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Case Nos: 1999 FOLIO 1248,
2000 FOLIO 260
2000 FOLIO 1120

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2006

Before :

THE HONOURABLE MR JUSTICE LANGLEY

- -

Between :

HIH CASUALTY AND GENERAL INSURANCE LIMITED	**Claimant**
- and -	
JLT RISK SOLUTIONS LIMITED (FORMERLY LLOYD THOMPSON LIMITED)	**Defendant**

- -
- -

Mr J. Flaux QC, and Mr S. Picken (instructed by **Holman Fenwick& Willan**) for the **Claimant**
Mr T. Weitzman QC, Mr J. Davies-Jones and Mr A. Kramer (instructed by **Eversheds**) for the **Defendant**

Hearing dates: 1st – 21st February 2006

- -

Judgment

The Hon. Mr Justice Langley :

INTRODUCTION

The Films

1. This is another film finance insurance dispute. It concerns the remaining unresolved claims arising from the slates of films which have come to be known as Hollywood 1, Hollywood 2 and Hollywood 3, or, as I shall refer to them, H1, H2 and H3. The descriptions by which the slates were known at the time the covers were placed were "7.23" (H1), "Rojak" (H2), and "Award" (H3).

The Insurance/Reinsurance

2. The Claimant ("HIH") was the sole insurer of the risks. HIH's underwriter was Steven Mitchell, who left HIH's employment at the end of February 1998. The assured was Law Debenture Trust Corporation (Channel Islands) Limited ("LDT"). HIH was reinsured by a number of reinsurers, prominent among which were Axa Reinsurance S.A. (or companies in the "Axa" "Group") and New Hampshire Insurance Co. ("New

Hampshire"). The Defendant ("JLT") was the broker who placed both the insurance and reinsurance. "Flashpoint", and its two principals, David Forrest and Beau Rogers, were the prime movers behind H1, H2 and H3.

3. The objective was to provide finance for the production of low-budget films for television. LDT was the holder of loan notes as trustee for the investors who provided the funding. The loan notes were rated by Standard and Poors (S&P) to improve their marketability. The risk insured was that the slates of films would not generate sufficient revenue to repay the loan notes.

4. Slip policies were placed in August 1997 (H1) and December 1997 (H2 and H3). They provided for slates of six films (H1), ten films (H2) and five films (H3). Wordings were agreed shortly after the slip policies. They were described as Pecuniary Loss Indemnity Policies or "PLIPS". The PLIP wordings contained a clause (Clause 8) entitled "Disclosure and/or Waiver of Rights" ("the Waiver of Rights Clause") by which HIH agreed "to the fullest extent permissible by applicable law" not to seek to avoid or rescind the PLIP.

Claims under the Insurance

5. The period before a claim could be made was many months to enable the films to be made and marketed and revenues to be collected. The H1, H2 and H3 slates were not at all successful. Their returns fell short of those predicted by very substantial amounts. LDT made a claim in July 1999 in respect of H1. On 12 August 1999 HIH paid US$ 15,611,008 on that claim. On 9 November 1999 a claim was made in respect of H2. HIH agreed to pay the H2 claim on 3 February 2000 and did so some days later in the sum of US$ 14, 679,473. The claim on H3 was submitted on 22 May 2000 and HIH agreed to pay and paid it in June 2000. HIH paid US$ 25,092,303 on H3.

6. HIH had retained 20% of the risks in the case of each of H1 and H2 and 12.5% in the case of H3. The balance of the risks were fronted by HIH for the reinsurers. As carriers of 100% of the risk, the loan notes could be and were rated by S&P in accordance with the S&P rating of HIH itself.

The Proceedings against Reinsurers

7. HIH sought an indemnity from the reinsurers. Some, with small lines, paid. Others, with larger lines, did not. HIH took proceedings against the non-payers. The defendants put forward a number of defences including a claim to be discharged for breach of warranty as to the number of films to be made in each slate and as to any alteration or amendment to the contracts of insurance being required to be agreed by reinsurers. There was no dispute that the number of films made was less in each slate: five not six in H1, eight not ten in H2, and four not five in H3. In fact, the evidence before the court is that only six films were ever made in the H2 slate.

8. In December 2000, David Steel J determined a number of preliminary issues in the H1 and H2 claims. The judgment is reported at [2001] 1 Lloyd's Reports 378. HIH was Claimant and New Hampshire, Independent Insurance Company Limited ("Independent") and Axa were Defendants. David Steel J decided that there were warranties both in the insurance and reinsurance as to the number of films to be made.

HIH appealed. On 21 May 2001, the Court of Appeal upheld the decision of David Steel J: see [2001] 2 Lloyd's Reports 161.

9. Prior to the decision of the Court of Appeal, JLT had not been a party to the proceedings. It was not, therefore, bound by the decision. JLT was joined as a Defendant in November 2001. The claim by HIH alleged that JLT had breached its duties as reinsurance broker by failing to advise HIH of the existence of the warranties as to the number of films which it had now been decided had been given. This claim in negligence against JLT was later withdrawn. It was probably hopeless in view of the legal advice obtained at the time of placement that there would be no grounds for avoiding the insurance.

10. In December 2001, Axa sought a summary judgment seeking the dismissal of HIH's claims in H1 and H2 on the grounds that the warranty as to the number of films had been breached. HIH contended that Axa had waived or otherwise lost the right to rely on the breach of warranty by reason of Axa's knowledge of the reduction in the number of films acquired from the receipt of Risk Management Reports about the progress and sale of the films. Axa was successful at first instance and, on 31 July 2002, on appeal: [2003] LRIR 1.

11. Recognising that no distinction could be drawn between Axa and other non-paying reinsurers, nor between H1/H2 and H3, HIH abandoned all its claims against those reinsurers, so that by December 2002 the only remaining Defendant in the H1, H2 and H3 proceedings was JLT.

The present claims

12. In March 2003 the claim against JLT was amended in a number of ways but it remained a claim only in negligence. In April 2003 the trial of claims involving slates of films known as Hollywood 4 and 5 began. Those claims were brought by the assured against the insurer (not HIH). Unlike this case, the insurer had not paid the claims. The insurer made allegations of fraud against JLT in relation to the placement of H3 and an earlier placement of a risk known as The New Professionals or "TNP". In July 2003 the Hollywood 4 and 5 proceedings were settled.

13. In December 2003, HIH indicated that it was intending to allege fraud against JLT in these proceedings. Draft pleadings, served in March 2004, alleged fraud in relation to both H2 and H3 and TNP. The allegations in relation to H3 and TNP were derived from those made by insurers in the Hollywood 4 and 5 proceedings.

14. In July 2004, on HIH's application to amend the claim to allege fraud, some amendments were allowed and others refused. Further allegations of fraud specific to H1 were allowed. In December 2005, HIH abandoned all specific allegations of fraud in relation to H2 and one allegation specific to H3.

15. At the time, 1 February 2006, when this trial began, HIH made two distinct claims which can be summarised as follows:

    i) A claim in negligence for damages in respect of the loss HIH incurred as a result of its failure to recover from reinsurers because of the breach of warranty arising from the reductions in the number of films made;

ii) A claim in deceit for damages in respect of all losses suffered by HIH as a result of its insurance of H1, H2 and H3 founded substantially on allegations made about the sales estimates provided for the slates at the time the risks were presented.

The Hearing

16. The trial, after short oral openings, proceeded with the evidence of Mr Mitchell and Mr Jean-Michel Guillot, the underwriter responsible for writing the reinsurances of HIH written by Axa. Mr Guillot's evidence concluded on Thursday 9 February (Day 6 of the trial). At that time, Mr Flaux QC, for HIH, informed the court that, in the light of the evidence given by Mr Mitchell and Mr Guillot in cross-examination by Mr Weitzman QC, for JLT, he wished to take further instructions in particular with regard to the claim in deceit.

17. In the course of the evening of 9 February, Mr Flaux let me know that HIH was no longer to pursue any part of its claim in deceit. It is right that I should state that in view of the evidence given that decision was in my judgment inevitable and, of course, taken in compliance with the duty of counsel in such circumstances.

18. The consequence, in terms of the trial, was that the evidence resumed on Wednesday 15 February and concluded on Thursday 16 February. HIH called Mr Thompson who was concerned, with others, on behalf of HIH, with the management of the film finance book in 1998 and thereafter until April 2001 when he resigned from HIH following the provisional liquidation of the company.

19. Expert underwriting and broking evidence was also adduced by HIH and expert broking evidence by JLT. The expert underwriter was Roger Day (HIH) and the expert brokers Julian Radcliffe (HIH) and Kit Brownlees (JLT). In addition, it was sensibly agreed that the report of Paul Philand, the expert underwriter instructed by JLT, could be read and accepted in evidence as such. Mr Philand would not have been available to give evidence in the truncated timetable required for the trial following the withdrawal of the claim in deceit. Mr Day and Mr Radcliffe had prepared reports and Supplemental Reports. Mr Philand and Mr Brownlees had prepared Reports. There were also joint memoranda signed by the underwriting and the broking experts.

20. JLT called no factual evidence. Witness statements had, in particular, been served by Gordon Dawson, who placed the risks, and by Mark Drummond Brady, the manager of the Financial Risks Unit within JLT and Mr Dawson's superior. It was also agreed that the statement of Mr Dawson (in so far as it dealt with "factual matrix") and a statement by a Ms Flanagan, who worked at JLT as personal assistant to Mr Drummond Brady, should be accepted in evidence.

THE HOLLYWOOD TRANSACTIONS

21. The structure and terms of the three transactions were essentially the same. I shall refer to H1 to illustrate the material matters.

22. A special purpose vehicle was incorporated in Jersey, called Hollywood Funding Limited ("HFL"). On 22 August 1997, HFL issued US$ 16.4m zero coupon notes at a discount. The notes were redeemable at par on 23 August 1999. The notes were held

by LDT as trustee for those who invested in them. The monies raised by the issue of the notes were to be transferred by HFL to Flashpoint to enable Flashpoint to fund the production of the slate of films.

23. It was a condition precedent to the transfer of monies from HFL to Flashpoint that the H1 PLIP had been delivered to LDT. In consideration of the transfer, Flashpoint agreed to pay on the last day of the policy period all the monies in a Collection Account (into which the revenue from the slate of films was to be paid) to an Escrow Account in the name of LDT. The PLIP was intended to respond in the event of a shortfall between the sum insured and the amount in the Escrow Account on the last day of the policy period. The sum insured was US$ 16.4m to reflect the par value of the notes and to ensure that the investors were paid in full for their investment. Ince & Co were instructed by HIH to provide a formal opinion to LDT (and others) stating that the PLIP was legal, valid, binding and enforceable.

24. Flashpoint's part in the transactions was central. Flashpoint provided the finance to the film production companies. It was Flashpoint which was obliged to procure the insurance for LDT. Flashpoint was the source of information presented by JLT to underwriters when placing the insurance and reinsurance and Flashpoint was the "risk manager" for monitoring the risk and exploitation of the films. The material documents, again using H1 as an illustration, were as follows.

The Slip Policies

25. The Slip Policy for H1 was scratched by Mr Mitchell for HIH on 13 August 1997. It was drafted by Mr Dawson. The scratch was for 100% of the risk subject to reinsurance of 80%.

26. So far as material, the wording was:

> "TYPE: SLIP POLICY
>
> INSURED: THE LAW DEBENTURE TRUST….
>
> PERIOD: 22ND AUGUST 1997 TO 22ND JULY 1999
>
> INTEREST: 7.23 Productions will produce and make six made-for-TV Films.
>
> It is understood that, if at expiry of the Policy Period the revenue collected is less than the Sum Insured as a result of Force Majeure, as defined, then Underwriters will pay to the Assured, at the expiry of the Waiting Period, the difference between the Sum Insured and the revenue collected, subject to the exclusions set forth below.
>
> SUM INSURED: Maximum USD 3,900,000 any one Film and USD 16,400,000 in the aggregate.

CONDITIONS: As per Pecuniary Loss Indemnity wording tba L/U only.

Waiting Period: 20 Day

UK Law and Jurisdiction

LSW 1001

Cross Collateralisation Clause to be agreed L/U only.

INFORMATION:

(Not to appear

on the Policy) Revenue from all films will cross-collateralise across the 6 film slate.

See "Side Agreement" agreed by L/U only.

All other information on file with Lloyd Thompson Limited.

PREMIUM USD 1,640,000 inclusive of IPT plus 7.5% of "Back End" payable semi annually from date of first exploitation.

DEDUCTIONS: -20% plus tax if applicable."

27. It will be seen that the "six" films appear in the "Interest" provision. The "Side Agreement" referred to as "Information" was to be and became an agreement between HIH and Flashpoint which is described below. The premium was 10% of the sum insured. That was, on the evidence, a high rate which would usually be taken to reflect high risk.

28. The Slip Policy wordings for H2 (scratched by Mr Mitchell for 100% on 4 December 1997) and for H3 (scratched by Mr Mitchell for 100% on 17 December 1997) were in substantially the same form and terms save for the numbers of films (10 and 5 respectively) and the Sums Insured (US$ 15.5m and 25.6m respectively) and the Periods of cover (23 months from 8 December 1997 and 29 months from 18 December 1997 respectively).

The PLIPs

29. The PLIP for H1 was dated 22 August 1997. So far as material it provided as follows. HIH was the "Insurer", LDT the "Assured", and HFL the "Purchaser":

> "H.I.H. … unconditionally, save as herein provided, and irrevocably agrees with the Assured … that in consideration of the payment of the premium … and subject to the Insuring Clause, Definitions, Exclusions and Conditions of this Policy

that the Insurer will pay amounts due to the Assured on the respective due dates for payment as set out in this Policy.

PREAMBLE

(A) WHEREAS, Flashpoint Ltd., … has invested or is in the process of investing in six revenue generating entertainment projects collectively known as "7.23" (the "Projects") where all the revenue generated thereby … is due to be paid into the Collection Account ….

(B) WHEREAS … Flashpoint Ltd has agreed … to pay to the Escrow Account … the Collection Amount … on the last day of the Policy Period ….

(C) ….

(D) ….

(E) WHEREAS, neither [HFL] nor the Assured is involved nor has any interest in the Projects or in the Collection Account.

NOW THEREFORE

Clause 1 Insuring Clause

1.1 Initial Claim

If at the close of business on the last day of the Policy Period the amount of the balance standing to the credit of the Escrow Account is less than the Sum Insured (as defined in the Schedule) as a consequence of the occurrence of the Insured Peril then on the last day of the Waiting Period (as defined in clause 2.6 below) the Insurer will pay to, or to the order of, the Assured such US Dollar amount as is necessary to ensure that the Assured receives and retains in the Escrow Account a net sum equal to the Sum Insured.

1.2. ….

Clause 2 Definitions

2.1 Insured Peril

Insured Peril means the failure to generate a balance in the Escrow Account as at the last day of the Policy Period equal to the Sum Insured, for any reason whatsoever ….

This definition includes, but is not limited to, the failure of the Projects to generate a balance in the Collection Account equal to, or in excess of, the Sum Insured or the failure of Flashpoint

Ltd to make any payment under the Purchase Agreement for any reason whatsoever.

2.2 Collection Account

The Collection Account means the account … in the name of Flashpoint Ltd to receive the revenue generated by the Projects ….

2.3 Escrow Account

The Escrow Account means the account … in the name of the Assured.

2.4 Collection Amount

The Collection Amount means the US dollar amount being equal to the lesser of:-

(i) The Sum Insured; and

(ii) The US dollar balance in the Collection Account as at the close of business on the second business day … prior to the last day of the Policy Period.

….

2.6 Waiting Period

The Waiting Period in respect of any claim under clause 1.1 ….means the period beginning on the date on which the Insurer receives a notice of claim in respect of such claim and ending on the date 20 days thereafter….

….

Clause 4 Assignments And Amendments

….

4.3 Amendments to the Policy

This Policy may not be amended, cancelled, revoked or rescinded without the prior written consent of the Assured.

Clause 5 Conditions

5.1 Claims Procedure under clause 1.1

A claim may be made under clause 1.1 of this Policy on or at any time after the last day of the Policy Period. The Assured may make a claim under this Policy by delivering to the Insurer a completed claims form, in the form annexed hereto.

….

5.4 Payments

Subject to the terms and conditions of this Policy, the payment of any claim under this Policy will be made in US Dollars … by no later than the last day of the relevant Waiting Period.

….

Clause 7 Governing Law and Jurisdiction

7.1 English Law

This Policy shall be governed by, and construed in accordance with, the laws of England and Wales.

7.2 English Courts

The Insurer and the Assured hereby irrevocably agree for the benefit of each other that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes which may arise out of or in connection with this Policy … and, for such purposes irrevocably submit to the jurisdiction of such courts ….

….

Clause 8 Disclosure and/or Waiver Of Rights

8.1

To the fullest extent permissible by applicable law, the Insurer hereby agrees that it will not seek to or be entitled to avoid or rescind this Policy 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 of any arrangements between Flashpoint Ltd and the Purchaser) 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 (including without limitation any such rights acquired by assignment or otherwise) 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 hereof.

9.1 Effective Date

This Policy is dated and becomes effective on 22nd August 1997."

30. The wordings of the PLIPs for H2 and H3 were in all significant respects identical save for references to the slates and numbers of the films. The H2 PLIP was dated 8 December 1997 and the H3 PLIP 18 December 1997.

The Insurance Cover Notes

31. The Cover Notes issued by JLT to the solicitors, Tarlo Lyons, on behalf of LDT, or LDT itself, mirrored the terms of the Slip Policies.

The Reinsurance Slip Policies

32. So far as material, the Reinsurance Slip Policy for H1 provided:

> "TYPE As Original Policy
>
> FORM Quota Share Reinsurance Slip Policy
>
> REASSURED All companies underwritten for by HIH ….
>
> ORIGINAL ASSURED HOLLYWOOD FUNDING LIMITED Jersey
>
> PERIOD 23 months with effect from 30th July 1997
>
> INTEREST As Original Policy
>
> ORIGINAL SUM
>
> INSURED Maximum USD 3,900,000 any one film and USD 16,400,000 in the aggregate
>
> SUM REINSURED USD 13,120,000 in the aggregate quota share part of USD 16,400,000 in the aggregate
>
> ….
>
> CONDITIONS This Reinsurance is subject to all terms, clauses and conditions as original and to follow that placement in all respects.
>
> This Reinsurance to bear its proportion of any and all costs and expenses incurred under the Original Insurance.
>
> The Reinsured hereon agrees to consult and obtain Reinsurers' agreement to all amendments and alterations to the terms, clauses and conditions of the Original Policy….

PREMIUM Original Net Premium to the Reassured being after all deductions provided for under the Original Policy.

BROKERAGE 5% OF Original Net Premium to the Reassured.

INFORMATION See copy of Original Slip and information as held on file with Lloyd Thompson Limited."

33. The Reinsurance was therefore "back-to-back" with the insurance. The Slip for H1 was written by New Hampshire for 35% and Axa for 30% and by Independent for 12.5% and others for smaller shares. HIH retained 20% of the H1 risk. The Reinsurance Slip Policies for H2 and H3 were materially the same save to reflect the different periods and sums insured and reinsured and the lines of reinsurers. HIH retained 20% of H2 (Axa wrote nearly 68%) and 12.5% of H3 (Axa wrote over 69%).

The Reinsurance Cover Notes

34. The Cover Notes provided by JLT to HIH mirrored the Reinsurance Slip Policies. They were dated 14 October 1997 (H1), 19 December 1997 (H2) and 19 January 1998 (H3).

The Flashpoint Agreements

35. The side agreements referred to in the Slip Policies were the subject of negotiation for some time after the insurance and reinsurance had been placed. A Draft had been presented to Mr Mitchell by Mr Dawson before the PLIP for H1 was agreed. It was also presented to Reinsurers. Between July and December 1998 the agreements were negotiated between solicitors, Ince & Co for HIH and Tarlo Lyons for Flashpoint. By that time an agreement (now called a Collateral Agreement) had been completed in respect of Hollywood 4. Eventually, probably in early December 1998, agreements were concluded in respect of each of H1, H2 and H3 to be effective from the dates when the relevant transaction closed. The principal terms of the agreements were that Flashpoint was appointed HIH's risk manager, was to provide HIH with details of the use of the funds which were to be used only (Clause 5) to produce the films, was to procure that the films were produced within budget and to schedule, agreed to restrictions on the disbursement of revenues received from sale of the films, and undertook to exploit the films commercially and to be responsible to HIH for collecting revenues and informing HIH about sales "to enable HIH to evaluate its potential exposure". Clause 7(5) required Flashpoint, if requested, to provide "status reports" on the films and revenues.

36. By Clause 8, Flashpoint gave various representations and warranties including that it had "fully and accurately disclosed to HIH in respect of the Policy all information which is material to the consideration of the risks forming the Policy, or to the terms, conditions and exclusions contained in the Policy". By Clause 13, Flashpoint acknowledged that "utmost good faith shall be the essence of the relationship between [HIH and Flashpoint], and in the interpretation and effect of this agreement and in the negotiation and placement of the Policy". The "Policy" was defined as the "Policy in favour of [LDT]" issued by HIH. The "Films" were defined by reference to Schedule

2. In the case of H1, Schedule 2 set out six films, which were named. In the case of H2, Schedule 2 set out five named films and added "(plus five other films to be agreed between Flashpoint … and the Producer)". The "Producer" was "Rojak Films Inc". In the case of H3, Schedule 2 set out 2 named films and added "(plus 3 other titles to be agreed between Flashpoint … and the Producers)". The "Producer" was "Award Entertainment".

37. The obligations undertaken by Flashpoint under the concluded Collateral Agreements were vastly more extensive than those in the draft Side Agreement which had been available at the time H1 was placed. That draft contained nothing of what became clauses 8 and 13 and little about obligations to procure production of the films.

THE NEGLIGENCE CASE

38. There are serious points raised by Mr Weitzman QC about what he submits is an impermissible divergence between the pleaded case of HIH and the thrust of the way in which that case has been addressed in submissions. There are some significant points on which, however, the parties are agreed, namely that:

i) The claim is made against JLT for breach of duty in the capacity of broker for HIH in the placement of the reinsurance;

ii) no allegations of negligence are made in respect of the placing of the reinsurance nor in respect of the terms obtained which complied with the instructions of HIH to obtain back-to-back cover. The complaint, and the alleged duty of care relates only to events post-placement; and

iii) the negligence case arises out of the two decisions of the Court of Appeal, to which I have referred in summary, and which prevented HIH from recovering from certain of its reinsurers their proportions of the sums HIH had paid to LDT. It is therefore necessary to refer to those decisions, and in particular the decision on preliminary issues, in more detail not only because, as a fall-back submission, Mr Weitzman QC submits the decision was wrong and in any event would have been different had the evidence of context been before the Court of Appeal as it is before me, but also because it impacts directly on the case of HIH in negligence. It is also necessary to examine the pleadings in some detail to address Mr Weitzman's objections and concerns.

The Openings

39. By way of introduction, I should set out how each party summarised the case in negligence in their written opening skeleton/submissions.

40. Mr Flaux QC and Mr Picken, in paragraph 12 of their opening skeleton, and reflecting the particulars of claim, said:

> "12. HIH allege that JLT (in their capacity as brokers for HIH in the placement of the reinsurances):
>
> 12.1 failed to ensure that reinsurers' agreement to any reduction in the number of films on each slate was obtained or

> recorded, thereby depriving HIH of the ability successfully to contend that reinsurers were precluded (by agreement, estoppel, waiver or affirmation) from relying upon the breaches of warranty as to the number of films and as to the alterations/amendments to the contracts of insurance; and/or
>
> 12.2 (in the absence of such agreement) failed to ensure that HIH were promptly informed of this fact and/or were advised of the consequences and/or were advised what should be done so as to ensure (i) that the reinsurance contracts remained back-to-back with the contracts of insurance; alternatively (ii) in the event that the reinsurance contracts did not remain back-to-back, that HIH were aware of the (actual or potential) gap in cover before they paid the claims under the contracts of insurance."

41. On that basis HIH claimed damages in respect of the inability to recover under the reinsurance, and the costs incurred in the proceedings brought by HIH against non-paying reinsurers. Quantum matters were left over at the conclusion of the hearing in the hope they could be agreed or at least where not agreed the issues could be clarified.

42. Mr Weitzman QC, Mr Davies-Jones and Mr Kramer succinctly summarised the claim, as they understood it, in paragraph 39 of their written opening submissions as:

> "In summary, [HIH] alleges that JLT was negligent in failing to seek and obtain Reinsurers' agreement to reductions in the number of the films making up the insured slates and/or their waiver of any breach of warranty in this respect."

43. The case, as understood, was described in more detail in paragraph 57; namely that:

> "(1) JLT should have obtained Reinsurers' consent to the reduction in the number of films (either by a variation to the terms of the reinsurances or, post-breach of warranty, by a formal waiver).
>
> (2) JLT should have obtained such consent of its own accord and even though it had not been instructed to do so by HIH.
>
> (3) JLT's failure to obtain such consent deprived HIH of the opportunity to argue that Reinsurers were precluded from relying upon the breach of warranty argument that succeeded before the Court of Appeal.
>
> (4) Having failed to obtain Reinsurers' consent, JLT should have ensured that HIH acted [as stated in paragraph 12.2 of Mr Flaux and Mr Picken's opening skeleton]."

44. In paragraph 56, counsel for JLT also made the points that HIH did not allege

    i) that JLT ought to have appreciated that there was a warranty as to the number of films to be made or that there was a term of the covers to that effect (the allegation which had been made but abandoned); or

    ii) that HIH itself had agreed to a variation in the contracts of insurance to reflect the reduction in the numbers of films on the slates, or that HIH itself was estopped or otherwise precluded from relying on a breach of warranty in that regard if such there was, or that JLT believed that either was the case; or

    iii) that HIH ever gave JLT any instructions to obtain the agreement of reinsurers to waive any breach of warranty or term in respect of the number of films; or

    iv) that JLT failed to pass on to HIH or any Reinsurer any relevant information which it had or had passed on any relevant different information to one and not another.

45. I would add, by way of comment, that on the evidence before the court it is reasonably plain that no one at JLT, nor at least Mr Mitchell at HIH and Mr Guillot at Axa, thought that the number of films were warranted or a term of the covers at all. They thought the covers were tantamount to financial guarantees and that the Waiver of Rights Clause (Clause 8 of the PLIPs) precluded all warranties or terms.

46. JLT's case was (and is) that:

    i) it was under no duty, absent instructions from LDT or HIH, to seek of its own accord any variation or waivers in respect of either insurance or reinsurance;

    ii) HIH's loss was not caused by any negligence on the part of JLT. It was caused by HIH's own actions in paying LDT's claims. In the alternative the payment is relied upon as contributory negligence or a failure to mitigate.

The Pleadings

47. I think, where it is not a direct quotation from it, JLT's summary in counsel's opening submissions of HIH's case as pleaded, is both fair and accurate.

48. The H1 Particulars of Claim, in their final much amended form, alleged quite generally a duty of care owed by JLT not only in placing the reinsurance "but also in or about their subsequent conduct on behalf of the Claimants in relation to the reinsurance". The inability to recover from reinsurers was alleged, in Paragraphs 12(1) and (2), to be "the result" of breach by HIH of that duty in failing to ensure that reinsurers agreed to any reduction in the number of films so as to preclude them from relying upon the breaches of warranty as the Court of Appeal held them to be. The alternative case, based on a failure to obtain agreement, was quoted verbatim as I have set out in Paragraph 40 at 12.2. The quotation comes from paragraph 12(3) of the Particulars of Claim.

49. There is, as Mr Weitzman submitted, no allegation that JLT should have advised HIH of any reduction in the number of films only that the agreement of reinsurers to a reduction should have been sought.

50. Further information was sought of the allegations of breach of duty. The answers, provided in April 2003, were as follows:

> "(a) The reason why the Defendants should have ensured that Reinsurers' agreement was obtained is demonstrated by what, in the event, happened with the Claimants finding themselves obliged to pay under the insurance without being able to recover from Reinsurers under the reinsurance ….
>
> (b) It was clearly negligent of the Defendants to place the Claimants in the position they found themselves in. No further plea is required.
>
> (c) It is, in particular, wholly unnecessary, if the case is to succeed, for the Claimants to have asked the Defendants to obtain Reinsurers' agreement. This was something which the Defendants should have done without needing to be asked had they been acting as reasonably competent reinsurance brokers.
>
> … The reason why the Defendants should have reported to the Claimants that Reinsurers' agreement had not been obtained is that, had this been done, the Claimants would have known that the reduction was something about which they themselves needed to take issue with their assureds, adopting the same position vis-à-vis their assureds as Reinsurers were adopting vis-à-vis the Claimants.
>
> … The Defendants should have advised the Claimants that Reinsurers' refusal to agree to the reduction would or at least might have the consequences set out in paragraph 12(3).
>
> … The reinsurance ceased to be back-to-back in the sense that, whereas the insurance remained valid and subsisting, Reinsurers had been discharged from liability under the reinsurance by reason of a breach of warranty.
>
> … The gap in cover was [that the reinsurance ceased to be back-to-back] as described … above".

51. Thus both allegations of breach and the source of the duty were predicated on the insurance and reinsurance not, or at least no longer, being back-to-back. Far from alleging that HIH was not aware of the reduction in the number of films it is alleged that HIH was obliged to pay notwithstanding the reduction.

52. In Paragraph 15 of the H1 defence, addressing Paragraph 12(1) of the Particulars of Claim, JLT alleged that it did inform Reinsurers of the reductions in the numbers of films, that HIH did not ask JLT to obtain their agreement to the reduction and, in sub-paragraphs (9) and (10) that:

> "(9) Further, during a conversation between Steven Mitchell (who had written the Insurance Contract for HIH) and

> Mr Drummond Brady of JLT following receipt of the first Risk Management Report in September 1998, Steven Mitchell told Mr Drummond Brady that he did not regard the change in the number of films in the slate from 6 to 5 as being material.
>
> (10) In the light of the above and/or in any event, it is denied that JLT was under a duty to HIH:
>
> (a) To obtain the agreement of the Reinsurers to a variation of the Insurance and/or the Reinsurance Contracts as to the number of films to be made when (i) HIH had not itself indicated an intention to agree or had agreed any such variation of the Insurance Contract and/or (ii) HIH had not instructed JLT to obtain any such agreement from the Reinsurers;
>
> (b) To take any steps to ensure that, in the event of HIH paying LDT as volunteers, the Reinsurers would be liable to HIH nonetheless and/or would be estopped from denying any such liability;
>
> (c) To take any steps to protect HIH from the consequences of the Court subsequently mis-construing the terms and/or effect of the Insurance Contract and/or the Reinsurance Contracts."

53. In Paragraph 5(6) of the Reply, HIH pleaded in response to Paragraph 15(9) of the Defence:

> "(6) As to sub-paragraph (9):
>
> (a) The alleged conversation between Steven Mitchell and Mr Drummond Brady is not admitted.
>
> (b) Further or alternatively, even if (which is not admitted) the conversation took place, Mr Mitchell had left the Claimants' employment and had ceased to act for the Claimants in late February/early March 1998. Accordingly, anything that Mr Mitchell might have said to Mr Drummond-Brady in or about September 1998 was not said on behalf of the Claimants and is not binding on the Claimants in any way.
>
> (c) The Claimants will rely on the fact that JLT rely on the alleged conversation between Mr Mitchell and Mr Drummond-Brady as recognition by JLT that, in order for their conduct to be excused or explained, there needs to have been some communication between the Claimants and JLT excusing or explaining JLT's failure to do what they should have done as regards the reduction in the number of films, namely the steps referred to in the Re-Amended Particulars of Claim. There was no such communication between the Claimants and JLT."

54. Mr Weitzman submitted that seen in context the pleaded position remained that HIH was not alleging that HIH was unaware of the reduction in the number of films but was alleging that JLT should have raised the matter with reinsurers and then reported back to HIH on the outcome notwithstanding the conversation between Mr Mitchell and Mr Drummond Brady even if that conversation had occurred. As Mr Weitzman put it in his oral closing submissions (Day 10 page 32):

> "Your Lordship, just standing back from this, nothing would have been easier than for HIH at that stage to say: well, the reason you had to act without instructions is you had not told us of the reduction in films and you should have drawn that to our attention. But that is not and has not ever been part of HIH's pleaded case."

The Oral Openings

55. In the course of his opening on the first day of the trial, Mr Flaux said, at Day 1, page 27:

> "My Lord, JLT seek to contend that there cannot be a duty owed to HIH to seek reinsurers' agreement because JLT did not have instructions to do so not just from HIH, and I have addressed that point, but also from the insured, and there is a suggestion in my learned friend's skeleton argument at paragraph 60 that to have gone off and done this of their own volition would have been a breach of duty in itself.
>
> Now, we would submit that that contention involves several fallacies. Firstly, if the argument elsewhere is correct, that there was no gap in the cover because the reduction in the number of films was as much a breach of the terms of the insurance as it was of the reinsurances, then the reality is that JLT were in breach of their duty owed to the insured, to the named insured, LDT, in failing to alert them to the problem and to seek their instructions, and it really cannot be an answer to say: well, we did not seek their instructions, therefore we did not have to act in relation to the reinsurers.
>
> Secondly, if JLT had approached HIH and told them about the reduction, their immediate reaction, as I have said, would have been to ask whether the reinsurers had been informed, and if the answer was no, then they would have said: please inform them and get their agreement. So that what would then have happened is that there would have been agreement all round.
>
> So, what one would have been left with is a situation where there was no question of any breach of the term, no question of any subsequent grounds upon which either the insurers or the reinsurers would have been entitled to avoid paying the claim.

> What one is left with here, in my respectful submission, is JLT admitting that if instructed they would have informed the reinsurers, but where they never informed HIH, so HIH are never in a position to give instructions, they seek to say that there cannot be any breach of duty, and we simply say they are seeking effectively to hide behind one breach in order to excuse the other."

56. As Mr Weitzman submitted, and I agree, this was the first time that HIH had asserted that HIH was not aware of the reduction in the number of films and that this was the result of a breach of duty by JLT. Mr Weitzman made this point in his opening at day 2, page 103. His riposte was that the new allegation was "factually incorrect" because the reduction had been (as it was) referred to in Risk Management Reports forwarded by JLT to both HIH and Reinsurers. He also submitted that HIH would have been contributorily negligent had it not read those reports carefully and in not then instructing JLT to approach Reinsurers about the reduction if it had been thought to be material. It was proposed that such an allegation of contributory negligence should be added by amendment. Mr Weitzman did not object to the "new" allegations as such provided this amendment was accepted.

57. In the course of his closing speech (Day 9, pages 73 and 75) Mr Flaux, in answer to a question from the court, said that it was not a question of HIH being unaware of the reduction in the number of films but "of being unaware of the significance of the reduction in the number of films" (my emphasis) namely that there had been "a material change in the risk". He said "one cannot deny that the risk management report said what it said but what matters is whether anybody at HIH or its reinsurers appreciated the significance".

58. Indeed I think Mr Weitzman is also right that the principal case sought to be advanced by HIH in closing was, as Mr Flaux expressed it, that

> "JLT were in breach of duty in failing to inform HIH about the significance of the reduction in the number of films and specifically that it was a material change in the risk in each case… and they should have drawn HIH's attention specifically to the point and asked them what they wanted to do …."(Day 9, pages 4-5).

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.

60. Mr Weitzman objected to this as "a bridge too far". The allegation remains unpleaded. Mr Flaux submitted it was covered by the existing pleading and in particular paragraph 5.6(c) of the Reply to which I have referred in paragraph 53. He said "the thrust of the criticism is always the same which is failure to obtain the agreement of the reinsurers to the reduction in one way or another or failing to tell HIH if it were the case that they could not get reinsurers' agreement". Mr Flaux also submitted that the question had been flagged in the broking experts' joint memorandum and so should not have come as a surprise to JLT.

61. I propose to re-visit Mr Weitzman's objection after addressing the decisions of the Court of Appeal, the factual evidence, including the contents of the risk management reports, and the expert evidence. I would simply comment here that I do think the thrust of HIH's case has changed from the case it pleaded and opened and, as will be seen, 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. Of course, when the trial began, the focus was very much upon the claim in fraud not the claim in negligence.

THE COURT OF APPEAL DECISIONS

62. HIH had paid the claims made by LDT. The proceedings concerned only H1 and H2 because the H3 payment was made, and the proceedings were commenced, later. There is no dispute that the decisions apply equally to H3.

The First Decision

63. In the first decision, HIH v New Hampshire [2001] 2 Lloyd's Rep 161, the judgment was given by Rix LJ. Mummery and Peter Gibson LJJ agreed with Rix LJ. Mr Flaux and Mr Picken appeared for HIH as they had done at first instance before David Steel J. The court held that:

    i) The contracts of insurance were contained in both the Slip Policies and the PLIPs and, contrary to Mr Flaux's submission, the latter did not supersede the former, in particular because certain basic terms (for example premium) were found only in the Slip Policies (paragraph 95);

    ii) in any event, both the Slip Policies and the PLIPs contained a term as to the number of films (paragraphs 60-68);

    iii) the Reinsurance contracts contained the same term (paragraph 98);

    iv) that the term was a warranty in both insurance and reinsurance (paragraphs 99 to 104);

    v) the Waiver of Rights Clause was not effective to exclude claims for breach of warranty (paragraphs 112 to 125).

64. At the outset of his judgment, (paragraphs 7 to 10), Rix LJ expressed disquiet at deciding the preliminary issues without a trial in which the facts had been investigated providing a clear understanding of "the factual matrix of these novel arrangements". In doing so, Rix LJ made express reference to the Flashpoint Agreements as containing provisions which could well be "the subject of debate".

65. The reasoning which led to the conclusion that the number of films was both a term and a warranty focused (as regards the Slip Policies) on the reference in the "Interest" Section and (as regards the PLIPs) on the references in Clause 2 to the "Projects" and the definition of "Projects" in Preamble (A). Read together they premised completion

of the films in order to generate the revenue to off-set against the risk. The term was a warranty because the omission of even one film would be likely to reduce the revenue and so increase any loss, and a claim for damages would be unsatisfactory because it would never be possible to know how much revenue the missing film would have achieved.

66. The Waiver of Rights Clause was addressing matters not the subject of the contract terms (non-disclosure, misrepresentation, the arrangements with Flashpoint) and not breaches of the contract itself.

The Second Decision

67. In the second decision, HIH v Axa [2003] LRLR 1, the principal issue was whether HIH had any real prospect of succeeding in an allegation that Axa had waived the breach of warranty as to the number of films. The judgment was given by Tuckey LJ with whom Carnwath LJ agreed. It was necessary for HIH to establish not only waiver by Axa of the warranties in the contracts of reinsurance but also waiver by HIH itself of the warranties in the contracts of insurance: see Tuckey LJ at paragraph 19. In the event it was unnecessary for the latter to be addressed by the court. Tuckey LJ (paragraphs 22 and 32) referred to the difficulty of establishing a case of waiver or estoppel "when neither party is aware of the right which is to be foregone".

68. HIH relied essentially on the fact that the risk management reports supplied to Axa from September 1998 for H1 and January 1999 for H2 had made it clear that the warranted number of films would not be made, yet Axa had raised no objection until June 2000 when it served defences alleging a breach of warranty for the first time. The court decided that the lack of reaction from Axa was insufficient to establish the requisite clear and unequivocal representation that it would not insist on its rights and that HIH had failed to establish that it had relied on any such representation, even if made, in the relevant sense of actually attaching some significance to it and acting upon it. Although Mr Weitzman submitted that the decision meant that nothing less than formal endorsements to the insurance and reinsurance would have sufficed to defeat the breach of warranty defence, I do not think that is right. But, at least some explicit representation would have been necessary.

THE FACTS

H1

69. The risk incepted on 22 August 1997. Reduction in the number of films from 6 to 5 was under discussion at Flashpoint in October 1997.

70. On 14 January 1998 Mr Drummond Brady was sent a draft of the Flashpoint Agreement prepared by Tarlo Lyons. The first preamble began "Flashpoint is in the process of investment in a project to finance five motion picture films ….". Mr Drummond Brady forwarded the draft to Mr Mitchell at HIH on 3 February. The letter enclosing it refers to a conversation between them the previous day and a wish to meet on 9 February "in order to conclude matters". There is no evidence that either Mr Drummond Brady or Mr Mitchell appreciated that the number of films had been reduced.

71. A fax from Mr Forrest to Mr Drummond Brady, received on 20 February, contained in the first paragraph a report "that out of the five proposed projects for the first 7.23 slate, the first three are completed, the fourth is in Principal Photography and the fifth has entered into pre-production". Mr Drummond Brady annotated the fax "copy to all markets". Again, there is no evidence of a reaction from anyone to this fax. The fax was also seeking to obtain interest in a further slate of films.

72. Probably on 22 September 1998, Flashpoint sent JLT the first Risk Management Report. The Report addressed H1, H2 and H3 and other productions. On H1 it listed five titles: Dish Dogs, La Cucaracha, One Hell of a Guy, Nowhere Land and Shark in a bottle. The first two were said to have been "delivered". "The remaining three" were said to be in post-production phase and expected to be delivered by mid-October.

73. JLT forwarded the Report first to Axa. It was sent to HIH probably at the end of October and had certainly been received by HIH by 2 November 1998. The "Policy Period" expired on 22 July 1999 and LDT made the claim the next day.

H2

74. The risk incepted on 8 December 1997. The first documented reference and evidence of a reduction in the number of films is in Flashpoint's fifth Risk Management Report which was circulated probably in March 1999. It was received by HIH on 11 March. The report named six films: Silicon Towers, Jack of Hearts, Fear Runs Silent, Paper Bullets, Trip Fall and Newsbreak. It stated that:

> "efforts have been concentrated on completing films 1-5 which are very close to delivery. This change in procedure has resulted in some additional budgetary requirements for the bond company to agree to bond the future films. To this end, this slate has reduced from a 10 film to an 8 film slate".

75. The "Policy Period" expired on 8 November 1999. A claim was first intimated in October 1999.

H3

76. The risk incepted on 19 December 1997. The Policy Period was due to expire on 18 May 2000. The claim was made the next day The first Risk Management Report, in September 1998, listed four titles: Kiss Toledo Goodbye, So Sue Me, "Box-under consideration", and "Hard Case-under consideration". Under "Production Status" it was stated that:

> "Kiss Toledo Goodbye has completed principal photography and is currently in post production. It is expected to be delivered within the next 45 days.
>
> The budget for Kiss Toledo Goodbye was increased in view of the production company's ability to secure Christopher Walken. This increased the cast costs for the film, but following his agreement to star in this film, the sales agent

> confirmed the project became a much more desirable film and could sustain the revised estimates.
>
> So Sue Me is in principal photography.
>
> In view of the increase in the budget for Kiss Toledo Goodbye, this slate has reduced to four films from the originally proposed five picture slate."

Subsequent Reports/knowledge of the reduction

77. Subsequent Risk Management Reports were circulated to HIH and Reinsurers which also referred to the reductions in the number of films following the first references made in the first Report as regards H1 and H3 and the fifth Report as regards H2. Mr Mitchell had left HIH in February 1998, months before these Reports were circulated.

78. The fact that Mr Drummond Brady was not called to give evidence means that, with one possible exception, there is no evidence as to when he first appreciated that there were reductions in the number of films nor as to what, if anything, he thought or did about it. Mr Dawson left JLT on 19 December 1997 to join another broker.

79. The "one possible exception" is the reference to Mr Drummond Brady's meeting with Mr Mitchell in the Defence and Reply to which I have referred in paragraphs 52 and 53. The Defence is, of course, verified by a statement of truth signed by the Group Legal Director of JLT. Mr Weitzman sought to amend the reference by deletion. Mr Flaux objected, if the deletion were to have the effect of disenabling HIH from referring to what was there alleged.

80. The reasons for this somewhat inelegant game are apparent. JLT pleaded the meeting in support of its case that far from instructing JLT to obtain the agreement of reinsurers to the reduction in the number of films in H1, Mr Mitchell was not concerned about it. HIH, whilst not admitting that there was a meeting, saw the advantage that, if there was, it showed that Mr Drummond Brady recognised that he should have raised the matter with HIH but chose instead only to raise it with the former underwriter of HIH.

81. Mr Weitzman submitted that, as Mr Drummond Brady did not give evidence, there was no evidence on which the court could find that such a meeting took place let alone that the reduction in the number of films in H1 was discussed at it.

82. I do not agree. I do not think the court is required to follow such an artificial path to the exclusion of reality. The meeting was described in Mr Drummond Brady's witness statement, was put to Mr Mitchell in cross-examination, was pleaded in the Defence, and referred to in the reports and oral evidence of HIH's experts and of Mr Brownlees.

83. CPR 32.2(1)(a) provides that "the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public". That is somewhat elliptical as it does not state what facts "need" to be so proved, is subject to any contrary provision in the CPR, and subject to any order of the court.

84. CPR 32.5(5) provides that, in the circumstances of this case, HIH could have applied to put Mr Drummond Brady's witness statement in as hearsay evidence. That, however, is hardly an attractive option having in mind the other contents of the statement.

85. CPR 32.6 enables a party to rely at hearings other than a trial on matters set out in a statement of case which is verified by a statement of truth. It says nothing about whether another party can rely upon such a matter, apart from the general rule about oral evidence.

86. In his first Witness Statement, dated 29 June 2005, and confirmed in evidence, Mr Mitchell said at paragraph 191:

> "I understand that JLT contend that Mark Drummond Brady had a conversation with me over lunch during September 1998, following receipt of the first Risk Management Report, during which I said that I did not regard the reduction in the number of films for the 7.23 slate from 6 to 5 as material. In any event, I was at Lexington at this time and therefore in no position to make any statements on behalf of HIH. However, I did see Mark Drummond Brady through 1998. He was broking to me at this time. He could have told me about the reduction in the number of films, but I do not remember anything about it. I am sure that I would not have said that such a change was not material."

87. In paragraphs 22 and 23 of his first supplemental witness statement, dated 4 August 2005, and confirmed in evidence, Mr Mitchell addressed Mr Drummond Brady's account of the meeting given in his witness statement. Mr Mitchell said:

> "…. [In] his witness statement, Mark Drummond Brady comments that he came to see me directly about the reduction in the number of films. He says that if he had gone to HIH direct, he believes that HIH would simply have asked him whether he had spoken to me and that HIH would have relied on my view.
>
> I do not remember anything about this. In any event, Mark should not have made such an assumption. He should have dealt with the matter properly by consulting with HIH and its reinsurers, obtaining their agreement and recording it by way of endorsement.
>
> He also says that I told him that I did not think that the matter needed to be raised with the market generally …. I would not have said this. In my opinion, the change in the number of films was an important change which would have required the agreement of reinsurers. I would have expected reinsurers to have been consulted and asked to agree. JLT should have sought agreement to the reduction from HIH and its reinsurers. In particular, JLT should have spoken to Axa given the size of

> Axa's involvement and given that the set-up was effectively one of co-insurance."

88. Mr Weitzman submitted that it was necessary for him to put Mr Drummond Brady's account to Mr Mitchell in cross-examination because the fraud case was still advanced at the time and Mr Drummond Brady was to be called to refute it. The meeting was not of direct relevance to the allegations of fraud and what Mr Mitchell said about it in cross-examination is also evidence which undoubtedly is before the court. What Mr Mitchell said is to be found in the transcript for Day 3 at pages 92 to 99. Mr Weitzman put to Mr Mitchell Mr Drummond Brady's account and what Mr Mitchell had said about it in his supplemental statement. Mr Mitchell confirmed that he had no recollection of the meeting. The questions and answers continued:

> "Q. But you are not saying, are you, that Mr Drummond Brady is making this up?
>
> A. Not at all. I think he could easily have mentioned this in passing. What I am fairly certain is that it would not have happened over the desk. It would never have been. I would have remembered if it had been over the desk. He could easily have discussed other risks whilst -- written at HIH in passing, no problems at all.
>
> Q. Mr Mitchell, Mr Drummond Brady's evidence is that he discussed it with you in your office and specifically raised this point about the reduction in the number of films. Do you understand that?
>
> A. Well, I have no recollection of that at all.
>
> Q. Mr Mitchell, I understand that you have no recollection, but you do not say that Mr Drummond Brady is making that up, do you?
>
> A. I would hope not.
>
> Q. If he says that is what happened, you would accept that is right, would you not?
>
> A. Possibly.
>
> Q. And you do not dispute his evidence that you were relaxed about this?
>
> A. I would have been relaxed.
>
> Q. And you do not dispute his evidence that you did not see any need for the rest of the market to be approached?
>
> A. I would dispute that. I would never have said that.
>
> Q. You are certain you could never have said that?

A. I am certain I would never have said that.

Q. You are saying that you would have regarded that reduction as something that had to be passed on to the rest of the market?

A. I think so. Just generally speaking, the market would have been relaxed here, they -- provided the information was sound of course, but if there had been a reduction in the number of films and we were given some comfort that the reduction did not have any major impact on the revenue flows, I think the market would have agreed to the reduction in the number of films.

Q. You see, Mr Mitchell, I confess to having some difficulty in what you are saying because you have agreed that the number of films was information only.

A. Material information.

Q. You have agreed that this conversation may have taken place.

A. We could have discussed anything in passing.

Q. You have agreed that you would yourself have been relaxed about the reduction.

A. Because I assumed that there would have been good reasons why there would have been one less film made, there would have been more money spent on the remaining films, which would have given them a higher profile, which therefore would have presumably meant that they would sell for more money and revenue streams would not be adversely affected. Because there had to be a reason.

Q. And if you understood that there was no term as to the number of films and were yourself relaxed about the reduction, it is perfectly possible that you did not ask Mr Drummond Brady to go to see the rest of the market and indeed, told him he did not need to.

A. I did not ask Mr Drummond Brady ever to go and refer to the rest of the market; he did it automatically on all things. This was co-insurance masquerading as reinsurance."

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 that 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 (see below) 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.

91. Equally, the terms of the Risk Management Reports were clear. In the case of H1, it is true that the Report did not expressly state that the five films involved a reduction from six. In the case of H3 and H2 that was expressly stated and an explanation provided for it.

92. The Reports were received and should have been read by HIH and Reinsurers. There is, by deliberate decision of the parties, a complete lack of evidence from anyone, except Mr Guillot, who did in fact read the Reports. Mr Mitchell had left HIH months before they were distributed. JLT called no evidence. Mr Guillot left Axa in January 1999 and thereafter was in dispute with Axa. Mr Thompson was based in Australia and was not responsible for reading and did not read the Reports.

93. In paragraph 76 of his witness statement, Mr Guillot referred to the September 1998 Risk Management Report where it referred to H3. He said he recalled reading it and "taking the view that Walken was good news as he added to the commercial value and his engagement resulted in a more desirable film and a better risk". He said it was "more than likely" that he would have agreed to the reduction in the number of films but as the change was relevant to the risk he should have been consulted and he might have wanted to see new sales estimates. In cross-examination he said he could no longer recall whether or not he had in fact "picked up" on the reduction in the number of films at the time because he "was so shocked by the absence of revenue that all other matters were not of tremendous importance". That does not sit easily with his evidence that he would have agreed to a reduction in the number of films had he been asked to do so. Mr Guillot did not impress me as a thoughtful witness.

94. Mr Thompson's evidence was, and the documents demonstrate, that HIH was concerned, at least from the second half of 1998, about the book of film finance business written by Mr Mitchell (not only the book broked by JLT but by other brokers as well). That was before any Risk Management Reports were received. Indeed HIH decided to withdraw from film finance shortly after Mr Mitchell left in February 1998. Mr Thompson said Mr Simons took charge of the management of the business and took a close personal interest in it. He also said that Mr Simons, and HIH staff, were experienced and would have read the Reports and had access to HIH's files. I conclude, therefore, that HIH also knew of the reduction in the number of films shortly after the relevant Reports were received. The history of the Pleadings, as I have described it, also supports that conclusion.

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. That is supported by the evidence of Mr Mitchell and Mr Guillot and is indeed the case of HIH. In the Further Information provided in response to a request made on 3 April 2003, HIH alleged that:

> ".. it was [JLT] who (together with Flashpoint) put the insurance and the reinsurance together. The deal was structured as an insurance backed by a collateral agreement with Flashpoint (with one insurance company fronting, a double A rated company, namely the Claimants) so as to make it easier to arrange finance at the front end. There could be no 'let out' for insurers (and therefore the reinsurers, who were regarded essentially as coinsurers) in the wordings, which therefore had to be as unconditional and as widely worded as possible. There could, in particular, be no conditions or warranties, these would instead be in the side agreement with Flashpoint, …. In short, if there were any question mark over underwriters' respective obligation to pay, the deal would not have happened. It was, therefore, in effect, a financial guarantee and the Claimants' case is that nobody involved (LDT, the Defendants, the Claimants, Flashpoint and Reisnsurers) was under any illusion about this."

96. Mr Mitchell referred to the advice from Ince & Co on whether insurers would be able to avoid paying claims. That advice was set out in a draft opinion, circulated on 29 July 1997, which included the statement:

> "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."

97. Mr Mitchell also said that although his own understanding was that if there were a reduction in the number of films which was not agreed the only remedy was against Flashpoint under the Flashpoint Agreements, he would have expected JLT to tell him if there were a reduction, as it was material information in the placement, and to have ensured that the rest of the market was also told so that everyone was in agreement and there was no room for misunderstanding. He said, like Mr Guillot, he would have expected agreement to a reduction provided it could be shown that the revenues would not be reduced.

THE CLAIMS BY THE ASSURED/HIH

H1

98. On 23 July 1999, the H1 claim was presented on behalf of LDT. HIH appointed loss adjusters who provided a preliminary report on 4 August 1999 which referred to the reduction in the number of films but expressed the view that the claim was recoverable under the insurance. HIH paid the claim on 12 August 1999. Although Mr Thompson said he believed he had been told by Mr Simons that HIH "had obtained

legal advice verbally" that the claim had to be paid he had no present recollection of the conversation and I think it is improbable that any advice was obtained despite the amount involved. In its Amended Reply, HIH pleads that it did not obtain legal advice from Cameron McKenna, its solicitors, in relation to the H1 claim and it is not suggested that there was any other probable source for such advice.

99. Mr Thompson said that he "had assumed, probably wrongly, that reinsurers had also agreed the claim". He acknowledged that in fact the claim had been paid either without reference to reinsurers or in the knowledge that they had not agreed to indemnify HIH.

100. By October 1999, it was plain that neither New Hampshire nor Independent would indemnify HIH. On 15 October HIH issued these proceedings against those companies. The proceedings against Axa followed in March.

H2

101. The claim on H2 was pre-notified in October 1999. Loss adjusters reported to HIH in November 1999. The report referred to the reduction in the number of films from 10 to 8. It also stated that only 6 films had actually been completed, of which 3 had been delivered, and that one further film was about to enter pre-production.

102. HIH did seek legal advice from Cameron McKenna. Cameron McKenna, having sought the advice of leading counsel, advised, in a long letter dated 23 December 1999, that in their opinion the reduction in the number of films did not give rise to a right to reject the claim. They advised that the insured risk included the risk that the number of films might not be made and that, if no objection to the reduction had been made, agreement to the reduction could be implied. HIH circulated the letter to Reinsurers. Axa refused to accept that the advice was correct. Mr Thompson decided not to pay without the agreement of Reinsurers, and in particular Axa, and to let LDT sue HIH and HIH claim over against Reinsurers if necessary. Mr Thompson was aware of the "nightmare scenario" that HIH might pay and reinsurers successfully avoid.

103. In December, JLT put considerable pressure on HIH to pay the claim. They also sought to persuade Reinsurers to pay. But Mr Thompson said it was apparent to him that Axa would not pay, although other Reinsurers, including New Hampshire at the time, agreed to do so, albeit in New Hampshire's case subject to all other Reinsurers also agreeing to do so. Mr Thompson said that at this time the consequences for HIH of an unfavourable security rating or bad publicity from S&P "would have hit HIH badly, given that the financial markets (London and Australia) were by this time starting to get anxious about HIH". Nonetheless, Mr Thompson stuck to his guns and informed LDT's solicitors on 28 January 2000 that HIH would not settle the claim as its principal reinsurer had requested that further enquiries be made.

104. In February, the Finance Director of HIH (Mr Fodera) was approached directly by S&P. Mr Fodera spoke to Mr Thompson. They discussed the legal advice received by HIH. Mr Fodera decided to pay the claim and to seek immediate recovery from Reinsurers. That decision was made known to JLT on 3 February 2000.

105. Mr Thompson explained the decision in paragraphs 46 to 48 of his Witness Statement. It would lengthen an already over-lengthy judgment to set out what he says there. But I think the substance of it is that:

i) Mr Thompson would not himself have reached the same decision;

ii) Mr Fodera had been very influenced by the pressure applied by S&P which put HIH in an invidious position and was seen as potentially causing HIH "enormous difficulties … considered to be significant at the time";

iii) Mr Thompson thought the risk to cash flow and the compromise of HIH's position on other claims was greater than any consequence S&P might engender;

iv) Mr Fodera thought the legal advice made a refusal to pay unjustifiable; Mr Thompson thought the advice was the best pressure to apply to Reinsurers to pay;

v) If HIH had been advised of the existence of breach of warranty defences, so that a decision to pay would make it very difficult to recover from Reinsurers, "then there would have been strong legal and commercial reasons for not paying", and Mr Thompson (and Mr Simons and Mr Piper, the Chairman) would have "firmly opposed payment".

106. Mr Thompson, in cross-examination, loyally sought to explain and justify Mr Fodera's decision as one dependent on the legal advice from Cameron McKenna and not driven by pressure from S&P. I formed the strong impression that in doing so he was seeking to express an understandable reason for a decision with which he nonetheless strongly disagreed and of which he disapproved.

107. On 4 February, New Hampshire declined to pay relying on Axa's refusal and the refusal of "Genstar" which had reinsured New Hampshire. Cameron McKenna were sent two letters in which Genstar set out their comments prepared with their lawyers (Barlow, Lyde & Gilbert). The letters put forward a number of bases on which, on a preliminary view, cover might be declined. They included fraud and the reduction in the number of films referring to the Preamble to the PLIP which "may be interpreted as a warranty". The letters were critical of Cameron McKenna's advice.

108. It was also on 4 February that New Hampshire served Points of Defence in the H1 proceedings. The Defence alleged in terms that "the original insurance" included a term that there would be six films and that the term "had the status" of a warranty. It also alleged that the position was the same in the contract of reinsurance and that in each case there had been a breach of warranty.

109. Nonetheless, HIH (by the claims manager, Mr Jervis) confirmed to JLT on 7 February that HIH would pay the H2 claims in full, in the knowledge of these allegations and that Cameron McKenna were considering them. The claim was paid in full on 11 February. Mr Thompson, however, said, and I accept, that he was not aware of what New Hampshire had alleged. Plainly, however, other senior people at HIH were aware of it.

110. Privilege has been claimed in respect of any legal advice obtained by HIH after 23 December 1999. Mr Thompson said in evidence that having agreed on 3 February to pay the claim HIH could not have gone back on this agreement. I agree, however, with Mr Weitzman, that no binding agreement to pay had in fact been made. HIH commenced the proceedings in H2 in March 2000.

H3

111. LDT made the claim in H3 on 19 May 2000. HIH paid the claim on 8 June. The decision was again taken by Mr Fodera. He, too, Mr Thompson believed was not aware of the allegation by New Hampshire that there had been a breach of warranty. Mr Thompson said the decision was based on further advice from Cameron McKenna. But privilege has been claimed for that advice.

Summary

112. In my judgment, the evidence establishes that:

i) HIH paid the H1 claim in the belief that it was obliged to do so but without taking legal advice and without knowing whether or not the Reinsurers would agree to or accept liability to indemnify HIH but, at least in the case of Mr Thompson, in the mistaken belief that they had agreed to do so.

ii) HIH paid the H2 and H3 claims in the belief that it was obliged to do so and with the benefit of legal advice but in the knowledge that its Reinsurers (with very limited exceptions) would not indemnify them and were advised that they and HIH had good legal grounds not to pay the claim, including the specific allegation of breach of warranty advanced by New Hampshire.

iii) The pressure applied by S&P, and HIH's financial weakness, were substantial factors in the decisions to pay.

THE EXPERTS

Underwriting

113. Although Mr Weitzman questioned Mr Day's underwriting experience, Mr Day did underwrite a number of film finance risks and I have no doubt that he was both qualified to give the expert evidence he did and that he gave his evidence in accordance with his duty to the court. It is, however, a fair comment, as Mr Weitzman said, that much of his evidence was directed to and in support of the case in deceit which proved unworthy of pursuit.

114. Mr Day and Mr Philand agreed that the number of films was material. In his first Report Mr Day said that JLT:

> "should have consulted with and obtained the agreement of HIH and its reinsurers and then documented them by endorsement. In my view, it matters not whether JLT … believed the numbers of films to be a warranty. The simple fact is that the number of films was specified in the slip and the policy wording and accordingly any amendment or alteration

> should have been presented to underwriters for their express agreement by way of endorsement."

115. He also said that the Risk Management Reports were not an appropriate means by which to notify underwriters of any changes to the nature of the risk and that whilst it was possible it was not certain that upon consideration of the effect of the reduction in the number of films a prudent underwriter would have agreed to continue with the risk: "what is certain in my opinion, is that a prudent underwriter would have wished to reassess the risk and/or requested the risk managers to reassess the risk and advise."

116. In paragraph 16 of his Supplemental Report (dated 19 January 2006) Mr Day addressed a point made by Mr Philand that it was the underwriter's job to review and question post-placement information provided in relation to risks such as these and he should not rely on the broker to do so. Mr Day said:

> "In relation to paragraph 57 of Mr Philand's report, I would not expect the broker's role to simply end following inception of the risk. The broker is not merely a "post box" and he cannot wash his hands of all responsibility. If a broker is "copied in" on documentation I would expect him to review it, make recommendations and suggestions and identify and highlight any areas which may be of material concern to underwriters (see paragraphs 32 to 39 of my first report)."

117. Mr Philand's opinion (paragraph 96) was that he

> "would not have expected the broker to have obtained the consent of reinsurers to any variation of the terms of the reinsurance, unless instructed by the insurer to do so."

118. In cross-examination, Mr Day –

i) agreed that his views were predicated on the basis that the reduction in the number of films was a breach of a term in the insurance;

ii) agreed that an underwriter should read documents such as the Risk Management Reports carefully and consider whether they require any action to be taken;

iii) agreed that if HIH did not itself agree to a change in the insurance there was no need to seek a change to the reinsurance;

iv) acknowledged that whilst he was of course aware that HIH had paid LDT, he was not aware that HIH had not agreed to a reduction in the number of films and so that insurance and reinsurance had remained back to back.

119. Mr Weitzman submitted, relying on sub-paragraph (iv) of the previous paragraph, that Mr Day's evidence on the negligence case was premised on the assumption that HIH itself had agreed to the reductions in the number of films. Mr Flaux took issue with that. But I think Mr Weitzman is right in the sense that Mr Day had assumed that HIH would not have paid the claims unless it had itself agreed to the reduction in the

number of films. In fact, of course, the legal advice to HIH was substantially premised on the basis that the number of films was not a term of the insurance and HIH had no basis to rely on the reductions to avoid the reinsurance.

Broking

120. Mr Radcliffe was an impressive witness. Mr Weitzman's criticisms of his experience were, I think, misplaced. The criticisms of Mr Radcliffe's evidence on the case of fraud, and his refusal to withdraw any imputation of dishonesty, were more compelling. Mr Radcliffe has high standards. That is entirely commendable and encouraging. But they did, I think, in that context, lead him to express emphatic opinions where a more measured view might have been appropriate. Mr Brownlees was less impressive. He had, I think, concerns about the absolutist stance that a broker owed no relevant post-placement duty as regards policy matters to the Assured and reinsured and should not take the initiative or act without express instructions to do so.

121. It was agreed in the Joint Memorandum that:

> "the broker should have read (the Risk Management Reports) and highlighted any important matters of concern and the underwriter should have read them."

122. However, it became apparent in the course of Mr Brownlees' evidence that post-placement the "matters of concern" he had in mind were limited and, consistent with his report, it was his opinion that post-placement "the die was cast" and reductions in the number of films was simply information properly communicated by way of the Risk Management Reports. As he put it "post-inception … it is a different duty. It is an informational duty. The risk is crystallised." He said a broker would not attempt to check that what was happening remained consistent with the placing information. Nor, where insurance and reinsurance were back-to-back, would it have occurred to him that there was a need to change the reinsurance unless the insurer was proposing to change the insurance.

123. Mr Radcliffe was in radical disagreement. It was his evidence that:

i) all brokers would regard it as routine and proper after obtaining reinsurance to continue to act in the reinsured's best interest to ensure that the reinsurance remained valid;

ii) it was "a clear principle" that the broker has a post-placement duty to inform underwriters of any significant change to the broking information or wording and to obtain agreement to the changes if by not doing so he risks prejudicing the cover or its suitability;

iii) any competent broker would have understood that the number of films being insured was an important element of the cover;

iv) the distribution of the Risk Management Reports was not an appropriate way to obtain agreement to a variation in cover.

124. In cross-examination, Mr Radcliffe agreed that his criticisms of JLT's conduct depended on JLT being under an obligation to seek the agreement of Reinsurers to the reduction in the number films. He also agreed that, in accordance with HIH's instructions, JLT had obtained back-to-back reinsurance cover. He agreed that HIH should have read the Reports carefully, and that it was obvious from them that there had been a reduction in the number of films, but insisted it was the broker's duty to highlight important information and to ensure that HIH had someone, after Mr Mitchell's departure, with whom the broker could deal and to whom the information would be supplied. He said the information about the number of films was:

> "so fundamental to the underlying contract of insurance that, whether it is a warranty, a condition, a term or whatever, should not have been the first question the broker asked himself."

125. If there were material changes to the information which JLT believed or were in doubt as to whether they risked prejudicing the cover then it was JLT's duty to obtain the agreement of HIH (acting on behalf of LDT) and reinsurers (acting for HIH) to the change, albeit they would need their (respective) clients' instructions to do so but should be pro-active in trying to obtain such instructions. He agreed that "in the first instance" JLT had therefore failed in its duty to LDT.

126. Mr Brownlees considered any notification of a reduction in the number of films was sufficiently provided for by the Risk Management Reports from which it was "self-evident" that there had been reductions. He agreed with Mr Flaux that if Mr Drummond Brady had gone to see Mr Mitchell because he was concerned about the reduction in the number of films he should have gone to see HIH itself. But he persisted in his opinion that the only post-placement duty was "an informational duty" because "the risk is crystallised" and that the terms of the Reports were sufficient to discharge that duty. It does, of course, follow, as Mr Brownlees accepted, that JLT were at least under an obligation to inform HIH of the reduction in the number of films.

Summary

127. The, perhaps extreme, positions of the broking experts are on the one hand (Mr Ratcliffe) that, post placement JLT owed a duty to highlight to HIH (on behalf of LDT) and to Reinsurers (on behalf of HIH) any matters which might reasonably be considered to be material to the risk and to obtain a consensus about them if possible and to report back on the outcome; and, on the other hand (Mr Brownlees and Mr Philand) that JLT's role was then no more than a post-box passing on to insurers and reinsurers any relevant information which came its way. Mr Day's opinion that the broker should highlight any information which may be of material concern to underwriters is a perhaps more modest description of the duty described by Mr Ratcliffe, albeit it may lead to the same outcome.

DUTY OF CARE

128. In his closing submissions in reply, Mr Flaux put the duty for which HIH contends in these terms, that:

> "a broker who identifies a matter of concern which has a material and potentially deleterious effect on the risk which he has placed is under an obligation to act in his client's best interest by drawing it to the attention of the relevant insurers and, so far as possible, obtaining their agreement."

129. HIH, to an extent, relied in support of this submission on the fact that JLT were in a real sense the authors of the scheme and the form of the insurance and reinsurance working together with Flashpoint, and that Flashpoint was in reality JLT's client. Mr Flaux said those matters negated any suggestion there was no duty or that the role of JLT was an insignificant one.

The Law

130. Mr Flaux relied on The Superhulls Cover Case (Youell v Bland Welch & Co (No 2)) [1990] 2 Lloyd's Rep 431. Phillips J held that a broker owed the reassured a duty to warn him that reinsurance cover was about to expire because of a 48-month cut-off clause which did not apply to the underlying insurance. It was also held that the duty extended to taking steps to procure extensions to the reinsurance. Mr Weitzman submitted that the post-placement duty in that case arose out of the breach by the broker of his duty in placing the reinsurance which was intended to be on the same terms as the insurance. He is right to the extent that Phillips J held that the brokers were in breach of duty in failing to inform the insurers that the reinsurance was subject to the cut-off clause. I also think he is right as regards the reasoning which led to the conclusion that the brokers were liable. The reasoning is to be found at page 447:

> "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 are 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 reinsurance cover, the reinsurers came on risk under the reinsurance cover. This led the witness 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….

> In my judgment …. the insurers establish the duty that they allege. The insurers had wanted reinsurance "as original" and the brokers had been unable to obtain this. In these circumstances it should have been clear to the brokers that, if construction of the hulls was delayed to the extent that reinsurance cover was likely to lapse, the insurers would want extension of that cover, if it could be achieved. It should also have been clear to the brokers that the insurers would rely upon them to take appropriate action if there was a risk of construction of a vessel overrunning beyond the 48 month period of cover."

131. I do not, however, think that Phillips J was intending to do more than to state that whether or not a broker would owe a duty of care, and the scope of such a duty, post-placement must depend on the circumstances. In The Superhulls Case the circumstances, in particular the failings in placing the reinsurance, justified the duty found. The consequence was that insurers recovered their loss less a 20% deduction for contributory negligence in failing to appreciate from the cover notes and wording that the reinsurance did contain the cut-off.

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 of course 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, but no complaint is made about the placement in that or any other respect and in the event the covers remained back-to back ;

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, and HIH as insurer and reinsured;

iv) the reduction in the number of films was, as I have found, 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 either Mr Mitchell or Mr Guillot gave the matter deep consideration;

vi) if JLT owed post-placement duties to HIH it did so as 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 to 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 "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. My conclusion does, however, make Mr Weitzman's complaints about the manner in which HIH has pleaded and presented its case (paragraphs 38 to 61) of direct relevance. As I have indicated, I think the complaints have substance. Nonetheless I do 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 (paragraphs 94 and 95). 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 (and is) permitted to do so.

BREACH OF DUTY

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, which I have held to arise, 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.

137. Mr Weitzman submitted first that even if the duty existed it would not assist HIH because HIH did not agree to any change in the insurance and so the insurance and reinsurance remained back-to-back throughout. However that submission in my judgment assumes too much. 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 Ratcliffe put it, it could prejudice insurers if "you let it all hang out… without a proper agreement".

138. JLT did not, as stated, call Mr Drummond Brady to explain what his reaction was to the information that there were reductions in the number of films or why he chose to speak to Mr Mitchell and no one else about it. HIH did not call those who were responsible for reading and considering the Risk Management Reports to explain their lack of reaction to the information.

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, I think, two questions, albeit the second belongs more to the issue of causation. The two questions are:

    i) Did the distribution of the Risk Management Reports, without more, suffice for JLT to perform the duty I have held 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 Ratcliffe'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.

143. It follows that in my judgment JLT was in breach of duty in failing properly to alert HIH to the reductions in the number of films.

LOSS AND DAMAGE

144. Before turning to the issues of causation, contributory negligence and mitigation, I should again state the loss that HIH claims to have suffered so that those issues can be seen in context.

145. The loss claimed is the inability to recover (and the costs of seeking to do so) from the major reinsurers after HIH had paid the claims made by LDT. It follows that it is the case of HIH that the breach of duty by JLT caused that reinsurance to be unavailable notwithstanding the payments by HIH. As Mr Flaux and Mr Picken put it, "had JLT sought instructions and ensured a unified approach to the reductions at the time that they became aware of them, HIH and its reinsurers would have ended up of one mind". But there is no claim in negligence (unlike the fraud claim) for loss arising from the payment by HIH of the claims by LDT.

146. The actual amount of the claim has yet to be agreed or any outstanding issues notified to the court.

CAUSATION

147. The first question is what would have happened had JLT, by Mr Drummond Brady, as I find it should have done, raised the reduction in the number of films directly with HIH at or about the time of the relevant Risk Management Reports. Here the court inevitably enters the world of inference, if not speculation, but there are some strong clues on which weight can be placed. They are that:

    i) It is probable that HIH, whether or not they would have discussed the matter with Mr Mitchell, would have learnt 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 (paragraph 9) 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.

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. He said the matter would only have been referred to him had Mr Simons and Mr Bird been absent, which there is no evidence that they were. Mr Thompson's evidence was that 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. This conclusion leads to the further question what would then have happened. There is even less evidence on which to seek to answer this question. 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 in 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 and I have commented on Mr Guillot's evidence in paragraph 93;

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, of course, it did know those views (or did not enquire about them in the case of H1) before it nonetheless decided to pay the claims.

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 to 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. At the least, they would have wanted to reassess the risks and the sales estimates. Indeed Mr Guillot said, and I accept, that after he left Axa in February 1999 Axa was not going to agree to anything in relation to the risks he had written. The reduction in the number of films in H2 was only first notified to Axa in March 1999 by the fifth Risk Management Report. Mr Flaux submitted that had the reductions been highlighted "by one means or another it would have been resolved". Mr Flaux suggested that perhaps another film or films would have been made or a "commercial resolution" found. He pointed out that no claims had been made at the time. But the suggestion is wholly speculative, there is no evidence to support it, and I reject it.

152. In my judgment, Mr Weitzman is right in his submission that 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 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 been different, or Mr Weitzman is right that the involvement of S&P was decisive, neither can be laid at JLT's door.

154. It follows, in my judgment, that the claim by HIH fails because it has failed to prove that the loss for which it claims was caused by a breach of duty by JLT.

CONTRIBUTORY NEGLIGENCE

155. My findings on causation make it unnecessary to consider contributory negligence. Had I decided otherwise, I would have found HIH guilty of contributory negligence in two major respects. First, in not addressing the references to the reduction in the

numbers of films in the Risk Management Reports; and, second, in paying the claims without the agreement of reinsurers that it should do so and when it knew, in the case of H2 and H3, that reinsurers would not pay. The first would, on my findings, be a matter for which JLT would bear much the greater blame as JLT should have done more to alert HIH to the matter. The analogy with The Superhulls Cover Case is compelling, and I would attribute 20% responsibility to HIH. The payment of the claims is, I think, another matter. Mr Thompson's view that no payment should be made without the agreement of reinsurers was readily explicable (even to LDT and S&P) and legally and commercially sensible. As he said, to pay and not recover, or to face contested recovery, could have damaged HIH just as much, if not more, than any action S&P might have been minded to take. Legal advice can be wrong. There is no evidence that HIH was advised to pay first and seek recovery later. It would have been unusual if it had been. In the absence of a waiver of privilege, I am not prepared to assume more in favour of HIH than advice that none of the possible defences to the claims by LDT were thought to be sustainable and, if so, that the same was the case for any defences reinsurers might raise in seeking to resist the claims by HIH. HIH backed the wrong horse in a race it did not have to bet on. Had the issue arisen, I would have decided HIH was substantially to blame for its own loss for this reason. Taking the two matters together, I would have held HIH to be 70% to blame and JLT 30%.

MITIGATION

156. The submission that HIH had failed to act reasonably to mitigate its loss by making the payments to LDT was not pursued with more than passing mention by Mr Weitzman. It, of course, also predicates liability on JLT which I have rejected. Suffice it to say that, in the event of liability, whatever the criticisms to be made of HIH, and I have found them to be compelling in the context of contributory negligence, they do not satisfy the much higher test required for a failure to mitigate.

THE FIRST DECISION OF THE COURT OF APPEAL

157. Mr Weitzman devoted some substantial alternative submissions to an attack on the correctness of the first decision of the Court of Appeal (and the decision of David Steel J to the same effect). As he submitted, HIH's claim, as pleaded, is predicated on the decision being correct. Happily the question does not arise in view of my decision on causation. I shall therefore limit my comments to the minimum.

158. The foundation of the submission is that the court did not have before it the evidence of the commercial purpose of the transaction and so a vital part of the "factual matrix" about which Rix LJ expressed disquiet (paragraph 64). Mr Flaux found himself in the awkward position of having lost the argument in the Court of Appeal and now being told by Mr Weitzman that he should have won. It was his submission that he had in fact argued everything Mr Weitzman was now putting forward, apart from references to what Mr Mitchell believed to be the case which would have been inadmissible, and the role of S&P in rating the loan notes in accord with its rating of HIH. Mr Flaux pointed out that the Flashpoint Agreements were only finalised months after the wordings and the provisions which placed upon Flashpoint the obligations normally placed upon the assured were not in the earlier drafts at all.

159. I have already said that there is no evidence that any of the main players in the drama contemplated at the time the covers were placed what the consequences would be if the stated number of films were not made and I do not think they did. Indeed, even when the reductions became known, I do not think anyone thought about them deeply. The pre-placing focus was on the sales estimates and thereafter the focus was upon the revenue earned (or lack of it).

160. Nonetheless, none of these considerations to my mind addresses the analysis of Rix LJ. The question remains: what was the subject of the insurance and reinsurance. To say the cover was seen as akin to a financial guarantee and that the rating of the notes by S&P was crucial to the transaction does not, I think, answer that question, which is fundamentally a question of construction. This would not be the first case in which a problem arises which had not been contemplated and which, on analysis, shows firmly held views to be wrong; nor would it be the first case in which legal advice on wordings has proved to be erroneous. The transactions were novel and the risks untested. No doubt that was why the legal opinion was sought by HIH but also made available to LDT and S&P.

161. The tension is between the references to the number of films in both the Slip Policies and the PLIPs, on which the Court of Appeal relied, and the terms of Clause 2.1 of the PLIPs (paragraph 29) defining the Insured Peril as the failure to generate the necessary balance in the Escrow Account "for any reason whatsoever". But the amount in the Escrow Account was itself the amount in the "Collection Account" into which was to be paid the revenue generated by "the Projects".

162. It would not be right to give the impression, particularly in the light of Rix LJ's disquiet, that I think the outcome in the Court of Appeal would inevitably have been the same had that court had before it the evidence before this court. There is room for real doubt. But in my judgment the outcome would, and if it be relevant, would rightly have been the same.

CONCLUSION

163. The claim by HIH fails. I will hear the parties on the form of order and any ancillary matters, if they cannot be agreed, when this judgment is handed down.