uncontroversial.

118. Mr Weitzman QC for JLT submitted, however, that when (as often happens and happened in this case) an insurance broker acted for both a lay client insured in obtaining insurance and for the professional insurer in obtaining reinsurance, the position was different. He drew a distinction between what he called "a primary coverage issue" and what he called "a secondary coverage issue". A primary coverage issue, according to Mr Weitzman, is an issue relevant to both the original insurance and the reinsurance (e.g. in this case a reduction in the number of films) while a secondary coverage issue is an issue affecting the contract of reinsurance only, particularly an issue which (where the cover is back-to-back) affects the back-to-back nature of the cover. He then submitted that the broker, who acted as a reinsurance broker, had a duty in relation to secondary coverage issues but not in relation to primary coverage issues. The reason put forward for this distinction was that, if the broker owed a duty in relation to primary coverage issues that would give rise to a potential conflict. If, for example, the broker advised the insurer that there had been a reduction in the number of the films and that that might mean that the reinsurers could decline liability for that reason unless some steps were taken to obtain their agreement, that would be tantamount to informing the insurer that they could decline liability to the insured. So to inform the insurer would thus cut across the broker's duty to the insured to preserve the cover for the purposes of any claim.

119. The proposed distinction is to my mind both unnecessary and unprincipled. As I have said, it is common place for insurance brokers to place both original cover and reinsurance cover. There are excellent market reasons for that but, save to the extent (if relevant) that in the case of reinsurance the broker acts for a professional client rather than a lay client, the duty owed to each client should, in principle, be the same. If there is information which may potentially put cover at risk, both clients will want to know about it and, in normal circumstances, both clients should be informed.

120. I say "in normal circumstances" because it may be possible to envisage a case (in relation to which the experts called in the present case gave some evidence) in which the lay client, on being told of information relevant to the cover, might positively say to his broker that that information should not be passed to the insurer. This possibility shows that the prudent broker may be well advised to discuss the matter first with his lay client and obtain his instructions before sending the information to the insurer in his capacity as reinsurance broker. But such a situation would be rare. In the present case JLT seem to have had no hesitation in sending the risk management reports (which contained the information about the reduction in the number of the films) to both their insured client and their reinsured clients at the same time.

121. The fact, however, that it is possible to envisage a rare case of difficulty does not mean that the precise scope of a broker's duty should be artificially restricted to cater for that rare case. The fact is that he has assumed duties to two principals and must properly carry out his duties to both those principals until a conflict arises; if it does arise, he would then have to consider his position. Of course, the likelihood is that if the lay client is given information that might put his cover at risk, he will instruct his brokers to discuss the matter with his insurers so that an accommodation can be reached before any question of loss arises. That is the way in which the market usually works.

122. In the present case things did not work out like that. The brokers did not draw the attention of either of their clients to the fact that the reduction in the number of films might put the cover at risk and the result was that no accommodation was reached with either the insurers or the reinsurers. The insured has no complaint since his claim was in fact paid but the insurers do have a complaint which cannot, in my view, be met by an argument that for the brokers to have performed their duty might have been contrary to their (unperformed) duty to their lay client. As Mr Flaux QC for the insurers put it the fact that JLT did not perform their duty to LDT does not absolve them from performing their duty to HIH.

123. The precise point that arises in this case does not appear to have arisen before but the above conclusions are, in my judgment, consistent with the authorities on potential conflicts of duty such as *North and South Trust Co. v. Berkeley* [1971] 1 WLR 470 and *Kelly v Cooper* [1993] AC 205. When a not dissimilar argument was adduced by the brokers in *The Zephyr* [1984] 1 Lloyds Rep 58 to the effect that any duty assumed directly to insurers would be in conflict with the duty owed to the insured and could not therefore exist, Hobhouse J responded by saying (page 84) "the fact that a defendant is the servant or agent of another does not mean that he may not owe a duty of care to the plaintiff".

Breach of duty

124. I would also uphold the judge on breach of duty. This question is more difficult since it can be said with some force that both JLT and HIH were insurance professionals; they could each read the risk management reports, take on board the fact that the number of films had been reduced and decide for themselves whether that was likely to make any difference to the cover; indeed since the insurers were altogether more intimately concerned with the cover they would naturally be able to form their own view on the matter without any need for any highlighting of the risk by JLT. Mr Weitzman also submitted that a claim for breach of duty could not succeed without HIH proving that their relevant personnel were not fully alive to the issues that could arise from the reduction in the number of films.

125. Once it is accepted, however, that a duty exists to direct a client's attention to information which may affect coverage, I do not think it is for the client to prove that he was not aware of the significance of the information which the broker should be passing on to him. That is all the more so in this case when Mr Drummond-Brady did discuss his concern with Mr Mitchell who had left HIH but not with the personnel who were still there.

126. The fact that both JLT and HIH were professionals is not irrelevant but, once it is clear that the duty exists and was not performed, then the relevance is to the question of contributory negligence, which the judge assessed on the hypothesis that he was wrong on causation, rather than to the question whether there was a breach of duty in the first place.

Causation

127. As to causation I entirely agree with the conclusions of Auld LJ to which I cannot usefully add. I prefer to express no view about contributory negligence.

Conclusion

128. I agree that the appeal and cross-appeal should be dismissed.