Neutral Citation Number: [2011] EWHC 268 (Comm)

Case No: 2007 FOLIO 1396

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2011

Before :

MR JUSTICE CHRISTOPHER CLARKE

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Between :

AXA SEGUROS, S.A. DE C.V. (FORMERLY KNOWN AS SEGUROS COMERCIAL AMERICA, S.A. DE C.V. AND SEGUROS ING, S.A. DE C.V.)	**Claimant**
- and -	
(1) ALLIANZ INSURANCE PLC (T/A ALLIANZ GLOBAL RISKS) (FORMERLY ALLIANZ CORNHILL ENGINEERING) **(2) SWISS RE EUROPE SA** **(3) MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AG** **(4) ASSICURAZIONI GENERAL SPA** **(5) QBE INSURANCE (EUROPE) LIMITED**	**Defendants**

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Helen Davies QC and Tony Singla (instructed by **Hogan Lovells**) for the **Claimant**
Andrew Miller (instructed by **Kennedys**) for the **Defendants**

Hearing date: **4th February 2011**

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Judgment

MR JUSTICE CHRISTOPHER CLARKE :

1. The Claimant, Axa Seguros S.A. de CV, is an insurance company registered in Mexico. It claims under a facultative reinsurance contract (the "Reinsurance Contract") pursuant to which it reinsured its participation in an insurance policy covering, amongst other things, all risks of physical damage to a "Toll Road Network concession" in Mexico for the period 1 November 2000 to 31 December 2001. The 38 roads within the concession include the Don Nogales highway. The original insured was Nacional de Obras y Servicios SA de C.V. ("Banobras"), a bank which is owned by the Mexican State and which has responsibility for various highways in Mexico.

2. By a letter dated 27 October 2000, the Claimant appointed Alexander Forbes Mexico Intermediario de Reaseguro SA de CV as its broker and sole and exclusive agent for the purpose of placing reinsurance of the Banobras risk. During November 2000, 70% of the Banobras risk, above a deductible of US$500,000, was placed with the Defendant reinsurers in the London Market via Alexander Forbes Risk Services UK Limited ("Alexander Forbes").

3. The Reinsurance Contract was recorded in a slip, an addendum to which provided, amongst other things, that:

> *"Cover hereunder is to apply to Roads constructed to Internationally acceptable standards and complying with the relevant Earthquake codes of Construction.*
>
> *Within a reasonable time from inception hereof Surveys are to be carried out in accordance with a timetable to be agreed by Reinsurers to confirm the acceptability of the quality of construction and maintenance of Roads, Bridges and Structures and to verify the valuation of the Insured Property.*
>
> *Cover hereunder will not attach on any damaged roads, dirt roads, or rescued property until such time as they are brought up to International Standards.*
>
> *The sum insured seems to be very low in respect of more than 3300 km "first class" roads and including over 800 bridges. Therefore, the premium of USD 2,360,689.50 should be a non refundable deposit premium for the policy period and to be adjustable on an actual NRV after the re-evaluation survey is completed, latest 3 months after inception of cover".*

4. In February 2001 Grupo MC Ingenieria SA de CV ("Grupo Mexicano") on behalf of the Claimant, surveyed all 38 roads in the concession, including the Don Nogales highway, to determine the value of the roads and to report on their condition. Their report was delivered to the Defendants in May 2001. On 31 July 2001 the lead underwriter wrote to Alexander Forbes to say:

"…as you are aware, our acceptance of this risk was on the basis that the condition of the road , and that the standard of maintenance, was at least as good as current world wide best practice.

In line with this expectation we agreed that Grupo Mexico would provide a survey report to confirm this assumption but also to reassess the insured valuation.

Whilst the "Grupo Mexico" report is accepted as additional information, unfortunately the report does not contain the level of detail that we would expect from such a document. (I attach a detailed list of issues that we would expect to have been addressed in such a report).

As you will appreciate the report does not satisfactorily answer these points, accordingly the panel of lead insurers (Allianz Cornhill, Munich Re, GE Frankona) have agreed that the following shall apply with immediate effect

The policy is endorsed to include a "Reverse Onus of Proof" clause"

Attached was a two page list of issues.

The hurricane

5. Between 30 September and 2 October 2001 Hurricane Juliette caused torrential rainfall in parts of Mexico which resulted in considerable damage to parts of the Don Nogales highway.

6. In the immediate aftermath of Hurricane Juliette, Cunningham Lindsey Mexico S.A. de CV ("Cunningham Lindsey") were appointed as loss adjusters on behalf of the Claimant and the Defendants to investigate the loss. The exact nature of their appointment is debatable. According to the Defendants they were appointed by the Claimant in respect of the underlying claim by Banobras and by the Defendants in respect of any possible claim on the reinsurance. Their reports were addressed to "*Interested Reinsurers per Alexander Forbes London*". The reports were sent to Alexander Forbes, who provided them to the Claimant. Cunningham Lindsey retained Grupo Mexicano to assist in the evaluation of the damage caused by Hurricane Juliette, having regard to Grupo Mexicano's prior knowledge of the roads.

7. On 10th October 2001 Cunningham Lindsey published its Preliminary Report and thereafter produced 10 further reports including a final report dated 11th August 2003.

8. In addition, the Don Nogales highway was inspected by two other engineering firms, namely D Ingenieria SA de CV ("D Ingenieria"), who were appointed by Banobras to assist in formulating a reinstatement plan, and Halcrow Group Limited ("Halcrow"), who were appointed by the Defendants in January 2002 and conducted their first inspection of the road in February 2002 (see para 22 below).

9. As a result of the damage to the Don Nogales highway, on 4th October 2001 Banobras notified a claim against the Claimant under the insurance policy. The formal claim was made in June 2002 and was met by a response that little could be done to advance it without documentation that had been requested on several previous occasions. In September 2002, the claim was referred to arbitration in Mexico under the terms of the underlying policy and on 15 January 2003 the arbitrator, Construcontrol SA, published an award which required the Claimant to pay US$14,825,539.11. There was a subsequent arbitration as to the currency in which this amount was to be paid, which determined that the payment should be in US Dollars. Following this second award payment was duly made by the Claimant.

10. In these proceedings, which were served on the Defendants on 9 September 2008, the Claimant claims an indemnity for the sums said to be due under the Reinsurance Contract. The Defendants deny that they are liable to provide the Claimant with any indemnity under the Reinsurance Contract on a number of grounds. In particular, they allege that:

    i) It was a condition precedent to coverage under the Reinsurance Contract that the Roads were to be constructed to "*internationally acceptable standards*", and some or all of the relevant sections of the Don Nogales highway were not constructed to those standards; and/or

    ii) The loss is excluded as having been caused by, arisen out of and/or had been substantially aggravated by inherent vice and/or wear and tear and/or gradual deterioration and/or failure by the insured to maintain the relevant sections of the Don Nogales highway in a good state of repair; and/or

    iii) The damage occurred to roads that were "*rescued property*" (within the meaning of the addendum to the Reinsurance Contract) and accordingly cover did not attach at the time of the damage since the relevant sections of the Don Nogales highway had not been brought up to "*internationally acceptable standards*".

The Claimant's application

11. The application on the part of the Claimant with which this judgment is concerned is for inspection of all reports and associated documents produced by Halcrow between 2002 and 2003 in connection with its investigation of the Don Nogales Highway and any communications between Halcrow and the Defendants or their solicitors or other agents relevant thereto. It appears that there are 3 relevant reports: (i) a Preliminary Report dated March 2002; (ii) an Additional Pavement Report dated December 2002 and (iii) an Additional Studies Report dated May 2003. The second of those reports is in the Claimant's possession, having been obtained from Alexander Forbes. The other two reports have not been disclosed and are not in the Claimant's possession.

12. The Defendants claim litigation privilege over this material on the basis that they were obtained and prepared for the dominant purpose of obtaining legal advice in connection with litigation reasonably in prospect. The Defendants did have a claim for the return of

the second report but Mr Andrew Miller on their behalf did not seriously press that claim before me and it cannot succeed. Reliance was placed in the Defendants' written submission on CPR 31.20 which provides:

> "*Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court*".

However, the December report was not obtained on inspection and it was not inadvertently disclosed. It was obtained independently of the disclosure exercise.

The law

13. The law is not seriously in dispute. It is for the party claiming privilege to establish his right to it. In order for a document to be protected by litigation privilege two conditions must be satisfied. Firstly, at the time that the document in question was created, litigation must be reasonably in prospect and not a mere possibility. It is not sufficient that there is a "*distinct possibility that sooner or later someone might make a claim*", or that there was "*a general apprehension of future litigation*": see *USA v Philip Morris Inc* [2004] 1 CLC 811 at [68] per Brooke LJ. But it is not necessary to show that there was more than a 50% chance of litigation. Secondly, the documents in question must have been made with either the sole or, at least, the dominant purpose of using it for obtaining advice about actual or anticipated litigation.

14. An affidavit which sets out a claim for privilege by stating the alleged purpose of the communication is not conclusive where it is appears from other evidence that the characterisation of the documentation is misconceived. The court must consider the issue in the light of all the evidence including, but not limited to any statement of purpose. Whether or not litigation is reasonably in prospect is an objective question, on which, again, the views of any deponent are not necessarily conclusive: see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027. In some cases its evidential value may be negligible as where, for instance, it has been manifestly contrived for the specific purpose of attracting legal professional privilege: *Price Waterhouse v BCCI Holdings* [1992] BCLC 583 at 591D.

15. The Claimant resists the claim for privilege on four grounds:

    i) Litigation between the Claimant and the Defendants was not reasonably in prospect prior to 2003;

    ii) The documents in question were not made for the dominant purpose of any such litigation. Halcrow was instructed for the dual purpose of (a) investigating the underlying claim by Banobras against the Claimant and the extent of the damage caused by the hurricane; in respect of which there was a community of interest between the Claimant and the Defendants; and (b) examining the pre-accident condition of the highway the result of which might give rise to grounds to avoid cover;

iii) There has been a loss of confidentiality in respect of the reports as between the parties such that, if there was any privilege, it has been lost;

iv) Since Halcrow are to be the Defendants' experts in the case it cannot be just for the court not to know what their contemporaneous appreciation was of the state of the roads.

16. In order to examine the validity of these contentions it is necessary to examine the history of events with some care.

The history

17. In their Preliminary Report of 15th October 2001 Cunningham Lindsey recommended a reserve of $ 3,500,000 and indicated that a firm of engineers had been retained to inspect damage on behalf of insurers. This was Grupo Mexicano (on the recommendation of the Claimant). Cunningham Lindsey's Interim Report No 1 of 6th December referred to the continued involvement of Grupo Mexicano (described as retained on behalf of insurers/reinsurers) and recommended an increase in the Reserve to $ 12,000,000. Their Interim Report No 2 of 24th December 2001 recommended an increased reserve of $ 16,000,000 and contained the following:

> *"…further inspections undertaken on site jointly with the local engineering consultants retained on behalf of Insurers/Reinsurers and the Original Insured's engineers have, regrettably, revealed a further problem which was not apparent at the time of initial inspections, being severe subsidence of sections of the road surface attributable, it is contended, to this incident.*
>
> *Further meetings on site are scheduled for the week commencing 20th January 2002 and Reinsurers, therefore, may wish to consider whether the appointment of a further independent civil engineering expert would be advisable to comment upon (a) the extent of such additional damage and the scope of remedial works necessitated and (b the issue of the justification and design criteria of the additional costs falling for potential consideration under the additional coverage for "Future Damage Mitigation" works…"*

This report marks the beginning of increasing consideration of whether the hurricane had caused certain parts of the highway to subside. The report recommended "*for consideration of Insurers/Reinsurers*" the release of a payment on account of US $ 2,000,000.

18. On 7th January 2002 Mr John Chambers, then the Claims Manager of the First Defendant, made a file note. It included the following:

> *"1. We wrote this reinsurance on the basis of the attached addendum …and Tim Cook's letter to Richard Cross dated 31st July 2001. The reinsurance is therefore on a different basis from the local cover.*

2. At the very least we should maintain that there is under insurance as indicated by the Grupo Mexicano risk survey which indicated some 63% of the actual value at risk[1] (see page 11 of Cunningham's report dated 6th December 2001). Obviously this point has now been realised by the cedant (see adjuster's report no 2 dated 27th December 2001) so it is important that no additional premium is accepted by ourselves. Presumably the endorsement dated the 20th March 2001 relates to this increase in values and Tim Cook will ensure the premium which to date has not been paid, is not accepted by ourselves.

3 Grupo Mexicano were appointed by the cedant (so their assessment of under insurance may be generous to Seguros Comercial America) so we need to appoint our own independent civil engineering expert who should concentrate on the following questions:

a) Were these roads constructed to internationally accepted standards?

b) Are the quantum figures for remedial work intimated by Grupo Mexicano reasonable?

c) What is the precise nature of mitigation / improvement work envisaged?

We should have to more closely define the expert's instructions when he is appointed and need to give consideration to the appointment of a lawyer to protect privilege."

According to Mr Chambers' evidence coverage was potentially in dispute at the outset and this prompted him to undertake various steps in early January to protect the Reinsurers' position. One of those was the appointment of independent civil engineers, given that the Claimant had appointed Grupo Mexicano, to consider the matters set out in para 3 of his note.

19. On the same day Mr Chambers e-mailed Mr Gross of Cunningham Lindsey:

"*Firstly may I apologise for not replying earlier but this matter has been the subject of discussions with our underwriter and the brokers. Bearing in mind the nature of the comments which I will now make please ensure that any further activities or investigations on our part are, as far as reinsurers are concerned, to be deemed to be on an entirely without prejudice basis.……*

1. The reinsurance is on an entirely different basis from the risk accepted by the local cedant, for example, in the event of under insurance average would apply and our understanding of the "costs and expenses for mitigation of losses" clause is entirely different from that indicated in your report. Perhaps however the most important point is that our cover only applies to roads "constructed to

[1] i.e. that the original Declared Value represented some 63% of the actual value at risk.

internationally acceptable standards and complying with Earthquake codes of construction. We will therefore be appointing our own civil engineer and his brief in summary will be as follows:

a) To check whether the construction <u>was</u> to internationally accepted standards

b) To check the quantum figures for remedial work intimated by Grupo Mexicano and

c) To investigate the precise nature of mitigation/improvement work currently envisaged.

We will revert soonest on the question of whom we appoint."

20. On 9th January 2002 Mr Chambers informed Mr Cross of Alexander Forbes by letter for the record that "*any further action/investigation undertaken by reinsurers will be on an entirely without prejudice basis"*. On the same day he endorsed an e-mail from Mr Plummer of Alexander Forbes enclosing Interim Report No 2 so as to confirm (inter alia) that payment on account was not agreed and that all further investigations and comments by the Reinsurers would be entirely on a without prejudice basis and that the Reinsurers would be instructing their own civil engineer to investigate whether the roads had been constructed to internationally acceptable standards in accordance with the addendum to the slip.

21. On 11th January 2002 the First Defendant, on behalf of the Defendants, instructed Halcrow.

22. Cunningham Lindsey's Interim Report No 3 of 4th February 2002 referred to further site visits that had taken place since their previous report and to protracted meetings with the Original Insured, Cedants and Brokers and said that:

> *"certain advances have been made in establishing the extent of damage and method of remedial works …Independent civil engineers* (i.e. Halcrow), *retained on behalf of reinsurers (at this stage, we understand solely in respect of the London Market element) also participated in the last meetings and inspections on site and their report is currently under preparation*".

The report said that the issue of whether the highway had been constructed in accordance with international standards was:

> "*one of the areas upon which Halcrow will be commenting in their forthcoming report, although we understand that their view will be that there is no universally accepted international standard for road constructions but that the road with which we are concerned in the context of this loss was built and maintained to reasonable standards and was fit for its intended purpose"*.

23. In Interim Report No 4 of 20th March 2002 Cunningham Lindsey noted that:

> "*At the time of our last meeting with the Original Insured, an outline of the general level of quantum as suggested by the review exercises undertaken by independent civil engineering expertise retained on behalf of reinsurers was discussed.*"

In relation to the issue of whether the additional damage to the road surface to which Cunningham Lindsey had referred in their Interim Report No 2 was attributable to the incident, the report said:

> "*During subsequent inspections provoked by this allegation, it was suggested that, in total, more than 60 kilometres in total would possibly require attention and an initial estimate was sources [sic] by D Ingenieria for a sum of approximately MX $ 118 million (around US$ 13 million). Neither Grupo Mexicano nor Halcrow (retained on behalf of the London Reinsurance market) could accept the arguments put forward by D Ingenieria regarding either the cause or likely scale of the problem and it was therefore agreed that a series of core sample would be extracted from the areas of the highway ...*"

It is apparent from the above that Halcrow was engaged in considering the cause and extent of the damage to the highway. The report then referred to a dispute that had arisen as to the analysis of those samples:

> "*Depending upon the reaction received, Reinsurers may well consider it appropriate to seek the opinion once more of Halcrow who, it will be recalled, were retained by the London Market Reinsurers to provide an overview report on the nature and extent of the damage and the general nature of construction of the highway*."

24. In March 2002 Halcrow produced a report following meetings in late January and early February in Mexico with Grupo Mexicano. This is described in Halcrow's Additional Pavement Report of December (see para 30 below) as a report "*on the damage*" and in Cunningham Lindsey's Interim Report No 7 as a "*comment generally upon the damage to the road*". Cunningham Lindsey's Interim Report No 6 describes it as a report "*upon the nature of construction, condition and maintenance of the highway, as well as the nature of damage sustained as a result of this incident*".

25. In May 2002 Halcrow were reinstructed by Mr Paul Roberts on behalf of the Defendants to carry out a further survey and prepare another report. In Cunningham Lindsey's Interim Report No 6 of 29th August 2002 the first (March 2002) and second (in the event December 2002) Halcrow reports are described as follows:

> *"[The March] report served to allay the fears of the majority of the reinsurers regarding the general quality of the risk underwritten and the fact that the damage was, indeed, the result of a catastrophic event. Indeed, we understand that following the issue of that report, all participating London market reinsurers,*

with one exception, released their shares of the payment on account of US $2 million which we recommended.

One particular reinsurer... continued to signal concern regarding the overall condition of the risk and separately retained the services of Halcrow to perform further inspections of the highway, particularly the road surface, structures and design taking into account available rainfall and river flow statistics."

26. In relation to the second Halcrow report, Cunningham Lindsey's Interim Report No 5 dated 8th July 2002 had noted that:

> *"Certain reinsurers are reserving their rights pending completion of further investigations which are currently underway. Although it is our understanding that* ***even if it is accepted that coverage attaches for this loss, any indemnity*** *will exclude works of improvement or betterment ..."*

It is apparent from the words in bold (emphasis added) that whether liability would be accepted was doubtful. The report also said:

> "*It will be recalled that Halcrow were earlier involved in the review of this claim on behalf of London Market reinsurers and, indeed, remain involved on behalf of certain reinsurers who have requested additional investigations to be undertaken. Previously we had suggested that if the issue of contended damage to the road surface continued to be a barrier to advancement of the claim, it would be worthwhile involving Halcrow again to assist in the defence of the claim.*
>
> *Given the apparent* ***i****mpasse which has been reached, we would now recommend that Halcrow be asked to review the information currently available with regards to the question of the alleged damage to the road surface.*"

The impasse to which this report referred was the impasse which had been reached as between Banobras and Insurers/Reinsurers. The "*defence of the claim*" for which the involvement of Halcrow was being suggested was the defence of the underlying claim.

27. On 5th August 2002 representatives of Halcrow held meetings with representatives of Grupo Mexicano and Cunningham Lindsey in Mexico City and those representatives visited the Comision Nacional del Aqua. That evening the group travelled to Ciudad Obregon to see the highway. On 9th and 10th August site inspections were carried out, principally on the stretch from Ciudad Obregon to Guaymas but also on the Guaymas By-Pass and a limited section of the stretch from Navajos to Ciudad Obregon. A video was made of the entire 223 km stretch from Ciudad Obregon to Guaymas in both directions: see Cunningham and Lindsey's Interim Report No 6. On 11th August further meetings with local offices of the Comision took place, and further meetings took place then and the next day between representatives of Grupo Mexicano and Halcrow.

28. Cunningham Lindsey's Interim Report No 6 summarised what it understood would be the six conclusions of Halcrow's report.

29. Cunningham Lindsey's Interim Report No 7 dated 25 September 2002 noted that:

> "*It will be further recalled that Halcrow Group Limited were retained by the participating London Market reinsurers to comment generally upon the damage to the road and a Preliminary Report in this regard has long since been issued to Reinsurers. Given the importance attached to the issue of alleged structural damage to the road structure, and as recommended in our previous reports, a further inspection of the highway surface was undertaken by Peter King of Halcrow Group Limited with representatives of Cunningham Lindsey Mexico DA de CV and GMC in August 2002*."

Halcrow's December 2002 report

30. In December 2002 Halcrow produced the Additional Pavement Report. This report was the appendix to Cunningham Lindsey's Interim Report No 8 of 8th January 2003. It was intended to be circulated only to participating London Market reinsurers. This was because the local market reinsurers (who reinsured as to 30%) had not endorsed the appointment of Halcrow and were not, at that date at any rate, sharing in payment of their fees. The Claimant got a copy of the report apparently from Alexander Forbes, the broker. How Alexander Forbes got it is unknown; but the likelihood is that it came to them from Cunningham Lindsey. It was found in a file of the Claimant entitled "*Documents from Alexander Forbes – Brokers*" between copies of Cunningham Lindsey's 7th and 9th Interim Reports. It is not clear when the documents in that file were received. The report expressed the view that the damage inspected on the A 15 Obregon to Guayamas (which of necessity could not include previous damage in areas which had been repaired or maintained since the hurricane) was not related to the hurricane but was routine deterioration. This supported the reinsurers belief that the works carried out after the hurricane, by way of asphalt dressing or an overlay on top of the existing blacktop, did not cover underlying structural failure in the form of settlement beneath the surface, and that such work as was carried out was of a maintenance nature.

31. None of the documents mentioned in or associated with the Halcrow reports, nor any documents relating to their site visits and inspections have been disclosed by the Defendants.

The evidence of Mr Chambers

32. Mr John Chambers was the Defendants' claims manager. His evidence as to the position in January 2002 is this:

> *"7 At the time when the incident occurred the Claimant had not produced a survey acceptable to Reinsurers to confirm the acceptability of the quality of construction and maintenance of the roads….As*

coverage was potentially in dispute at the outset, this prompted me to undertake various steps in early January 2002 in order to protect the Reinsurers' position.

11. …Reinsurers were …appointing their own civil engineer whose brief included "to check whether the construction was to internationally accepted standards". I emphasised "was" by underlining the word. At the time [7 January 2002] investigating the construction of these roads was more important than anything else…My primary concern was as to the issue of coverage, because the policy would not respond if the roads were not constructed to internationally accepted standards...It was certainly within my contemplation that if liability under the policy did not attach that there would be a dispute between the insured and Reinsurers. It was at that time my belief that such a dispute was likely and would probably only be resolved by litigation.

12 I would comment that this was a high value claim with a high reserve. By December 2001 Cunningham Lindsey had increased the loss reserve to US $ 18 million… Reinsurers were not satisfied that the claim was covered under the policy and refused to make a US $ 2 million payment on account as recommended by Cunningham Lindsey in their 24th December 2001 report….Taking into account the background to this dispute and the investigations Reinsurers needed to carry out, it can be seen why at that time I considered it highly likely that litigation would ensure.

13…my file note[of 7.1.02] shows that it was my intention for the report to be obtained for the purpose of obtaining legal advice for the legal dispute that would arise between the parties in the event that an indemnity was refused

14. I therefore instructed Halcrow on Reinsurers' behalf in January 2002 with the intention that the report would [be] used to obtain legal advice on coverage and for the purpose of contemplated litigation if cover or the claim was denied. I specifically remember making Halcrow aware that coverage could be in dispute and that potentially they may have to go into the witness box".

Mr Roberts' evidence

33. The evidence of Mr Paul Roberts is to the following effect. He was the solicitor retained by the Defendants following the claim arising from the hurricane. He was instructed on or about 8th February 2002. By this time coverage was already in dispute. There were major concerns by the Defendants about the Claimant's claim from the outset. The primary reason for those was that the Claimant had failed to comply with the requirement to provide a satisfactory survey report showing the true condition of the roads. Halcrow were instructed in order that their report could be passed to a lawyer (in

the event himself) for advice. They produced their preliminary report in March 2002. Mr Roberts then undertook a review of the preliminary report and gave advice. In May, on the Defendants' instructions, he instructed Halcrow to undertake further surveys of the roads. On 12th February 2003 Kennedys took over conduct of the matter from him and thereafter Halcrow was instructed by them.

34. Mr Roberts observes:

> *"12. I believe it is well known in the London market that if reinsurers investigate a claim without prejudice to liability and that if reinsurers, having taken legal advice on coverage, decline a claim or avoid a policy, litigation will generally follow. Any reinsurer considering coverage knows he will be in dispute with the cedant and consequently there is a real likelihood of litigation if he denies the claim or the quantum or avoids.*
>
> *13. I can confirm that at all times during my retainer I was of the opinion that the Halcrow reports (including the preliminary report) were being obtained by Reinsurers and subsequently by myself for the purpose of providing me with information so that I could advise Reinsurers on the indemnity issue. There is therefore no doubt in my mind that the dominant purpose of retaining Halcrow and obtaining the reports was for the purpose of obtaining legal advice in respect of coverage issues, the prospect of litigation arising out of an indemnity dispute by that time being within the contemplation of Reinsurers. As such it is my respectful view that the Halcrow reports are protected by privilege."*

The Claimants' submissions

35. Miss Helen Davies, QC, on behalf of the Claimant submitted that the evidence taken as a whole does not show that when Halcrow was instructed litigation between the Claimant and the Defendants was reasonably in prospect or that the material in issue was created for the dominant purpose of use in the litigation between them. Such litigation was not reasonably in prospect in 2002 or until after the January 2003 Award.

36. In July 2001, when the underwriter wanted more information than was contained in the May report, there was no information available which gave grounds for suspecting that the Toll Network had not been constructed to internationally acceptable standards such that there was no cover under the Reinsurance Contract. That was a possibility, which the Defendants wanted checked, but no more than that. There was no reason to suppose that the particular highway in question, which was part of a network of 38 roads, was not up to international standards. When Halcrow was appointed in January 2002 Banobras had notified a potential claim which was being investigated; but it was quite unclear whether the Claimant would be required to pay out under the underlying insurance, let alone whether it would be commencing proceedings against the Defendants under the Reinsurance Contract. The underwriter's declaration that further communications would be without prejudice was a precaution. It does not establish a reasonable prospect of litigation. The fact that in the file note of 7thJanuary Mr Chambers gave consideration to the appointment of a lawyer shows a desire to generate

a claim for privilege. It does not show that litigation was in prospect rather than merely possible.

37. The file note of 7th January and the e-mail of the same date to Alexander Forbes do not suggest that Mr Chambers thought there was a real prospect that the highway might not have been constructed to internationally acceptable standards. Construction to such a standard is just one of the things that Mr Chambers wished to verify. He seems to have been primarily concerned with a potential lack of independence by Grupo Mexicano. Putting further communications on a without prejudice basis is a reservation commonly made in the aftermath of a potentially insured loss and is done on a precautionary basis. It does not establish a reasonable prospect of litigation.

38. Miss Davies submitted that the evidence of Mr Chambers was largely assertion. The supposed prospect of litigation was, in truth, a mere possibility dependent upon the outcome of a series of "ifs". Coverage was only "*potentially*" in dispute (para 7 of his evidence). His statements of subjective intention were far from conclusive and not borne out by the objective facts. His observation (in para 11) that if liability did not attach there would be a dispute begged the question as to whether there was any basis for liability to be in dispute and did not establish that there was.

39. So far as Mr Roberts evidence is concerned, he was wrong, she submits, to suggest that coverage was "*in dispute*" in January 2002. At that stage there was only a possibility of a dispute in the future. The prospect of dispute which Mr Roberts conjures up was one that arose only if a series of conditions were fulfilled (investigation, information resulting therefrom which supported declinature of the claim, taking of legal advice, and actual declinature) and whether they would was not more than a possibility. The conditionality of any prospect of litigation was reflected in the three "*ifs*" contained in his para 12.

40. As to purpose, Miss Davies submits that it is not established that the Halcrow material was commissioned for the dominant purpose of obtaining legal advice. They were instructed for the dual purpose of (i) assessing whether the highway had been constructed to internationally acceptable standards and (ii) determining to what extent any damage had been caused by the hurricane and verifying the correctness of Grupo Mexicano's quantum figures for remedial work. The issues were of equal importance, or, at the least, neither predominated. The first issue bore on the question whether there was cover under the reinsurance at all. The second set of issues did not. They were concerned with whether and to what extent there was liability under the original insurance, and thus the reinsurance. This duality of purpose is insufficient. As Lord Wilberforce observed in *Waugh v British Railways Board* [1980] A.C. 521:

> *"On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation."*

41. Both sides sought to place some reliance on *Re Highgrade Traders Ltd* [1984] BCLC 151. In that case the insurers of stock which had been burnt in a warehouse fire obtained two preliminary reports from loss adjusters – in respect of which no privilege was claimed – which indicated some highly suspicious circumstances in relation to the fire. Those, the court held, "*could not but have alerted the reader to the probability that any claim under the policy would be disputed not only as to quantum but as to liability*" and that the writer clearly envisaged that his evident suspicions might be confirmed by both forensic and financial evidence. In those circumstances, at the time the insurers obtained subsequent reports in order to confirm whether the fire had been fraudulently started, it was clear that if their concerns were substantiated, "*litigation would inevitably follow*" (per Oliver LJ at page 173) and also that the dominant purpose of obtaining the subsequent reports of which disclosure was sought was to confirm whether the fire had been fraudulently started. These, the Claimant submits, are not the circumstances of this case nor are they similar thereto.

42. The Defendants for their part draw attention to another aspect of the case. At first instance the judge had found that there was a duality of purpose for the reports. The first was to obtain advice from the solicitors and the second was to ascertain the cause of the fire. As to that Oliver, LJ (as he then was) said:

> *"What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow*."

This, they submit, is an illustration of how the Court should not be astute to find a duality of purposes where in truth there is a composite one, such as a purpose to obtain legal advice on both liability and quantum.

Discussion

43. The dividing line between circumstances which afford a reasonable prospect of litigation (but not necessarily that litigation is more probable than not), on the one hand, and a (mere) possibility of litigation on the other, is not entirely clear. The fact that one or more conditions have to be fulfilled in order for a dispute to arise which requires the commencement of litigation in order to resolve it does not necessarily mean that litigation is only a possibility. Much may depend on what, at the relevant time, is the prospect that the conditions will be fulfilled. Thus in *Highgrade* itself, there was a real prospect of litigation because, if the expert advice supported the allegation of arson by someone for whom the insured was responsible, cover would be denied and litigation

would almost inevitably follow. There was a reasonable prospect of such advice being given in the light of the reports which had already been made.

44. Although I regard the present case as close to the border line, I am persuaded that there was in January 2002 a reasonable expectation of litigation between the Claimant and the Defendants. Cover was only available in respect of Roads constructed to internationally acceptable standards. The acceptability of the quality of construction and maintenance of Roads, Bridges and Structures was to be confirmed by surveys carried out within a reasonable time from inception. Surveys had taken place but they did not confirm that acceptability to the satisfaction of the Defendants. Further, the Defendants had purported to introduce a reverse burden of proof clause which, if applicable, as the Defendants asserted, would impose on the Claimant the obligation to show that the Roads were up to the correct standard – an obligation which may well have been there absent such a clause, and which the Claimant had, at least in the Defendants' view, not fulfilled.

45. In those circumstances there could in January 2002 be said to be what can properly be described as a reasonable prospect that the reports from Halcrow would reveal that the reason why the Claimant had not fulfilled its obligation to provide surveys which confirmed the acceptability of the roads, was because they were not constructed to an acceptable standard, with the result that the Defendants would reject the claim and litigation would inevitably follow. There was also a reasonable prospect of litigation if the Halcrow report left the acceptability of the Roads unclear, on the basis that, according to the Defendants, it was for the Claimant to prove fulfilment of the condition specified in the Slip ("*Cover hereunder is to apply to Roads constructed to internationally acceptable standards*.") either in accordance with its terms or on account of the reverse burden of proof clause.

46. Miss Davies submitted that when Halcrow was instructed the Defendants did not know either way whether the road had been constructed in accordance with international standards and that a doubt as to whether it had been was not the same as a reason to believe that that was so. But, as it seems to me, a reasonable prospect of litigation does not depend solely on knowledge of the facts that justify rejection of the claim (in which case rejection and hence a dispute would be almost certain) but on what was reasonably to be regarded as in prospect, upon which question the failure of the claimants to produce the confirmation promised was highly material. Such failure was, in my judgment, one of the factors that took the prospect of litigation beyond that of a mere possibility.

47. I do not regard the evidence of Mr Chambers as in any way conclusive on this point. But I do not regard it as irrelevant either. Evidence as to the actual perception of the reinsurer or his lawyers at the time is some guide as to whether there was a reasonable prospect of litigation. In the case of Mr Chambers, his file note (an internal communication not likely to be inaccurate as to his perceptions) of 7th January, his e-mail of the same date, and his letter of 9thJanuary, together with his evidence indicate that he thought that litigation was likely to ensue.

48. Mr Roberts' evidence goes so far as to say that by the time he was instructed coverage was already in dispute and to claim that the correspondence with the broker revealed that the Reinsurers already contemplated that there was likely to be an issue over indemnity that would be likely to lead to litigation. In my judgment, the former observation puts the matter too high, given that there had been no rejection of any claim by the Claimant; and the latter is a comment on correspondence which should speak for itself. Nevertheless the tenor of his evidence was that he and the Defendants regarded litigation as in prospect in the light of the failure of the Claimant to fulfil their obligations to provide a satisfactory survey. There was, in my judgment, a reasonable basis for taking that view.

Predominant purpose

49. The Defendants have not, however, established to my satisfaction that Halcrow were instructed to produce and produced their reports (and that the other material was generated) for the predominant purpose of anticipated litigation between the Claimant and the Defendants; rather than, as seems to me to be the case, for the dual purposes identified in para 40 above. That that was so appears from (a) the description in the Cunningham Lindsey reports of what Halcrow were to report on viz (i) the extent of the damage and of the remedial work for which Banobras was entitled to indemnity, which involved questions of quantum and causation of damage to the highway; and (ii) the standard of road construction and maintenance (see (a) Interim Report No 3: – para 22 above; (b) Interim Report No 4 – para 23 above); (iii) the Additional Pavement Report (see para 30 above) whose subject matter is the extent of damage to the pavement. Insofar as Halcrow were instructed in relation to the quantum of Banobras' claim the interests of the Claimant and the Defendants were common, not adverse. There is no evidence of any issue on quantum as between the Claimant and the Defendants or that Halcrow's work was in any way directed to any such issue. As between the two purposes I do not regard either purpose as predominant. Nor was it established that the material the subject of the application can be separated into distinct parts, each wholly or predominantly attributable to a separate purpose.

Loss of confidentiality.

50. In those circumstances it is not necessary to determine whether confidentiality in the Halcrow reports and associated material has in any event been lost. The Claimant relies upon the following statement of principle in Hollander on *Documentary Evidence* (12th Edition, 2009) at § 19-02:

> *"It is a precondition of a claim to privilege that the documents in question are confidential. If particular documents are no longer confidential, then privilege cannot be claimed. This will usually arise where documents enter the public domain.*
>
> *It is also important to remember that a document may be confidential as between some persons and not others. If a document enters the public domain, it ceases to be confidential and no claim for privilege can be maintained. But, otherwise, the*

question always arises in issues of confidentiality: confidential between whom? If A is entitled to, or is given, access to privileged documents of B, it may be said that there is no confidentiality between A and B so that no claim for privilege could be maintained by A against him in relation to those documents."

51. The Claimant relies in this respect on the following matters:

i) Cunningham Lindsey, who were retained as loss adjusters on behalf of both the Claimant and the Defendants, referred in their reports to conclusions reached by Halcrow: see Interim Report No 3 and No 6 quoted at paras 22 and 28 above;

ii) The Claimant has already obtained, without impropriety, the December 2002 report, which (noticeably) is not identified on its face as being privileged;

iii) The file entitled "*Documents from Alexander Forbes - Brokers*" which contained the December 2002 Halcrow report also contains an e-mail sent by Dean Rebello of GE ERC to David Plummer of Alexander Forbes on 17 May 2002. This refers to what is presumably Halcrow's March 2002 report and, in so far as Mr Rebello seeks to correct Mr Plummer's understanding of the report ("*...your understanding that Halcrow's report concluded that the standard of road was totally acceptable is incorrect*"), shows that Halcrow's investigations and opinions were a matter of discussion between those involved in analysing the loss on both sides of the Reinsurance Contract.

iv) As of September/October 2004, the Defendants themselves did not consider that Halcrow's reports were privileged. They refused to disclose them to the Claimant on the sole basis that the Reinsurance Contract had allegedly been amended to incorporate a reverse onus of proof clause. Thus in an email disclosed by the Second Defendant dated 8 October 2004, in which Mr Plummer reports on a meeting that he had attended with Amanda Hubbard of Allianz Cornhill on 28 September 2004, Mr Plummer records that the Reinsurers "*are relying on a report (which we have yet to see) from Halcrows stating that the insured roads were not constructed to International Standards"*. Later in the e-mail he goes on to report: *"... we asked Allianz Cornhill for a copy of the Halcrows report with all supporting documentation but they have declined this request referring again to the reverse onus of proof."*

52. I do not regard those matters as showing that confidentiality has been lost in the Halcrow reports (other than that of December 2002) or of any supporting or associated material. What exactly these documents say is still unknown. I do not regard such partial (and possibly inaccurate) revelation as has taken place as destroying any confidentiality in the reports or the material; nor do I regard the Defendants as having waived or abandoned any claim to confidentiality.

Halcrow as experts

53. Had I concluded that the claim to privilege was prima facie well founded it would have been necessary to determine whether it could still be maintained in the light of the fact that the Defendants have appointed Halcrow as their Part 35 Experts. I asked Mr Miller on what basis the Defendants could seek to adduce expert evidence from Halcrow without revealing the details and records of inspections that that company carried out in 2002. If Halcrow is to act as an expert it would need to act independently and to inform the court of any matter known to it which was inconsistent with or which cast doubt on any expression of expert opinion. It did not, and does not, seem to me that documentary evidence of Halcrow's investigations, which bears on the issues in the litigation, could properly be withheld if they were to give expert evidence, particularly if that documentary evidence was unhelpful to the Defendants case.

54. Mr Miller acknowledged that there may come a time when, in order to produce their report and fulfil their duties to the Court as experts, Halcrow may wish or need to be in a position to deploy such material. But, as I understood him, his clients wished to take matters in sequence i.e. to assert and maintain their claim to privilege and later, if necessary, to choose to waive it to the extent necessary to enable Halcrow to act as experts. In particular they did not wish to be in a situation where production of witness statements of fact could be delayed on the footing that it was necessary to look at the privileged material before witness statements were completed.

55. I regard this situation as profoundly unsatisfactory. It is true that, if the Defendants are entitled to privilege they have, absent waiver or iniquity, an absolute right to it. But if, as seems inherently likely, much of the material in dispute is going to have to be disclosed anyway it is wasteful and inefficient to spend time arguing a claim to privilege which within a short period will become irrelevant. Had I reached a different conclusion on privilege I would have wished to consider (a) whether to give directions as to expert evidence which brought forward the time at which it became necessary for the Defendants and/or the Court to decide what waiver of privilege would have to be made if Halcrow was to provide expert evidence; and/or (b) whether the question as to the costs of this application should be reserved until any such further directions (or the production of Halcrow's expert report) took place.

56. I will hear counsel on the form of the order.