IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-009-1842
[2018] NZHC 1025

BETWEEN	RICK PAUL JOHN GROEN AND ANNA KATE GROEN Plaintiff
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Defendant

Hearing: 26 April 2018

Appearances: G D R Shand for Plaintiffs
N F D Moffatt for Defendant

Judgment: 11 May 2018

JUDGMENT OF NICHOLAS DAVIDSON J
(WAIVER OF PRIVILEGE)

Introduction

[1] The plaintiffs, Mr & Mrs Groen, owned a property at 4 Brynn Lane, Bexley, in Christchurch. It was damaged in the Canterbury earthquake sequence and they claimed on their insurance policy with AMI/Southern Response Earthquake Services Limited ("**AMI/SRESL**") in 2011.

[2] The claim was settled in 2012 on the basis of a representation by AMI/SRESL that the rebuild cost of the house was $337,716.83.

[3] They now sue Southern Response Earthquake Services Limited ("**Southern Response**") as successor to AMI/SRESL for what they allege to be a deliberate concealment from them of repair/rebuild costings held on the insurer's records. This judgment refers to Southern Response and the insurer synonymously.

[4] The substantive trial is to be heard on ***Monday 21 May 2018***. This judgment concerns the plaintiffs' contention that the defendant has waived legal privilege in respect of advice it received relating to the interpretation and application of their policy.

Background

[5] The settlement figure was derived from costings in a Detailed Repair/Rebuild Analysis ("**DRA**"). The plaintiffs received that from the insurer and accepted it for the purpose of settlement. This is described as the "disclosed DRA" or "customer" version.

[6] They say that in April 2016, they obtained "another version" of the DRA held on the insurer's files, which showed a rebuild cost of $442,577.50. For this judgment, that version is described as the "office copy" or "office version", or the "undisclosed DRA".

[7] The plaintiffs sue Southern Response for misleading and deceptive conduct, and for breach of its good faith duty to give them copies of relevant documents, including the "office copy" of the DRA. They seek the difference between the two DRAs, plus interest and costs.

[8] By the first amended statement of claim dated 28 September 2017, the plaintiffs plead the express written terms of the policy that:

> Cover for your house
>
> Your house is covered for any unforeseen and sudden physical loss or damage that is not excluded by this policy.
>
> …

1 What we will pay for

a. We will pay to repair or rebuild your house to an 'as new' condition, up to the floor area stated in the Policy Schedule;

b. We will use building materials and construction methods in common use at the time of repair or rebuilding;

c. If your house is damaged beyond economic repair you can choose any one of the following options:

i. To rebuilding on the same site. We will pay the full replacement cost of rebuilding your house;

ii. To rebuild on another site. We will pay the full replacement cost of rebuilding your house on another site you choose. This cost much not be greater than rebuilding your house on its present site;

iii. To buy another house. We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your house on its present site;

iv. A cash payment. We will pay the market value of your house at the time of the loss.

[9] The plaintiffs plead implied terms of the policy that the defendants would disclose all material information and that it would act reasonably, fairly and transparently.

[10] The Fair Insurance Code ("**FIC**") requires that the insurer keep the insured informed of the progress of a claim, settle claims quickly and fairly, and explain how the insurer reaches its decision.

[11] The plaintiffs plead that the insurer provided the plaintiffs with a *House Claim Decision Pack* which included a "decision letter" of 24 November 2011 and the disclosed DRA. The insurer took the position that the property was in the red-zone, that the Government had determined it was not feasible to rebuild on the land, and the house was beyond economic repair. That meant, as pleaded, that the plaintiffs could choose:

(a) To rebuild the house on another site, up to the cost to rebuild the house on its present site (in certain circumstances AMI may elect to provide a cash settlement); or

(b) To buy another house, up to the cost to rebuild the house on its present site, up to $337,416; or

(c) A cash payment being the market value of the house immediately prior to the earthquakes.

[12] The plaintiffs say that they elected to rebuild on another site and accepted a cash payment of $203,138, being the rebuild costs advised by the insurer in the disclosed DRA, less EQC payments, less excesses. They signed a settlement discharge agreement dated 14 March 2012.

[13] On 10 March 2016, the plaintiffs made a request under the Privacy Act 1993 for a:

> full copy of the DRA used to calculate our settlement …, including the hidden amounts section not previously disclosed to us.

[14] In response, the insurer provided the plaintiffs with the "most up to date, latest version of the DRA" dated 25 October 2011 which showed a rebuild cost of $442,577.50 (GST inclusive). This is pleaded as the "undisclosed DRA", being the "office copy" or "office version".

[15] The plaintiffs say the undisclosed DRA was held by the insurer at the time of the "decision letter", when it disclosed the DRA customer version. They are much the same in format and content but the undisclosed DRA has additional items/costs that the plaintiffs plead are an essential part of the rebuild cost. The plaintiffs plead that the defendant consciously chose not to send them the undisclosed DRA.

[16] The pleaded causes of action are under s 43(3)(a) of the Fair Trading Act 1986 ("**the Act**") for an order that the settlement agreement be declared void, and pursuant to s 43(3)(f) of the Act for damages of $105,161.50 being the difference between the settlement reached under the disclosed DRA and the undisclosed DRA rebuild amount. They seek general damages of $50,000 plus interest and costs.

[17] The second cause of action is in breach of obligation, as pleaded above, based on an alleged failure to disclose. The same damages are sought.

[18] By its statement of defence, the insurer pleads that it assessed the plaintiffs' claim in good faith and that the settlement discharge agreement contained the following clauses:

> (i) Clause 3: the parties agree that a fair and reasonable estimate for the rebuild cost of the insured property, and the sum insured under the policy, is $337,416, including EQCover payments already received.
>
> (ii) Clause 4: the parties agree that the policyholder's entitlement under the policy is $203,138 including GST (the "settlement payment"), for:
>
> (A) the house under *Earthquake top-up cover*, clause 1.a., $174,082; and
>
> (B) the fences, path and driveway under *cover for your house*, having deducted the applicable AMI excess, $29,056.
>
> (iii) Clause 8: The policyholder accepts the settlement payment, with AMI arranging demolition and debris removal as described in clause 6, in full and final settlement and discharge of the claim under the policy for damage to the insured property and in respect of any complaint, claim or right of action the policyholder has or may have against AMI, whether known or unknown, which arises directly or indirectly out of the event or any subsequent aftershock that has occurred before the date of the Agreement.

[19] Southern Response says that the disclosed DRA of 25 October 2011 provided to the plaintiffs, did not require any reference to the additional amounts in the undisclosed DRA as these were not payable to them, and otherwise that it assessed the amount payable in good faith.

[20] It pleads that of the amounts not disclosed to the plaintiffs, reflected in the undisclosed DRA, $16,000 (excluding GST) was for claims administration costs and therefore not payable to the insured, $26,875 represented demolition costs incurred by the insurer and not therefore payable to them, and $34,986 represented *contingencies* to which the plaintiffs were not entitled as they rebuilt their house without the need for payment of additional sums which may have been reflected in contingencies. It further pleads the full and final settlement as conclusive of the insurer's obligations.

Waiver of legal privilege

Submissions for the plaintiffs

[21] Mr Shand for the plaintiffs says that the evidence to be given at trial by Cassey Hurren for Southern Response, constitutes a waiver of legal privilege (litigation) attaching to legal advice given to the insurer relevant to the issues for trial. In particular, he says the advice is said to be relevant to Southern Response's defence that it acted in good faith in what it disclosed to the plaintiffs.

[22] Mr Hurren is the General Manager, Legal and Strategy at Southern Response, and earlier was legal counsel for Southern Response while working at law firm Wynn Williams. His brief of evidence dated 23 February 2018 says that he is familiar with Southern Response's approach towards the interpretation of AMI policies for which it is responsible, as well as claims assessment and settlement processes. Mr Hurren is also familiar with the plaintiffs' AMI policy claim, and how it was handled by Southern Response.

[23] He goes on to say that AMI at the time of the earthquakes offered four different house cover policies being premium house cover, premier rental house cover, market value house cover and market value rental house cover. The plaintiffs had a premium house cover policy and Mr Hurren's brief says he will focus on how Southern Response interpreted that policy when it provided the disclosed DRA to the plaintiffs. Mr Hurren says that the plaintiffs' house was uneconomic to repair, and in those circumstances the policy gave the customer the four options referred to above to choose from, including a cash payment for the market value of the house at the time of the loss.

[24] This judgment does not need to detail all Mr Hurren's evidence for the trial scheduled to start ***Monday 21 May 2018***. Some thought relevant to the judgment is set out below. In short, he says that when Southern Response kept "customer" and "office" versions of DRA calculations, but they were for different purposes. Southern Response say certain "additional costs" would not be payable by the insurer depending on which option is elected.

[25] In paragraph 6 he says:

> I will not discuss any privileged material acquired in my role at Southern Response and Wynn Williams.

[26] In paragraph 23 Mr Hurren says:

> Southern Response adopted its interpretation of the policy after receiving legal advice. Because that advice is privileged, I do not discuss it further.

[27] Mr Hurren says that after the Court of Appeal delivered judgment in *Avonside Holdings Ltd v Southern Response Services Ltd*:[1]

> Southern Response excluded internal administration, demolition, design costs and a contingency allowance from the customer copy of the DRA because it considered they were not part of the cost of rebuilding under the buy another house section of the policy. At this time, this was the good faith view of Southern Response management, including myself. Southern Response had obtained legal advice on this point. However, as that advice is privileged, I will not address it further.

[28] Mr Hurren says that after the Supreme Court judgment in *Avonside Holdings*, Southern Response adopted a new policy *addressing professional fees and contingencies*.

[29] What these and other paragraphs are meant to convey is at large. Mr Moffatt for Southern Response says reference to legal advice is simply part of the narrative, that the position taken by Southern Response as to interpretation of the policy was reached after receiving legal advice. It can be seen that Mr Hurren was careful to say that he would not, in his brief of evidence, refer to the content of legal advice which is privileged, which Mr Moffatt says means reference only to the *fact of legal advice being obtained*.

[30] Mr Shand says that Southern Response is claiming as part of its "good faith" defence that it had legal advice and it is important that it says that *supported its decision* and Mr Shand says that constitutes a waiver of privilege.

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1 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040.

[31] Mr Shand refers to s 65(3)(a) of the Evidence Act 2006 whereby a person who is entitled to maintain solicitor-client privilege will waive the privilege "If the person so acts as to put the privileged communication, information or opinion in issue in a proceeding". Mr Shand says this typically occurs when a party seeks to justify a course of conduct by saying it had legal advice, and when they do that, they cannot resist disclosing the advice.[2] Southern Response referred to the legal advice in its statement of defence when asserting that it acted in good faith when it made the rebuild cost assessment. He says that the insurer asserts inferentially that it took legal advice relevant to its good faith defence, and it has exposed its thinking, bringing to account that advice and therefore to scrutiny at trial.

[32] Mr Shand refers to other paragraphs in Mr Hurren's brief of evidence:

> 21. The policy also provides "cover for additional costs", under a separate section of the policy. Under this section, Southern Response will pay for four categories of additional cost:
>
> (a) The first category is titled professional fees, and provides that Southern Response will pay the reasonable cost of any architects' and surveyors' fees to repair or rebuild the house. These costs must be approved by Southern Response before they are incurred.
>
> (b) The second category is the cost of demolition and debris removal. Southern Response will pay the reasonable cost of demolition and debris removal. Again, these costs must be approved by Southern Response before they are incurred.
>
> (c) The third category is the cost of removal of household contents. Southern Response will pay the reasonable costs of removing household contents if this is necessary to carry out repairs or the reinstatement of the house.
>
> (d) The final category is the cost of compliance with building legislation and regulations. Where additional work is required to comply with building legislation and rules, Southern Response will pay the reasonable costs of that work. This is subject to certain conditions set out in the policy.
>
> 22. Because these four categories of costs are additional to the cost of rebuilding the customer's house, Southern Response does not include them in calculating the cost of rebuilding the house. Instead, it treats them as additional to the cost of rebuilding. This means that:

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2 *McCullagh v Robt Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at [102].

(a) If the house is rebuilt on the same site, Southern Response will also pay for any additional costs that are in fact incurred in respect of the rebuild on that site.

(b) If the house is rebuilt on another site, Southern Response will also pay for any additional costs that are in fact incurred in respect of the rebuild on the alternative site.

(c) If a customer buys another house, Southern Response will pay the additional cost of demolition if the insured house is in fact demolished. However, none of the remaining additional costs will in fact be incurred in buying another house, and so none are payable.

…

36. Because the buy another house option was capped at the cost of rebuilding on the same site, the DRA (and the letter) set out what Southern Response considered to be included within the cost of rebuilding on the same site. It did not include additional costs, because Southern Response did not consider that these came within the cost of rebuilding.

…

40. As Southern Response considered that these additional and other costs were not part of the cost of rebuilding and therefore not included in the buy another house cap, it did not provide this section to customers such as the Groens and did not include these costs in the calculation of a customer's maximum entitlement under the buy another house figure.

…

48. At the time of the Groens' DRA Southern Response considered that design fees came within "professional fees" in the additional costs section of the policy, and as a result, it considered them to be separate to the cost of rebuilding. As a result, these design fees were not provided to the customer for the purposes of the buy another house figure.

…

53. At the time of the Groens' DRA and settlement, Southern Response considered that a contingency allowance was only needed if the rebuild work was actually being undertaken. Because the DRA was calculating the notional rebuild cost for the buy another house figure, and as no rebuild work was being undertaken under that option, Southern Response did not include a contingency allowance in its estimate of the cost of rebuilding under the buy another house option.

…

> 61. As I have said, Southern Response excluded internal administration, demolition, design costs and a contingency allowance from the customer copy of the DRA because it considered they were not part of the cost of rebuilding under the buy another house section of the policy. At this time, this was the good faith view of Southern Response management, including myself. Southern Response had obtained legal advice on this point. However, as that advice is privileged, I will not address it further.

[33] Mr Shand says the legal advice is up for evidential scrutiny under this analysis as it is relevant to the insurer's state of mind and reasoning when it made its decision about what to disclose to the insured, as part of the policy response. The insurer has "exposed its state of mind to scrutiny", and therefore must provide all communications, information or opinions it received about DRAs and costings. In short, he says the insurer has waived legal privilege by claiming the legal advice as relevant to assessment of the insurer's good faith. He wants to see the legal advice.

Submissions for Southern Response

[34] Mr Moffatt, for Southern Response, says that the paragraphs referred to in Mr Hurren's witness statement do not constitute a waiver of privilege. He says the insurer has been careful not to waive privilege, and it is referred to only *as part of the narrative of the insurer's process*.

[35] He says reliance by the plaintiffs on Australian authorities referred to below is misplaced because the Court of Appeal has ruled these are not part of New Zealand law, and by the relevant New Zealand test there is no waiver of privilege. Even if there has been a waiver he submits it can be cured by amendment of the witness statement to remove the relevant passages.

[36] Because demolition and administration costs could not be part of a settlement sum, Mr Moffatt says that the claim, when it comes to trial, is confined to that section of the undisclosed or office version of the DRA for $62,286.50, *for professional fees and contingencies*.

[37] Mr Moffatt explained that the insurer's position is that the office DRA, more correctly the "AMI Office Use" section of the DRA, included provisions which it did

not consider were payable under the "buy another house" option of the policy, unless the insurer managed the rebuild itself. Southern Response says it conducted itself in good faith and Mr Moffatt says there was no misleading or deceptive conduct, and therefore no basis to declare the settlement agreement void under the Act, or in breach of a duty of good faith.

[38] At trial, it will say that the DRA provided to the plaintiffs was based on its interpretation of the policy at the time. How the insurer interpreted the policy in November 2011, and why, are properly matters for trial. Southern Response says the plaintiffs' settlement sits with its interpretation of the insurer's obligations reflected in other judgments including *Turvey Trustee Ltd v Southern Response*,[3] *Avonside Holdings v Southern Response*,[4] and *Southern Response v Shirley Investments Limited.*[5] Appellate judgments led to the insurer changing its procedures.

[39] As to waiver, Mr Shand refers to the judgment of the Federal Court of Australia in *Telstra Corporation v BT Australasia Pty Ltd*,[6] but Mr Moffatt says that judgment is based on the Australian perspective that a party waives privilege when they put in issue a matter such as their state of mind, *which cannot fairly be assessed without reference to the legal advice*. That case concerned action taken in reliance on representations made by the defendant. Reliance could be fairly assessed without examining the legal advice received by BT Australasia.

[40] *Telstra* does not apply in New Zealand.[7] In *Shannon v Shannon*, Glazebrook J said the test in *Telstra* was inconsistent with the advice the Privy Council in *B v Auckland District Law Society*,[8] and the Court's decision in *Ophthalmological Society of New Zealand Limited Inc v Commerce Commission*.[9]

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3 *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344.
4 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*, above n 1.
5 *Southern Response Earthquake Services Ltd v Shirley Investments Ltd* [2017] NZHC 3190.
6 *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 156 ALR 634 at 645-647.
7 *Shannon v Shannon* [2005] 3 NZLR 757 at [33], [34] and [38] to [39].
8 *B v Auckland District Law Society* [2004] 1 NZLR 326.
9 *Shannon*, above n 7, at [38]; *Ophthalmological Society of New Zealand Ltd v Commerce Commission* [2003] 2 NZLR 145 (CA).

[41] Section 65(3)(a) of the Evidence Act 2006 reads:

> **65 Waiver**
>
> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
>
> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
>
> (3) A person who has a privilege waives the privilege if the person—
>
> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
>
> (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
>
> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
>
> (5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[42] Although *Shannon* predates this provision, New Zealand Courts have since recognised that s 65 gives effect to the common law principles as articulated in *Shannon* and other cases. Mr Moffatt referred to Panckhurst J's comment in *Astrazeneca Ltd v Commerce Commission*.[10] (emphasis added)

> … the judgments in *Opthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) and *Shannon v Shannon* [2005] 3 NZLR 757 (CA) indicate where the boundaries of s 65(3)(a) lie. While the former espouses a test based on the Court's objective judgment as to the consistency of the claimant's conduct with maintaining the privilege, the discussion in *Shannon* elucidates the principles which underpin that test. **The mere relevance of a privileged**

[10] *Astrazeneca Ltd v Commerce Commission* (2008) 12 TCLR 116 (HC) at [39].

> **communication to an issue in the case provides no basis for waiver.** Even a party's asserted reliance upon a privileged communication is generally insufficient. Waiver occurs where a party both asserts reliance upon the privileged communication and also seeks to inject the substance of the communication in evidence. At that point an abuse of the privilege exists. The claimant cannot have the benefit of reliance upon the substance of the advice and still seek to shield that advice from disclosure to the other side. To permit this would give rise to unfairness in the requires sense, in that the party's conduct would be offensive to the trial process.

[43] The section is thus concerned with:

> whether the substance of the privileged communication has been put in issue, not whether a matter has been put in issue which cannot be fairly assessed without reference to the relevant legal advice.

[44] On that analysis, Mr Moffatt submits that the substance of the legal advice has not been put in issue and the foundation for Mr Shand's submission is misplaced on Australian authority which has no application in New Zealand. Mr Moffatt says the plaintiffs have focused on the pleading for the insurer that the assessment of the plaintiffs' claim was made in good faith, following squarely in the *Telstra* line of reasoning, but that is not applicable in New Zealand. A party does not waive privilege *merely by referring to their state of mind*. Mr Moffatt says there is no other basis to find that service of the statement of defence or the brief has waived privilege.

[45] Two paragraphs of Mr Hurren's witness statement, paras 23 and 61, are part of an "overall" explanation given by Mr Hurren as to how the insurer interpreted the policy when settlement was reached in 2012. Mr Hurren is submitted to have referred to the insurer having obtained legal advice "in passing" and neither the pleading nor Mr Hurren discloses or seeks to invoke the *contents of that legal advice*. Instead, he expressly maintains the privilege. The legal advice is not a basis for defence of the plaintiffs' claim, and the insurer does not intend to rely on the *substance* of the legal advice at trial at all.

[46] Hence, he says that the test for waiver of privilege has not been met. The insurer has not *put the substance of its legal advice in issue* and there is no unfairness to the plaintiffs in maintaining the privilege where it is not relying upon the contents of the advice as part of its defence.

[47] Otherwise, Mr Moffatt says any apparent waiver can be "cured" by the insurer serving an amended brief for Mr Hurren that removes all reference to legal advice. A party can amend its briefs prior to trial to remove privileged material.[11] He submits there has been no disclosure of privileged communications.

Discussion

[48] In my view, the law in New Zealand is as submitted by Mr Moffatt. While the wording of Mr Hurren's brief does seem to align the receipt of legal advice with the good faith pleading, and Mr Hurren's evidence in that regard, on closer analysis it goes no further.

[49] A first reader of the pleading and the brief may reasonably take it that the insurer is calling in aid the legal advice as *part of its good faith position* that it supported the insurer's position, and if it did that *expressly* or by necessary implication, then it would in my view have waived the privilege notwithstanding the difference between the New Zealand and Australian positions.

[50] It would have done so because it would be asserting, hidden behind privilege, that the legal advice was relied on and should be brought to account in some way to uphold the client's contractual position as reasonable or otherwise in good faith. It cannot blow hot and cold, but in my view, it does not do so here, expressly disavowing reliance in that way.

[51] Thus, it is my view that where the insurer makes it quite clear that it does not in any way rely on the contested legal advice to support its good faith position or otherwise, then the law in New Zealand means that there is no waiver, *consistent with the fact that Mr Hurren and the pleading expressly record that fact*.

[52] The good faith of the insurer will therefore have to be considered on the evidence of the reasoning adopted, *but without reference to the legal advice*. That may seem incomplete, but it does not unduly narrow the plaintiffs' position because Mr Hurren can still be cross-examined on the insurer's reasoning, *but without*

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[11] A similar view was expressed in *Minister of Education v H Construction North Island Ltd* [2017] NZHC 3147 at [30].

reference to the legal advice obtained. If the insurer seeks to bring that to bear, then in my view it will have waived privilege, but it has not done so at this stage.

[53] There is a sting in the tail of this judgment. Not to waive privilege in respect of legal advice which contradicts the insurer's asserted evidential position of good faith dealings would I think, constitute bad faith in itself. The insurer would not in those circumstances be open with the Court. I do not suggest that is the insurer's position here, but it would be unconscionable to conceal legal advice antithetical to its position when asserting its good faith position.

[54] There was another application before the Court which was not developed further, namely reference in Mr Hurren's brief to legal propositions. This, while perhaps technically inadmissible, does not require the amendment which the plaintiffs seek. That was why it was not developed further by Mr Shand and it needs no judgment of this Court in that regard.

Disposition

[55] Legal privilege has not been waived. The insurer is to remove any reference to legal advice in the pleading and the brief of evidence of Mr Hurren, so that it will not figure in the substantive proceedings at all, unless by the side door it is introduced in the evidence of Southern Response.

…….
Nicholas Davidson J

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