IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2015-409-000428
[2018] NZHC 2809

BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	AON NEW ZEALAND Defendant
AND	OPUS INTERNATIONAL CONSULTANTS LIMITED First Third Party
AND	COLLIERS INTERNATIONAL VALUATION (CHCH) LIMITED Second Third Party

Hearing:	7 September 2018
Appearances:	N R Campbell QC and S D Williams for Plaintiff J G Miles QC, and N R Frith for Defendant
Reasons:	30 October 2018

REASONS FOR JUDGMENT OF NICHOLAS DAVIDSON J
(LEAVE FOR SECOND APPEAL)
[REDACTED VERSION]

A. INTRODUCTION

[1] Lyttelton Port Company Limited ("**LPC**") suffered damage to its assets in the Canterbury earthquake sequence beginning 4 September 2010. It negotiated a settlement of some $450,000,000.00 with its insurers, but it says this was less than the cover which it should have had.

[2] It says that its broker Aon New Zealand Limited ("**Aon**"), was negligent in failing to secure an unambiguous policy wording to reflect its instruction that it have full reinstatement cover for its assets with no sublimits. Aon denies any breach but says if it is liable, then LPC's own solicitor, Mr Paterson, is a joint tortfeasor with it, and should contribute to any judgment sum.

[3] Aon has so far failed to obtain leave to join Mr Paterson as a third party. Leave is required as it did not join him as of right within the time allowed under the High Court Rules ("**HCR**"). For this judgment, the question is whether leave to appeal to the Court of Appeal should be granted against the most recent judgment of this Court declining joinder, given on a review of the judgment of Associate Judge Christiansen to the same effect. There are two facets of this case which are unusual. First, LPC does not sue its own solicitor for negligent breach of contract, but Aon seeks to join him as joint tortfeasor despite having no contractual relationship with him. The second is that cover was effected by placing slips, then earthquake damage occurred *before* the policy wording was concluded.

LPC'S claim against Aon

[4] LPC says Aon was negligent and in breach of contract in arranging cover, and that it suffered losses of some $170m when the insurer took advantage of what it said was ambiguity in the policy wording, and in the placing slips.

Aon's third party claim against Colliers International Valuation (ChCh) Limited

[5] The third party, Colliers International Valuation (ChCh) Limited ("**Colliers**"), was joined by Aon after leave was granted by Associate Judge Matthews.[1] Aon says

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1 *Lyttelton Port Company Ltd v Aon New Zealand* [2018] NZHC 568.

that if it is liable to LPC, which it denies, then Colliers should contribute as a joint tortfeasor. That element of the proceeding does not impinge on this judgment.

Aon's third party claim against Opus

[6] In the same judgment, Associate Judge Matthews also granted Aon leave to join Opus International Consultants Ltd ("**Opus**") as a third party. Again, this does not have any effect on this judgment.

LPC

[7] LPC opposes leave to appeal.

B. JUDGMENT AGAINST WHICH LEAVE IS SOUGHT TO FURTHER APPEAL

[8] By judgment of 26 July 2018, I dismissed the appeal against the decision of Associate Judge Christiansen.[2]

[9] With other alleged errors Aon says its case for joinder of Mr Paterson was misunderstood by this Court. For LPC, Mr Campbell QC submits the Court did not misunderstand Aon's case, and there is no error, or such that there was does not matter. I summarise the judgment as follows.

Associate Judge Christiansen's decision[3]

[10] The Judge declined Aon's application for joinder, and in so doing upheld LPC's claim to legal privilege over two "discovered" documents.

[11] LPC's solicitor, for some purposes, was Mr Paterson of Markit Law. Aon says that Mr Paterson was engaged by LPC to give legal advice about the policy wording:

(i) *after* placing slips were issued on 1 July 2010;

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2 *Lyttelton Port Company Ltd v Aon New Zealand* [2018] NZHC 1867.
3 *Lyttelton Port Company Ltd v Aon New Zealand* [2018] NZHC 2215.

(ii) *after* the first earthquake on 4 September 2010;

(iii) *before* the wording was concluded in the policy issued on 28 October 2010.

[12] Aon says if it was negligent in not alerting LPC to defects or ambiguities in the policy wording, and resolving them, then so too was Mr Paterson; he contributed to any loss which LPC can prove it suffered as the result.

[13] The contest as to legal privilege concerns two emails sent after the 4 September 2010 earthquake, but before the Material Damage Policy ("**MD policy**") was issued on 28 October 2010. One was sent by Mr Faire, a claims consultant working for LPC, to Mr Paterson, and the other by LPC's CFO, Ms Meads, to Board Chair Mr Fisher, which refers to comments *said* to have been made by Mr Paterson about the draft policy wording.

[14] The Associate Judge upheld the privilege asserted by LPC, and found that there was no waiver. His Honour refused leave to join Mr Paterson for several reasons, one being that he did not contribute to LPC's loss as he was not engaged until *after* the policy became legally binding when the placing slips were issued, and *after* the 4 September earthquake had damaged LPC's assets. Another reason was that LPC instructed *Aon* to make it clear to the insurer that there should be full reinstatement cover with no sublimits, so whatever Mr Paterson advised or did not advise, *he* did not cause or contribute to loss when the policy wording was said by the insurer to be ambiguous.

LPC's pleaded claim against Aon

[15] LPC pleads that Aon failed to ensure that LPC had full reinstatement cover, subject to a single limit of liability with no asset specific sublimits. It pleads that Aon could have secured such cover by making sure there was no ambiguity in the policy wording. It also pleads that Aon earlier failed to draw up a material damage *placing slip* which was clear and unambiguous, in the same regard.

[16] The insurer contested the scope and terms of cover and LPC says settlement was achieved for less than the cover it sought and should have had. It faced resistance from the insurer in several respects.

[17] LPC pleads that Number One Breastwork should have been reinsured on a reinstatement basis, but was not, although it had such cover under the expiring policy. It says that it should have been advised to obtain the estimated reinstatement costs for Number One Breastwork, and a valuation was needed to put into the MD spreadsheets. If Aon identified that the relevant spreadsheet (prepared by Opus) had a zero-dollar value and had raised this with LPC then LPC says it would have made sure it had reinstatement cover.

[18] Then LPC says that "excluded as agreed" assets were insurable but Aon failed in several ways:

(a) to get estimated reinstatement values for them;

(b) to analyse underwriting information for such assets to present to insurers;

(c) to identify the assets "excluded as agreed"; and

(d) to raise with LPC whether such "excluded as agreed" assets were to be insured, and to advise LPC that assets identified but not valued in the spreadsheets might not be covered under the policy.

[19] It pleads that Aon failed to advise LPC to obtain valuations for these assets, to ensure estimated reinstatement cost values were in the MD spreadsheets, to provide reinstatement cost values for these assets, and to arrange for full reinstatement cover. If prior to 4:00pm on ***1 July 2010*** Aon had identified these issues and raised them with LPC, it would have taken steps *to ensure full reinstatement cover*. (This was long before Mr Paterson is said by Aon to have advised LPC about the policy wording).

[20] In a similar way, LPC alleges a failure by Aon to include additional valuation data for Jetty Three and Tug Wharf, which it says should have been unambiguously insured on a reinstatement basis.

Aon's (draft) pleading against Mr Paterson

[21] Sometime after damage was suffered *on 4 September 2010* (the first earthquake), Aon says that Mr Paterson was retained to give legal advice about the draft MD policy wording, and the cover under it. It infers this from correspondence, including that said by LPC to be privileged, but says this is an available inference even without using that correspondence.

[22] Aon says Mr Paterson should be joined as before 28 October 2010, when the MD policy was executed and issued, he did not advise LPC that the *draft* MD policy wording did not clearly and unambiguously ('indisputably') establish cover without sublimits, nor advise about assets being listed in spreadsheets without estimated reinstatement costs, where the reinstatement estimated was "nought" or "dash", or "excluded as agreed". Had LPC been so advised, Aon says LPC would have instructed it to obtain full replacement cover for all of its assets, and for the MD spreadsheets to include estimated reinstatement costs value. (This draft pleading assumes such cover could have been obtained despite the damage having already occurred. The Court is said to have misapprehended Aon's case, which is not that policy wording would or may have *extended* cover beyond the placing slips, but that it should have reflected what LPC wanted, and to which it says it was entitled.)

[23] Aon pleads that Mr Paterson owed LPC a duty in contract and in tort to exercise reasonable care and skill in legal advice *as to the draft MD policy wording,* and if Aon is liable to LPC then Mr Paterson is liable as a concurrent joint tortfeasor. Contribution is sought under the Law Reform Act 1936.

Privilege

[24] **LPC00040** is an email sent to Mr Paterson by Mr Faire of Fawcett Faire Limited, with seven documents attached, **[REDACTED]** This email, marked "Private, confidential and privileged", was disclosed during discovery, listed as

"open" in LPC's first affidavit of documents on 24 March 2016, and provided for inspection on 31 March 2016. Documents were inspected by Aon in April 2016 and its solicitors asked LPC's solicitors if they had intended to discover emails between Markit Law (Mr Paterson) and various parties. With no reply, they followed that up in June 2016, with reference to "discovered documents that were marked 'privileged'". Mr Paterson *then* said this email was discovered in error, privilege was claimed, and LPC asked that the documents be destroyed or returned. Aon said it would challenge the claim to privilege.

[25] **LPC01596** is an email from Ms Meads to the LPC Board Chair dated 26 October 2010. In it Ms Meads refers to a letter from the Chief Executive of Aon to LPC, and said that "combined with" emails from staff within Aon, **[REDACTED]** and the signed policy documents were expected within two weeks. As judgment records, this correspondence does not establish that the draft policies were interpreted by Mr Paterson in a certain way, nor does it reveal what he was told by or for LPC, or what passed between LPC, Aon and the insurer. **[REDACTED]**

[26] This email was "open" in LPC's first affidavit of documents and provided for inspection. It had not been identified in April/June 2016 correspondence as it was not to or from Markit Law. Mr Paterson told Aon there was no general waiver of privileged material disclosed, and in March 2017, therefore nearly a year later, Aon's solicitors drew this email to the attention of LPC as it appeared to contain privileged material. It took some months before LPC asserted privilege in respect of this document, and Aon said it would challenge that. The Associate Judge held that both documents were privileged, and that privilege was not waived.

[27] The two judgments in this Court held that Mr Faire was agent for LPC when he sent LPC00040 to Mr Paterson. Mr Taylor QC for Aon relied on *Robert v Foxton Equities Ltd*,[4] and submitted that the request for legal advice had to be made *for Mr Faire* for privilege to apply. In contrast, Mr Campbell QC said that Mr Faire was acting *for LPC* as "its man on the ground", and any advice Mr Paterson gave was for LPC. I concluded that Mr Faire wrote to Mr Paterson *only as part of his*

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4 *Robert v Foxton Equities Ltd* [2014] NZHC 726, [2015] NZAR 1351.

(Mr Paterson's) engagement, to give legal advice to LPC, thus privilege applies to this email.

[28] As soon as Mr Frith, solicitor for Aon, adverted to the 'open' categorisation of the email, Mr Paterson said it had been mistakenly disclosed, and asked that it be returned or destroyed. Aon did not accept that and six months later sought to join Mr Paterson, with reference to LPC00040. I upheld the Associate Judge's reasoning that this document was inadvertently disclosed and privilege was not waived.

[29] LPC01596 includes a hearsay reference to Mr Paterson's *advice*. Aon accepts that any such advice was privileged but says privilege was *waived* when the document was listed for discovery, with LPC's failing to identify and act on the mistake until it was used by Aon in an unredacted form to support the application for joinder. Mr Paterson says that it was disclosed inadvertently, and not identified because analysis for discovery purposes had been of emails to which Markit Law was a party. Aon's solicitors knew there was no general waiver of privilege, and LPC says it was obvious that this document was privileged. Significant time passed between attention being drawn to LPC01596 on 2 March 2017 and LPC's response, but I did not find that of itself sufficient to constitute waiver.

[30] Under s 65(4) of the Evidence Act 2006, privilege is not waived if disclosure is involuntary or mistaken, or otherwise without the consent of the person who has the privilege. Administrative or procedural mishap is different from a reasoned intention to disclose a document, even if later regretted as wrongly reasoned. I concluded that privilege was not waived and s 65(4) would apply to preserve the privilege, should that be necessary.

Joinder

[31] Privilege aside, I concluded that joinder turned largely on whether there was any merit in Aon's case that Mr Paterson caused or contributed to LPC's claimed loss. LPC at trial will first have to show how the pleaded deficiencies in the placing slips and policy wording resulted in a lesser settlement with Vero than it says should have been the case.

[32] The Court will need to look inside the settlement process to see why LPC settled for so much less than it claimed under the policy, as Aon says there was no ambiguity in the placing slips nor in the policy wording. The Associate Judge saw no merit in the argument that Mr Paterson contributed to LPC's loss and referred to authority that it is appropriate to assess the relative strengths and weaknesses of the parties' cases.[5] Having upheld the claim to privilege over the two emails the Judge turned to the prospects of a claim against Mr Paterson based on concurrent joint tortfeasorship.

[33] Aon's position is that if it is found liable as broker, so as to cause LPC loss, then Mr Paterson had an obligation to advise LPC that the draft policy wording did not clearly and unambiguously establish cover without asset specific sublimits, *and* provide cover for the assets listed in the spreadsheets without reinstatement cost values.

[34] Mr Taylor QC for Aon submitted that it had not been guilty of unreasonable delay in seeking joinder, and the Court should recognise it could have joined Mr Paterson as of right if it had applied to do so within the time limit under the High Court Rules. He says it can issue separate proceedings against Mr Paterson and apply for consolidation and he submits joinder must follow because otherwise the Court would be dealing with the same issue in separate proceedings.

[35] He submitted that the balance between the parties' interests is struck by leave being granted, as all three parties are "inextricably linked" with the events in issue. LPC's claim against Aon is for *damages* and Aon simply seeks to recover any sum for which it is found liable by way of contribution from third parties. He says that Aon accepts that a placing slip, once signed, is a legally binding contract and provides for cover in its own right, but the policy wording supplements or supersedes the slip and contains the full terms of the insurance contract. LPC says Aon's failure to advert to the policy wording and its infelicities contributed to loss when later the insurer used the policy wording against LPC, saying that it was ambiguous.

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5 *Westwood Group Holdings Ltd v Rilean Construction (South Island) Ltd* [2013] NZHC 1739 at [15].

[36] Aon says there is a compelling inference to be drawn from the documents that Mr Paterson gave advice *with regard to the wording of the draft policy*, and that his conclusion was the same as that of Aon (which conclusion it still asserts), that the cover placed was *as LPC sought* and unambiguously so. At trial, there will be evidence about insurance practice when finalising policy wordings *after* the issue of a placing slip, so the wording reflects the cover already effected by the slip.

[37] I did not find any prejudice to LPC if Mr Paterson is joined, although there is room for criticism of Aon in its delay in seeking joinder. I did not consider the joinder of Mr Paterson would be oppressive.

[38] The judgment turned to whether Aon had demonstrated a prima facie case in its joint tortfeasor claim against Mr Paterson. The signed placing slips effected cover, and were received by Aon on 1 July 2010. *That* had nothing to do with Mr Paterson. The first Canterbury earthquake event occurred on 4 September 2010 before the policy wording was finalised. Mr Campbell QC for LPC says the allegations of default *against* Aon nearly all relate to events before cover was placed on 1 July 2010, whereas Aon alleges Mr Paterson was negligent *after* cover was effected by the placing slips, after asset damage had been sustained under that cover, but before the policy issued.

[39] The *alleged* deficiencies in the cover are discussed in the judgment. The policy wording was clearly not just a matter of tidying up wording already agreed, expressly or impliedly, or else there would have been no issue between LPC and the insurer after the 4 September 2010 earthquake. I put to counsel that if the policy wording did not match the cover effected by the placing slips, then there would be grounds for rectification. Aon's case against Mr Paterson seemed to rest on the basis that whatever the placing slip provided, the wording of the policy should have reflected what LPC wanted, and the failure to achieve that meant the insurer was given "wriggle room" (as Mr Miles QC put it for Aon in the hearing of the application for leave to appeal), to achieve a settlement for less than the cover which should have been unambiguously provided by the policy.

[40] Aon's case is that if there is ambiguity in the policy wording, then if Mr Paterson had given the advice he should have done, unambiguous cover would have been achieved. If Aon is right then one would expect there to be evidence of contractual intent in the placing slips, to support rectification of the policy wording to have the effect LPC sought. If there had been such evidence, one would have expected it to have been reflected in the settlement between LPC and the insurers.[6]

[41] It has become a contentious point, but as I understood it, Aon maintained that the insurers would (or may) have agreed to provide or extend cover for damaged assets *beyond* the cover reflected in the placing slips *after* the damage occurred. The premia had been set against reinstatement values in the spreadsheets, and Mr Campbell said the insurer simply would not have provided cover for over $50,000,000.00 worth of assets *not* included in the placing slips for which no premium had been paid, after damage had occurred. In the same way, the insurer would not on the face of it have agreed to an increase in the loss limits.[7]

[42] I found that the case for Aon, as I understood it, that extension of cover *beyond* what was reflected in the placing slips would have been obtained, was not credible as further explained. At the hearing of this application for leave to further appeal, discussed below, I observed that by the time Mr Paterson was said to have been negligent, the insurers had no obligation to go beyond the placing slips.[8] *If* the insurer was bound by the placing slips, then there should have been no issue that the policy wording *should have* reflected their terms.

[43] I concluded that a placing slip is generally superseded by the policy when issued.[9] I referred to authority that if the Court decides that the parties did not *intend* the placing slip to be superseded, it will construe the slip and the policy together.[10] The placing slip (unlike a cover note) is binding in the interim, and ceases to have effect *once the formal contract is concluded*. My conclusion that the policy supersedes

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6 *Lyttelton Port Company Ltd v Aon New Zealand*, above n 2, at [109]
7 At [110] - [111].
8 At [112].
9 At [114]
10 *Alison Padfield Insurance Claim* (4th ed, Bloomsbury Professional, West Sussex, 2016) at 7-8.

or may supersede the placing slip *for the future*, but not usually as to the past, is under challenge on this application for leave to further appeal.

[44] LPC gave clear instructions to Aon what it wanted. Ms Meads was concerned about the draft MD policy wording and asked Aon whether the wording should make it clear LPC had full replacement cover. Ms Mullan of Aon responded. The issue raised by LPC as to whether the spreadsheets created sublimits was directed in the first place to Aon.

[45] My understanding was that Aon says the insurers would or may, after damage occurred, have been receptive to the wording LPC says it should have secured had Mr Paterson (or Aon) realised and advised the wording was ambiguous. Mr Taylor submitted that the policy wording is the outcome of "good faith" negotiation *to give effect to the intention of the parties already agreed and reflected wording in the placing slips*. I understood Aon to say that had it gone into negotiation with the insurer on behalf of LPC contending for a mutual intention that the policy provide full replacement cover without sublimits, then while the draft policy wording may not have clearly achieved that, there *may* have been an amendment to the wording. There is no evidence to that effect, but that does not mean it would not be available at trial. However, I concluded that Aon could not show (at trial) that Mr Paterson could have advised LPC in such a way as to secure the policy wording which LPC says it wanted. The negotiation of the policy wording was Aon's responsibility, *whatever Mr Paterson advised*, and that is a central tenet for LPC, pressed hard on the Court by Mr Campbell.

[46] I did not find delay or prejudice sufficient to refuse joinder. I brought to account the conclusion that the documents relied on by Aon are not available against Mr Paterson and LPC as privilege has been upheld. The application for joinder is largely based on this privileged material. Mr Paterson's 'advice' and what he was told or provided for that purpose is simply not known in any detail from this material, and leaves much unknown. I concluded there was nothing to suggest that Mr Paterson did or did not do anything which influenced the insurance outcome. LPC told Aon

what it expected of the policy. It did not get that. I concluded that Aon's application to join Mr Paterson was untenable.[11]

[47] Although it was not discussed in the hearing, I made an observation, in 'rider', as I was troubled by an unusual aspect of the case. The joinder application is based on alleged joint tortfeasorship. If Aon has failed LPC, then Mr Paterson is said by Aon to have contributed to any LPC loss. If evidence shows that Mr Paterson's advice did contribute to LPC resting on what it understood to be Aon's assurance about cover, Aon and Mr Paterson *may* in their separate ways have contributed to LPC's understanding that it had the cover it wanted. Mr Campbell QC says that this has nothing to do with it because Aon failed LPC, and that is all it has to prove. Aon, however, seeks to lay off any liability, saying that Mr Paterson is part of the story as a contributor to LPC's loss.

[48] *If* LPC was entitled to rely in contract on each of Aon and Mr Paterson to achieve an unambiguous policy wording which provided the cover it wanted, then it is a question of fact as to what influenced LPC in its decision to accept the policy wording as it understood it. It says it had no opportunity to address the draft policy wording. It expected Aon to achieve the cover it wanted, and Aon says LPC expected Mr Paterson to advise to the same effect. Mr Campbell says this case does not involve reliance at all, as Aon had to secure the cover LPC wanted, but the rider was based on the prospect of LPC having received legal advice about the policy wording, which with Aon's advice influenced LPC in not pressing for the policy wording which it says it should have had. Beyond that, there is an underlying question of considerable import – whether LPC *could have* achieved an unambiguous policy wording to provide the cover it wanted.

C. APPLICATION FOR LEAVE TO APPEAL

Outline of the parties' positions

[49] Aon requires leave to further appeal under s 26(P)(1AA) of the Judicature Act 1908, which will be granted when an appeal raises some question of

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[11] *Lyttelton Port Company Ltd v Aon New Zealand, above* n 2, at [132].

law or fact capable of bona fide and serious argument, in a case which involves public or private interest of sufficient importance to outweigh the cost and delay of a further appeal.

[50] It says that it is seriously arguable that the Court erred, and that this is in part because the Court misapprehended Aon's case.

[51] Mr Miles QC for Aon says that the Court of Appeal will clarify the law and determine whether it has been properly construed and applied by the Court below.[12] He submits the claim for some "$170 odd million", is enough of itself to justify an appeal, if Aon can show there is a serious bona fide argument.

[52] LPC says that when it called on the policy, it had to face the insurer's case that there was ambiguity in the policy wording and had to settle for a sum less than the cover it should have had, so it sues for the difference between those sums. *Aon's case remains that it did secure cover for a single sum insured, without sublimits, and this is reflected both in the placing slips and the policy wording*. Therefore, why LPC gave ground to the insurer when it asserted ambiguity is a central issue at trial. Aon says LPC should not have given way.

[53] However, if the policy wording is found to be ambiguous and causative of loss to LPC, it says Mr Paterson should have told LPC about that ambiguity so the policy wording would (or may) have been amended to provide the cover LPC wanted. This raises the question of what the placing slips provided and whether they were ambiguous. Aon says it was given no chance to put the case that there was no ambiguity in the LPC/insurer negotiation, and that LPC conceded the ambiguity when it should not have done so and as a result is the author of its own loss.

[54] Aon says that the Court was wrong to hold that Aon's case for joinder is untenable, on several grounds. It says it is seriously arguable that the Court was wrong in upholding LPC's legal privilege over documents LPC00040 and LPC01596, because it failed to apply the correct tests under ss 54 and 65 of the Evidence Act.

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[12] *Snee v Snee* (1999) 13 PRNZ 609 (CA) at 612-613; *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

However, Mr Taylor QC in written submissions for Aon, and Mr Miles QC in oral argument, say whether privilege is upheld or not does not matter as the 'open' documents suffice to support Aon's case for joinder.

[55] Aon says LPC cannot 'hide' Mr Paterson's advice 'behind a cloak of privilege'. At heart, this is a submission that if Mr Paterson's advice influenced LPC in accepting or at least not engaging with the draft policy wording then that must come out at trial, privilege or no privilege, as LPC would be wrong not to acknowledge that when it blames Aon for the loss it says it suffered.

[56] The trial is not scheduled until 20 May 2019, so the cost and delay associated with a further appeal are said to be justified. The Court has set a timetable between the parties, save for the intended joinder.

[57] LPC opposes leave. It says privilege has now been upheld twice and the law has been correctly applied. Mr Campbell says Aon seeks to challenge again factual findings of the Court, and the exercise of discretion whether to allow joinder. He submits an appeal would not raise a question capable of bona fide and serious argument, nor would it be in the public interest, nor of sufficient importance to outweigh the cost of a further appeal. He submits that the application of the law to the facts of an individual case by the *fact*-finding Court does not give rise to a question of law.[13] Where what is in dispute is entirely or largely a question of fact the task of an applicant for leave is harder. The Court of Appeal is not engaged in general correction of error in a second appeal.[14] The *correctness* of the decision from which leave is sought to appeal is not relevant to determining whether leave should be granted of *itself*.[15] Mr Campbell says in a forthright way that it does not matter what Mr Paterson did or did not do, as the contract between LPC and Aon is the real issue, so that comes down to saying Mr Paterson is out of the loop, and should stay there.

Privilege

LPC00040

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13 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].
14 *Waller v Hider*, above n 12, at [412].
15 *Gregory v Gollan*, HC Auckland CIV-2005-404-2485, 4 July 2007 at [7].

[58] Mr Miles QC says that I did not apply the test of privilege enunciated by Kos J in *Foxton Equities*.[16] He submits that for LPC00040, nothing indicates that Mr Faire has been told by "the lawyer" to send documents to Mr Paterson, and there is nothing to indicate that his response would be privileged. Mr Faire does not say expressly that the email was for the purpose of getting legal advice. If it was for legal advice, then Mr Miles says the advice went back to Ms Meads, not to Mr Faire, and that does not mean of itself that it was privileged. Mr Miles says it is seriously arguable that this Court erred with regard to privilege as the wrong test under s 54 of the Act was applied, and the conclusion of the Court was based on unsupportable finding of fact.

[59] In *Foxton Equities,* Kos J said:

> [40] Given that privilege is now codified in the Evidence Act 2006, it is important to focus on the words of the statute. They support the view that to be an agent for the purposes of privilege, a person must be given authority to communicate with the solicitor to obtain legal advice, and actually do so.
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> [41] Section 54(1) describes "a person who [requests or] obtains professional legal services". Privilege then attaches to the communications between that same "person and the legal adviser". I say the "same person" because there is no indication that Parliament intended the word "person" to have two meanings within the same sentence. A third party to whom privilege attaches must be operating under an agency agreement that encompasses them [requesting or] obtaining professional legal services.
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> [42] That approach is supported by s 51(4), which emphasises the importance of authorisation:
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> > Any reference in this subpart to a communication made or received by a person or an act carried out by a person includes a reference to a communication made or received or an act carried out by an authorised representative of that person on that person's behalf.
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> [43] I find that TAL (through its employee Mr Truebridge) was acting as the defendant's agent in relation to the exercise of obtaining a workable subdivision consent from the Council. This included work on a potential application to amend the conditions of the consent. It required TAL to obtain legal advice on that work. I am satisfied that Godfrey Hirst clothed TAL with the authority to obtain legal services form Chapman Tripp directly on behalf of Godfrey Hirst. And, thereby, the defendant.

[60] Whether a third party is authorised by the client to communicate with a solicitor to obtain legal advice is a question of fact. For Aon, it is submitted that there is no evidence that Mr Faire was operating under an agency agreement to that effect

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16 *Robert v Foxton Equities Limited,* above n 4.

and there is no evidence that he had authority from LPC to request such legal services. The submission is that Mr Faire "simply passed on insurance documents to Mr Paterson to allow him to provide advice directly to LPC", so there is no basis to claim privilege. This seems to me an unsupportable submission for reasons which follow but it remains Aon's position.

[61] LPC's evidence given through Ms Meads is that Mr Paterson was asked for legal advice about LPC's insurance claims, and the request made for Mr Faire to send LPC00040 was for that purpose. Aon says he acted as a mere conduit for non-privileged documents. This email was sent at a time of considerable sensitivity for LPC given the damage which had already occurred, and in my view, it was plainly sent to get legal advice. However, if these are non-privileged documents for some other reason, then my conclusion as to the nature of the advice being sought is submitted to be wrong, so should go on appeal. I do not understand how it can be said that there was "no evidence" to suggest that Mr Faire was operating under an agency agreement to request or obtain professional legal services. The purpose of the email is in my view quite clear, to get Mr Paterson's advice for LPC **[REDACTED]**.

[62] Aon says a further appeal would determine the *correct legal test* as to whether a communication between a 'third party' and a solicitor attracts privilege. Mr Campbell says that the correct legal test is not in doubt under s 51(4) of the Act. I have not read conflicting judgments as to the correct test. I concluded that this email was sent to obtain legal advice from Mr Paterson. I can see no argument about the basis upon which Mr Faire wrote to Mr Paterson. The Associate Judge and I concluded that Mr Faire was instructed to send the email to Mr Paterson. I agree that Aon simply seeks to challenge the factual finding that this document is privileged. LPC claims privilege over the whole of LPC00040 and I upheld that, as did the Associate Judge.

[63] Aon's alternative argument is that LPC's claim to privilege over LPC00040 and its attachments should be restricted to the content of the covering email and not the attachments or identifying characteristics, and that this was not dealt with in the judgment. Aon says that if privilege is upheld, it should be modified because the *attachments* are not privileged. These documents will emerge as part of the

narrative in the development of the draft policy wording, and the policy's final form. I agree with Mr Miles that the attachments do not become privileged. Their disclosure will not indicate the advice Mr Paterson gave. I consider the attachments to LPC00040 are not privileged, and this relatively minor matter should be addressed on further appeal.

[64] I would therefore be minded to not grant leave to further appeal as to privilege being retained over LPC00040, but grant leave to address the modified privilege. I return to this in the recommendations.

LPC01596

[65] Mr Miles says the Court applied the wrong legal tests under ss 65(2) and 65(4) of the Act and erred when concluding that LPC had not acted inconsistently with its claim to confidentiality, and had not waived privilege. It was listed in the open section of LPC's list, and provided for inspection, and privilege was therefore waived. The judgment upholds LPC's claim to privilege over that part which contains reference to legal advice. Aon says that when its solicitors wrote to Mr Paterson on 2 March 2017 about this disclosure, LPC did not address the issue in reply, nor assert privilege until nearly three months later, so Aon says privilege was waived and LPC has not acted consistently with confidentiality in respect of this document. Aon's submission is that under ss 65(2) and 65(4) of the Act, the waiver enquiry involves analysis of the circumstances of the disclosure, and while the focus of s 65(4) is on the *act* of disclosure, s 65(2) applies to the circumstances in the period afterwards. Aon refers to authority in this way:

[66] As Allan J said in *Pernod Ricard*:[17]

> Ordinarily, a party to litigation who sees a particular document referred to in the other side's list without privilege being claimed and is subsequently permitted to inspect that document, is entitled to assume that any privilege which might otherwise have been claimed for it has been waived.

[67] In *McGuire v Wellington Standards Committee (No 1)*, Kos J observed that:[18]

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17 *Pernod Ricard New Zealand Ltd v Lion – Beer, Spirits & Wine (NZ) Ltd* [2012] NZHC 2801 at [60].

18 *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 1159.

> [22] In most cases disclosure of confidential, privileged material means that the material disclosed loses its privilege. That is axiomatic. Privilege depends upon confidentiality. Material disclosed (e.g. in an affidavit or pleading) is no longer confidential. Ergo, nor is it privileged. An exception of course exists where s 65(4) applies, or there is another effective limitation on loss of confidence.

[68] In *Rollex Group (2010) Ltd v Chaffers Group Ltd*, His Honour stated:[19]

> The next question is whether the [disclosure] amounts to a "voluntary disclosure … inconsistent with the claim of confidentiality". The obverse of that is an "involuntary disclosure" to which s 65(4)'s continued protection applies. There is also a protected middle ground – mistaken disclosure. This presumably lies in a no-man's land of voluntariness, but protection is still given in such a case in s 65(4).

[69] Mr Miles summarises Asher J's discussion of the terms in s 65(4) in *Body Corporate No 191561 v Argent House Ltd* as follows:[20]

(a) An "*involuntary"* act is one other than a conscious act of will, for example, a document that falls out of a suitcase that is found by the opposing party;

(b) A "*mistake"* must be a mistake as to the act of disclosure itself, rather than the implications of it, meaning that mistakes made in determining whether privilege applied, careless, ill-judged or otherwise, did not qualify; and

(c) The terms "*involuntary"* and "*mistaken"* should be viewed synonymously with disclosures without consent. A deliberate handing over a document with no qualifying mistake at the time is not a disclosure without consent.

[70] Waiver is asserted by Aon because disclosure of LPC01596 was voluntary, "at least in the mechanical sense". It says that where discovery has been carried out meticulously, as it is said to have been in this case, using e-discovery and properly listed documents, the claim to confidentiality cannot be maintained.

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19 *Rollex Group (2010) Ltd v Chaffers Group Ltd* [2012] NZHC 1332, [2012] NZAR 746 at [58].
20 *Body Corporate No 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC) at [38], [42] and [43].

[71] Aon says that on receipt of the document it did not seem an obvious mistake, as it was relevant, and fell within the timeframe when the MD policy wording was being settled. It is also said to be relevant that it was presumed that LPC had elected not to try to conceal that Mr Paterson advised on the MD policy. That presumption is, as I understand it, said to be supported by direct evidence rather than as a matter of inference. Because the documents were listed, and Mr Paterson says were positively reviewed twice before disclosure to Aon, this was not "involuntary" under s 65(4) and not mistaken either because of careless or an ill-judged failure to identify documents. A misjudgment as to privilege is not involuntary nor a mistake. There is no room for a second bite at a reasoned *decision* taken to disclose, later regretted.

[72] Aon will say that the Court was wrong to find that LPC's disclosure of LPC01596 occurred without its consent, because Ms Meads was authorised to swear its discovery affidavit and that exercise was delegated to Mr Paterson. Thus, Aon says there was a deliberate handing over of a document with no qualifying mistake at the time, and that is not disclosure without consent.[21]

[73] Further, Aon says that LPC failed to claim privilege in LPC01596 after the disclosure. Mr Miles says that the issue is whether LPC could fix any waiver under the Court's equitable discretionary jurisdiction, to restrain use or disclosure of this document by Aon. The promptness with which a party moves to correct erroneous disclosure is relevant under the principle described in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm)*:[22]

> …the court has the power to intervene for the protection of the mistaken party by the grant of an injunction in exercise of the equitable jurisdiction … unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, for example, on the ground of inordinate delay.

[74] Hence, it is submitted there was an inexplicable delay in claiming privilege and that this is consistent with there being a waiver. Mr Miles refers to *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd*:[23]

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21 *Body Corporate No. 191561 v Argent House Ltd* (2008), above n 20, at [43].
22 *Guinness Peat Properties Limited v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716.
23 *Harbour Inn Seafoods v Switzerland General Insurance Co Ltd* [1990] 2 NZLR 381 (HC) at 383.

> It is clear that privilege can be waived. For example in *Re Briamore Manufacturing Ltd* [1986] 3 All ER 132, Hoffman J held that where production and inspection pre-trial of privileged documents mistakenly included in a list had taken place, it was too late to reverse the process and to correct the mistake. The Judge observed however that there was a right to correct a list before inspection took place, that is before actual disclosure to the other party.

[75] He also refers to passages from *Guinness Peat*:[24]

> (1) Where solicitors for one party to litigation have, on discovery, mistakenly included a document for which they could properly have claimed privilege in Pt 1 of Sch 1 to a list of documents without claiming privilege, the court will ordinarily permit them to amend the list under RSC Ord 20, r 8, at any time before inspection of the document has taken place.
>
> (2) However, once in such circumstances the other party has inspected the document in pursuance of the rights conferred on him by RSC Ord 24, r 9, the general rules is that it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief. Subject to what is said in (3) below, the Briamore is good law.
>
> (3) If, however, in such a last-mentioned case the other party or his solicitor either (a) has procured inspection of the relevant document by fraud, or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene for the protection of the mistake party by the grant of an injunction in exercise of the equitable jurisdiction illustrated by the Ashburton Goddard and Hebert Smith cases. Furthermore, in my view it should ordinarily intervene in such cases, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretion remedy, for example, on the ground of inordinate delay (see *Goddard v Nationwide Building Society* [1986] 3 All ER 264 at 272, [1986] 3 WLR 734 at 745 per Nourse LJ).

[76] The point is made that a Court will ordinarily permit an amendment to a list before inspection has taken place, but after inspection it is generally too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief.

[77] Where, on inspection, a party realises it has seen a document only because of an obvious mistake, the Court may intervene in the exercise of its equitable jurisdiction unless the relief sought should be refused on grounds associated with equitable

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[24] Above 22 at 730-731. The focus is not solely "on the time when disclosure is made, not as here at the time of a later supplementary affidavit" – at [67].

remedies such as inordinate delay. Given the circumstances of disclosure and LPC's later conduct, Aon says that the Court has made a mistake in principle and it should be corrected. At the very least, the precise words which LPC can claim to be privileged ought to be determined.

Privilege – discussion

[78] Nothing has been put to me by Aon which tells me that I have applied the wrong legal test as to privilege, whether it applies in the case of LPC00040, or as to waiver. I agree with Mr Campbell that this is a fact specific enquiry, applying the principles which I do not consider have been applied in error. I accept, however, that partial discovery should apply in the case of LPC00040 and there is a similar issue in respect of LPC01596.

[79] I agree with Mr Campbell when he says that Aon's case is that an appeal would address the correct legal test for determining whether privilege has been waived, but that the test is set out in s 65 of the Act. The issue is whether the disclosure, *on the facts*, is inconsistent with a claim to confidentiality. He submits that is all that will be dealt with on appeal, whether the disclosure made was inconsistent with a claim to confidentiality. This document was known by MERW on behalf of Aon to be privileged. It was obvious in itself, identified by Aon's counsel, and MERW knew it should not use the document until privilege was clarified, as there was no general waiver. On the facts, I concluded that once LPC had LPC01596 drawn to its attention, in the context of privilege, the fact that time passed before LPC asserted privilege does not constitute waiver. That is a question of fact.

[80] Not only is there obvious and significant private importance to Aon, but the issues of general or public importance include the proper legal test for privilege attaching to agent's communications, and the proper legal test for waiver of privilege in the circumstances described. I have come to agree that waiver is more nuanced than I had initially assessed in the case of LPC01596 although it does seem to be a question of fact.

[81] I grant leave to appeal the judgment as to the privilege findings to ensure full consideration of the issues. There is otherwise a strong case for privilege being modified, if upheld, as Aon submits.

Joinder argument for Aon

[82] Mr Miles says Aon's case for leave is first based on my misapprehension of Aon's case. He described privilege as a 'side issue', technical and complicated in itself, which should go on appeal for those reasons, but Aon's case for joinder does not fall even if privilege is upheld over LPC00040 and LPC01596.

[83] Mr Miles says obligingly that the submissions *for LPC* led the Court to misconceive Aon's position, by asserting Aon's case relied on "unpleaded propositions". Further, Mr Miles says that LPC's latest submissions amount to the same thing and are "simply wrong". He explains that there are *two breaches* alleged against Aon, that it *twice* failed LPC, first in not drawing up a clear and unambiguous MD placing slip, (which had nothing to do with Mr Paterson) then in not achieving a clear and unambiguous MD policy wording (with which it says Mr Paterson was involved). If Aon failed to draw up MD policy wording which was clear and unambiguous as to total reinstatement with no sublimits, then it says Mr Paterson has admitted in open correspondence that he provided legal advice to LPC in relation to the insurance contract, so is liable for a share of any damages awarded.

[84] If there was an ambiguity in the policy wording, which Aon denies, then it says it could have been addressed and resolved by amended policy wording, which must mean the insurer would have accepted the placing slips provided for, *or* the parties otherwise intended there be, full reinstatement without sublimits.

[85] Aon sets out this chronology, as it knows it:

Date	**Event**
1 July 2010	Placing slips attaching asset scheduled signed by LPC's insurers for LPC's 2010/2011 insurance programme.
4 September 2010	First Canterbury earthquake causes loss and damage to LPC's assets.

8 September 2010	Aon provides LPC's placing slips and asset scheduled to LPC's claims consultant, Peter Faire.
18 September 2010	Aon provides draft insurance policies including the draft MD Policy to Mr Faire.
1 October 2010	**[REDACTED]**
4 October 2010	Aon provides draft insurance policies including the draft MD Policy to LPC.
11 October 2010	LPC emails Aon seeking confirmation that the draft MD Policy provides for full replacement cover i.e. without asset sublimits.
14 October 2010	Aon responds to LPC confirming that the draft MD Policy provides for full replacement cover without asset sublimits except where assets intended by LPC to be covered on a different basis. Aon advises that further amendments to draft insurance policies are necessary to match policy response agreed with insurers at time of placement.
18 October 2010	LPC emails Aon seeking confirmation that Aon will make it clear that there is no implication in the MD Policy that the amounts in the asset schedule are sublimits.
18 October 2010	Aon emails LPC confirming that draft insurance policies have been amended to confirm nature of cover and that the asset schedule does not form part of the MD Policy.
21 October 2010	LPC emails Aon requesting that Aon provide a "*letter of comfort*" confirming replacement insurance programme in place.
22 October 2010	Aon writes to LPC confirming that it is not uncommon for the wordings to have final drafts and insurer signings after the commencement date, particularly as the intended coverage that was agreed at renewal has been confirmed by the provision of the insurer signed placing slips that include the reference to the core policy wordings that re in use with Vero as the lead insurer. (**AON.28.0077**).
26 October 2010	Email between Ms Meads of LPC and LPC's then chairman, Rodger Fisher, **[REDACTED]**
28 October 2010	Insurers sign and return final insurance policies.
29 October 2010	Aon sends LPC final insurance policies.

First alleged misapprehension – that the insurers would or may have agreed to extend cover

[86] The judgment includes reference to the insurers agreeing to extend cover *beyond* that agreed in the relevant placing slips.[25]

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[25] *Lyttelton Port Company Ltd v Aon New Zealand*, above n 2 at [110] and [111].

[87] Mr Miles says that Aon does not allege that the insurer would have "extended" cover *beyond* the placing slips. Aon says the placing slips established full replacement cover for LPC's assets, subject to a single sum insured per event, and the notation "sums insured" is a reference to the overall value of LPC's assets at risk, not to asset sublimits. The MD placing slip referred to standard policy wording MD6/96 and does not have a clause limiting insurance cover to a declared asset value. If the placing slip was ambiguous about asset sublimits as alleged by LPC, Aon says that was resolved in the MD policy which established full replacement insurance cover for all LPC's assets in New Zealand, subject only to a single sum insured per event, without sublimits.

[88] Aon says that the MD policy extended to LPC's assets with zero or undeclared replacement cost estimates in the asset schedule, unless LPC decided *not* to obtain cover for those assets, and it further says the MD policy established full replacement cover that would not be prejudiced by innocent misdescription or non-disclosure of any material particular if disclosure was made when the omission was identified, and the right premium paid.

[89] Aon says at trial its position will be that if the MD policy was ambiguous, whether of itself or measured against the placing slips, then Mr Paterson is a joint tortfeasor with Aon because he was asked to give legal advice in relation to the policy wording *before the MD policy terms were finalised.* If he failed to advise LPC that the draft MD policy did not clearly provide full replacement cover for assets without sublimits, notwithstanding that Aon thought and told LPC that it did, then Mr Paterson deprived LPC of the opportunity to 'require' further amendments to the draft policy *to resolve any remaining ambiguity*. That assumes that LPC could have '*required*' further amendments, which must mean that the insurer was already bound to the cover which LPC sought.

[90] Aon will ask the Court to draw an inference about Mr Paterson's advice from *open* correspondence which proves that LPC00040 was sent to get his legal advice. He was then blind copied into an email from LPC to Aon asking about the draft MD policy wording. Aon says LPC obviously would *not* have accepted the policy

wording if Mr Paterson said that the draft MD policy did not unambiguously provide for full replacement cover with no sublimits.

Second alleged misapprehension – Mr Paterson had no responsibility to address asset schedules as Aon was understood to allege

[91] The second alleged misapprehension is in finding that Aon alleged Mr Paterson was responsible for addressing asset schedules. Aon does *not* say he was. It says Mr Paterson was instructed to advise LPC on the draft MD policy wording. If it was ambiguous as to asset sublimits, that should have been addressed to remove any possible implication that the spreadsheets fixed limits of cover, and put beyond doubt that assets marked as "zero", "-", or with no replacement cost estimated, were insured on a reinstatement basis.

Third alleged misapprehension – LPC instructed Aon to effect full replacement insurance

[92] The third alleged error in the judgment is in placing weight on LPC having instructed Aon to effect full replacement insurance, which is common ground. Aon says its alternative third party claim is that Mr Paterson failed to identify that the MD policy as amended by Aon did *not* clearly provide for such so LPC was deprived of a chance to 'require' further amendments to resolve any ambiguity before it was finalised.

First 'error'

[93] Aon says the judgment is wrong in concluding that the policy wording does not usually supersede the placing slip from inception.[26] Aon says an *interim insurance contract* is preliminary in nature, and anticipates acceptance of the insured's proposal, and the issue of a formal policy. This case does not involve an interim contract or cover note, rather a *binding contract of insurance* on the basis of the placing slips, a contract which simply contemplates policy wording will follow in terms which conform to the placing slip. The cover under the placing slip reflects the parties' intention. If a placing slip incorporates reference to policy wording, that wording will

[26] At [114] and [115].

apply at inception of the policy, and in the final policy wording. The placing slip here incorporates reference to policy wording, which was finalised on 28 October 2010. LPC does not say the MD policy was not effective from inception by the placing slips, or that different terms apply to different insurance events. When LPC made its claim against the insurers those claims were governed by the MD policy wording finalised on 28 October 2010. Aon says that the placing slip provided *exactly* the cover which LPC sought, and the policy wording was intended to unambiguously record that cover. If Aon somehow failed to achieve an unambiguous wording, and that caused LPC loss, then Mr Paterson contributed to that loss as he should have adverted to any ambiguity.

Second 'error'

[94] The second error is said to be in the conclusion that any loss caused to LPC had nothing to do with Mr Paterson. That rests on the proposition that the 'proper' interpretation of the MD placing slip and policy could have been raised in the claim by LPC against the insurer. Aon infers that LPC thought these arguments lacked substance because they were not so raised.

[95] The Court does not know all that was in dispute between LPC and the insurers, and what factors contributed to settlement. Aon says the Court should not have drawn a conclusion about this without evidence. Aon says that discovery so far shows that the *insurer's* legal advice following mediation and settlement was that there was a real risk the MD placing slips and policy *did not provide for asset sublimits*. Aon had little involvement in negotiations and was not involved in the mediation, so did not get the opportunity to help LPC in that forum. It thinks the insurers in fact settled on the basis there were no sublimits.

Third 'error'

[96] A third error alleged is that LPC's claim against Aon is in part based on what it did or failed to do before the placing slips issued which effected cover on 1 July 2010. Aon says the MD policy superseded the placing slip from inception and LPC's claims against the insurers are governed by the policy. How the policy was to be interpreted, and whether the relevant placing slip is admissible evidence in that regard, are said to be matters for trial.

[97] LPC does not limit its case to what Aon did or failed to do leading up to the issue of the placing slips on 1 July 2010. Aon says Mr Paterson had the same instructions and obligation as did Aon, to achieve a policy wording which provided for full reinstatement without sublimits. Whether such wording could have been achieved is an altogether different matter.

Fourth 'error' – in undertaking a factual enquiry

[98] The fourth error is said to be undertaking a factual enquiry into the sufficiency of evidence on the application for joinder. As the facts are disputed, all that is needed for joinder is a prima facie case to bring the third party claim within 4.4(1) of the High Court Rules. The factual dispute involves the interpretation of the placing slip and policy, the extent to which LPC relied on Mr Paterson's advice, and the extent to which the insurers would have accepted further amendment to the draft policy to remove any ambiguity, particularly given the evidential context in which the insurers did accept some changes to the draft policy wording.

Summation – three alleged misapprehensions – four alleged errors

[99] Aon says that if the Court had not proceeded erroneously, there is a prima facie case against Mr Paterson, warranting joinder. My conclusion that there is no merit in the joinder application is described as "quite a significant call" because an application for joinder should not descend into the merits, *other than to recognise whether there is a bona fide argument*.

Joinder argument for LPC

[100] Mr Campbell says that this application for leave to further appeal is the fourth hearing associated with joinder, but Aon's case for leave is very different to that mounted on the previous occasions.

[101] Mr Campbell said at the hearing on 12 and 13 March 2018 that it was part of Aon's case that the insurers *could have been persuaded to extend cover beyond that in the placing slips*, and that Mr Taylor QC then said this *has* been done in other cases and is a matter for evidence. Mr Campbell submits that this is not an application for

a further appeal on the pleaded case for Aon, but a "further appeal on a new and different case".

[102] Aon in its draft statement of claim against Mr Paterson alleges that at no time prior to the policy being signed by the insurers did Mr Paterson advise LPC that the draft policy wording did *not* clearly and indisputably establish cover without sublimits. There is no pleaded allegation that Mr Paterson failed to advise that the draft policy wording, let alone the final policy wording, created an ambiguity because "it didn't properly reflect the placing slip". Mr Campbell therefore says that Aon has still not explained how any alleged failure by Mr Paterson caused or contributed to LPC's loss, given that Aon says there was already a contractually binding placing slip in place, effecting cover as LPC wanted.

[103] Mr Campbell understood the would-be joinder of Mr Paterson is based on his failure to address the policy wording in order to remove any ambiguity about the extent of cover, set against the placing slip. However, LPC pleads against Aon that *the placing slips are ambiguous* ***and*** *the policy wording is ambiguous*, so LPC is saying that *neither the placing slips nor the policy* clearly and unambiguously provided for a global sum insured with no sublimits. Aon's case is that Mr Paterson should have spotted the ambiguity and Mr Campbell says it would be hard to point out an ambiguity in the policy wording when set against the placing slip, if the placing slip was ambiguous too, as LPC pleads.

[104] Mr Campbell says that Aon *did* plead that Mr Paterson's alleged failure was causative of loss because Aon lost the opportunity to somehow *extend* the cover through the policy wording, even if that *extension* was simply to clarify something which was not clear in the placing slip. The way it is *now* put is that Mr Paterson's alleged failure caused loss because he "helped create an ambiguity in the cover" by not identifying that. LPC says that the placing slip is ambiguous and so too the policy wording.

[105] Mr Campbell also says that Aon is wrong to suggest that judgment was given under a misapprehension about what LPC asked of Mr Paterson. LPC's position is that nothing that Mr Paterson said or advised was of any import, given that LPC

specifically asked Aon to make sure it had the cover it required. As he put it (notionally), LPC told Aon, "When you are making any wording changes to the sum insured, so the very point that's in issue, LPC wants Aon to be making it clear that the amounts set out in the spreadsheet are not the sublimits". He says "no amount of advice" by Mr Paterson about the policy wording could have made any difference if the placing slips already secured LPC's position. It did not matter what Aon or Mr Paterson did thereafter. If the placing slips did *not* make it clear, then it might have mattered, but LPC *asked Aon* to make the position clear that when making changes to the wording relating to the sum insured there were no sublimits. He submits that was for Aon, not for Mr Paterson.

[106] Mr Campbell corrected me when I put to him that the case for joinder is predicated on the basis that Mr Paterson gave advice about the issue of such concern to LPC. Rather, he said, it was predicated on a "an alleged *failure* to give advice". Paragraph 30 of the draft statement of claim pleads that *had* LPC been provided with advice that the draft policy wording did not clearly rule out sublimits, then it would have instructed Aon to obtain cover without asset specific sublimits. Paragraph 31 pleads that assets listed in the MD spreadsheets without reinstatement cost values, or "zeros" or "excluded as agreed", might not be covered and says that that is simply a subset of the sublimits claim because if there are no sublimits, these items fall away.

[107] LPC will say that having asked Aon to secure reinstatement cover without sublimits, it did not receive any further draft policy wording from Aon, just the final signed policy wording. Aon did make a change to the "sum insured" section of the draft policy but LPC was stuck with the final policy wording and did not get the chance to see changes in the wording before it issued. The final wording was signed by the insurers.

[108] Asked about Aon's hypothesis that Mr Paterson was asked about, and did give advice about the very matter which ultimately became of such concern to LPC, Mr Campbell says that it does not matter what Mr Paterson said or did not say, because it is what Aon was asked to do in contract that is the issue for the Court, and that is an end to it. He says it does not matter what advice Mr Paterson gave or failed to give,

as it had no causative effect, and Aon's claim is based on Mr Paterson's alleged failure to advise on the *draft* policy wording, not the final policy wording.

[109] Mr Campbell says that leave to appeal does not involve application of the law to the facts to an individual case.[27] Where the issue is essentially one of fact the task of the applicant for leave is harder. A second appeal does not involve general correction of error.[28] The resources of the Court of Appeal are not to be wasted without realistic hope of benefit, so second appeals are restricted in nature. This is an appeal against the exercise of discretion and the Court of Appeal will only interfere where there is an error of principle, a failure to take account of a relevant factor, a taking account of irrelevant factors, or if the judgment was plainly wrong.[29]

[110] The judgment was predicated on Aon not being able to utilise LPC00040 and LPC01596 given the conclusions as to privilege, and this Court held that there was no evidential foundation for a conclusion that Mr Paterson had the legal responsibility alleged, hence Aon's claim was held to be untenable. Mr Campbell says there was no error of law and the Court may, and did here, have regard to the parties' cases.[30] That is not an enquiry into facts but rather a reference to the pleading. By the time Mr Paterson was engaged, the insurance contract had been entered, but the policy wording was not finalised. The first asset damage had occurred. Whatever Mr Paterson's advice may have been LPC says that it instructed *Aon* to ensure it had full replacement cover without sublimits.

[111] While Aon says that the Court erred in its observation that the policy wording does not usually supersede the placing slip from inception, Mr Campbell says that does not matter as there is no evidential basis to contend the insurers would have agreed "to increase their exposure after the September earthquake". Mr Campbell says the Court did not misapprehend Aon's case against Mr Paterson. *Now* Aon says its case against Mr Paterson does not require the insurers to have agreed to *extend* cover, and while Aon denies it, Mr Campbell says that Aon is advancing an unpleaded premise that the insurers *might* have extended cover *beyond that established by the placing slips*. Mr

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27 *Bryson v Three Foot Six*, above n 13.
28 *Waller v Hider*, above n 14.
29 *May v May* (1982) 12 NZLR 165 (CA).
30 *Westwood Group Holdings Ltd v Rilean Construction (South Island) Ltd,* above n 5.

Campbell says that is *still* part of Aon's case on the proposed appeal. The Court concluded there was no evidential basis for this part of Aon's case, and it lacked credibility, but Aon now advances a new point, that the policy wording did not include a term limiting cover to declared values and Mr Campbell says there is no evidence to support that assertion.

[112] Mr Campbell says the Court did not misapprehend that Aon alleges Mr Paterson should have reviewed LPC's asset schedules. It pleads that he failed to advise LPC that the draft policy did not establish cover for assets listed in the MD spreadsheets without estimated reinstatement costs values, etc.

[113] Finally, Mr Campbell says that Aon criticises the Court for finding that because LPC instructed Aon to ensure cover without sublimits was effected, then whatever advice Mr Paterson gave could not have caused or contributed to LPC's loss. He says Aon reframes its case, *for the first time*, to say that Mr Paterson failed to identify that the MD policy wording as amended by Aon did not clearly provide for full replacement cover without asset sublimits and deprived LPC of the chance to require such further amendments to the MD policy necessary to resolve any ambiguity. Mr Campbell says that is not capable of bona fide and serious argument. It is not Aon's case against Mr Paterson, and Aon asserts that LPC and by implication Mr Paterson were given an opportunity to review the amended wording before Aon finalised it and sent it to the insurers for signing. However, LPC was not given that opportunity and Ms Meads makes that clear. Aon never gave LPC the amended draft policy wordings to review.

[114] Aon says that it is improper for LPC to conceal Mr Paterson's involvement from the Court, as the advice which it says he gave related to the very matter on which LPC says it was failed by Aon. Mr Campbell says Aon has never raised this point to challenge privilege and it is thus beyond the scope of the appeal, but says there is no merit in the point.

[115] LPC says Aon breached its duties to LPC in drawing up an MD policy which was ambiguous, so in the end it obtained less from its insurers by settlement than it

would have done. This is not an allegation which relates to Aon's advice to LPC, or reliance on it, so the point misapprehends LPC's claim against Aon.

[116] Mr Campbell says Aon wants to revisit the Court's conclusions on the merits of the proposed third party claim against Mr Paterson, to challenge the Court's conclusions as to causation, saying that the Court erred by venturing into disputed facts, along with the alleged misapprehensions of the case against Mr Paterson. However, the Court may have regard to the strength of the parties' cases.[31] That invokes review of the pleaded case on facts which are beyond dispute. Mr Campbell says that LPC's insurance was binding when Mr Paterson was engaged, when there was no policy wording, but damage had occurred. LPC instructed Aon to make sure the final policy wording provided full replacement cover without sublimits, *whatever Mr Paterson's advice may have been*. So Mr Campbell says Aon's submission that the Court misapprehended Aon's case against Mr Paterson should be rejected.

[117] A new issue has arisen. Aon submits MERW was not on notice of an obvious mistake made about privilege by LPC because it is presumed that LPC elected *not* to conceal the fact that Mr Paterson advised on the policy. Mr Campbell is right that there is no evidence for Aon to support that proposition, to show Aon's thinking, internally or through its own advisers. The asserted 'concealment' that Mr Paterson had given legal advice gets close to the issue which lead to the "Rider" in the judgment against which leave to appeal is sought, namely the reason why LPC "lived with" the policy wording. The rider was an observation, that if LPC ended up with a policy wording which was ambiguous; which advantaged insurers, whether construed of itself or against the placing slips, then the reasons for doing so might include the reassurance from more than one source, in this case Aon and Mr Paterson under separate contractual obligations to LPC. LPC says that that does not matter one jot, because its contractual relationship with Aon required *it*, in its specialist role, to ensure the policy wording met LPC's requirements and whatever Mr Paterson did or did not do or advise is irrelevant. Here is the rub, because if that submission is correct, then Mr Paterson could *never* be a joint tortfeasor because the contract between LPC and Aon circumscribes the liability of Aon, whether or not Mr Paterson was in truth a

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31 *Westwood Group Holdings Ltd v Rilean Construction (South Island) Ltd*, above n 5.

'contributor' to LPC's claimed loss. LPC did not choose to sue Mr Paterson and Aon says it is wrongly exposed without reference to another party if liability is established.

D. DISCUSSION

[118] Exchanges with counsel were instructive. Mr Miles agreed with the Court that it does not really matter what the policy says at the end of the day because cover is established by the placing slips, by which the cover is "fixed". Aon had no intention to "alter it" in correspondence between LPC and Aon after the 4 September earthquake event, just to get what it already had. This means that if Aon did not achieve unambiguous policy wording, the policy was ripe for rectification.

[119] If LPC did *not* have that cover under the placing slips then that is a different matter. (In an exchange with Mr Miles, I inadvertently lapsed into reference to the "cover note" rather than "placing slip" and he was unwittingly drawn into my mistake.)

[120] There followed this exchange with Mr Miles:

> Q. … I understand now that your argument is because of the way the policy then issued, notwithstanding that core position that the … , the placement slip addressed the position in its entirety, the insurer had the opportunity to say that which was finally signed was different.
>
> A. Yes.

[121] Mr Miles says that Ms Meads in her affidavit demonstrates that Mr Paterson had been hired as a specialist insurance lawyer and at the material time, "through October", he was acting for LPC. Ms Meads wanted to be sure LPC had full reinstatement cover and Mr Paterson was clearly copied into her enquiry in that regard. Aon says it has a prima facie arguable case that he was involved in advising about the draft policy wording which helps determine the cover.

[122] Aon told LPC that the asset schedule was *not* part of the insurance contract, and it says that there is enough evidence to justify a third party notice because Mr Paterson was "in parallel to Aon" advising LPC *on the very issues* which make LPC's case against Aon. In essence, Aon says that after 1 October, Mr Paterson was

asked to advise whether the draft policy wording accurately reflected the "deal recorded in the placing slip". Mr Miles put it this way, that Mr Paterson was in a position "to point out that the wording of the policy document didn't nail the deal as clearly as it should have…". When he was asked to advise and to use his experience as an insurance lawyer to say, "Just add this phrase, just add this clause to make it quite clear that this is total reinstatement, no sublimits or …" he failed to do so.

[123] Mr Miles accepts that there will be no alteration or addition to a material clause in the policy document *after* cover is fixed by the placing slips, but *any ambiguity about cover* should have been removed if it could have been. This point was misunderstood by me as I thought Aon said the policy may have been negotiated to *extend* cover where it was otherwise ambiguous.

[124] A question was put to Mr Miles, that if LPC settled on the basis of an ambiguity that did not exist, that seems to create a problem for LPC. Aon's position is that the insurer has taken advantage of an ambiguity which does not exist, hence my several questions about why the policy was not rectified to reflect the placing slips or otherwise the insurer's position was rejected out of hand. Aon says it was for LPC not to concede to the insurers.

[125] The joinder of Mr Paterson is a matter of considerable import to Aon and in that sense sufficient under s 26(P)(1AA), as it faces a very large claim. It denies liability to LPC and it seeks to share with Mr Paterson and other third parties any liability determined by the Court, and by this application for leave to further appeal.

[126] In the end, notwithstanding the particularised errors alleged in the judgment, and the public or private interest, for which it contends, the application for joinder largely turns on whether there is a bona fide and serious argument contended for by Aon or whether it is clearly not available, as I concluded. It is indeed a 'call' of some significance as Mr Miles puts it, and it was not made lightly.

[127] Mr Miles refers to the LPC pleading *against Aon*, that it failed to draw up an MD placing slip which was clear and unambiguous that LPC had full reinstatement cover subject only to a single limit of liability, with no asset specific sublimits, so that

LPC's rights, remedies and entitlements under the MD policy were not open to doubt. Further, that it *then* failed to draw up an MD policy wording clear and unambiguous, to the same effect. The question for this application for leave to further appeal judgment is set against their case. Mr Paterson had nothing to do with the placing slips. So all depends on whether anything he did or did not do contributed to LPC's alleged loss through the "wriggle room" of ambiguity which Aon says stems from the policy wording on LPC's case, even though Aon denies final ambiguity.

[128] Nothing in the argument for Aon persuades me that my conclusions as to the privileged nature of the communications of the two emails, LPC00040 and LPC01596, is wrong, but given my conclusion that leave to further appeal should be granted, so it seems futile to put privilege aside if leave to further appeal is granted. My conclusion is otherwise that there is little or no room to weaken the scope of privilege, apart from the modification sought by Aon under that head.

[129] I do not see any point in exploring whether I misapprehended the case for Aon about joinder when it was argued before me. I took its submission to be that in these pointed circumstances where placing slips were issued *before* the events commencing 4 September 2010, before the policy wording was concluded, there might be expert evidence that the insurer would accept a policy wording which secured full reinstatement cover without sublimits, even if the placing slips did not, or arguably did not, extend that far. I have read the transcript of the submissions and it seems to fit with my understanding. However, that is not Aon's case now, so this judgment is given in the context of the case it now puts, which I summarise as follows:

(i) While LPC says there is ambiguity in the placing slips, Aon says there is none, so full reinstatement cover with no sublimits was in place *as a result of the placing slips being issued*.

(ii) LPC says there is ambiguity in the policy wording. Aon says there is no ambiguity in the policy wording.

(iii) Aon does not know why in these circumstances LPC conceded to the insurer as it seems to have done during negotiations which led to

settlement, but it says any loss to LPC was not caused by anything it did or did not do. The circumstances in which settlement was reached, the factors in play, will come up at trial.

(iv) Aon then says that despite its position in (iii) above, it faces the allegation that it is responsible for "wriggle room", available to the insurer to argue that the cover did not provide for full reinstatement without sublimits because the policy wording was ambiguous. If LPC can establish loss because the policy wording gave the insurer an advantage it should not have had (which must mean there was full cover under the placing slips), then it can only be because the policy left 'wriggle room' which compelled LPC to settle for less than full reinstatement value without sublimits.

(v) At that point Aon says that in contract or in tort, there was more acting on LPC's corporate mind about cover than just Aon's role as broker. Mr Campbell says Aon had a contractual obligation to meet the commercial expectations of LPC, and it did not do so, so that is an end to it. Aon says that is not an end to it, because it says Mr Paterson gave LPC advice which went directly to the issue which it alleges Aon got wrong. It says that Mr Paterson was instructed to give advice about this issue, although exactly what he was asked to do, and the exact advice he gave is unclear. Aon says it is entitled to join him as a joint tortfeasor, because he cannot simply be put to one side by LPC as not contributory to its loss. *There is a lot in this evidentially, which will become apparent only at trial unless LPC can close down all evidential inquiry as irrelevant*.

(vi) Aon says that LPC cannot get around Mr Paterson's involvement and his obligation to LPC simply by confining its claim to Aon. Aon says this represents a concealment of the true position as to Mr Paterson's involvement.

[130] The hurdle for Aon on the merits is whether, based on the above statement of its position, it can establish a good and arguable case for joinder, and whether any judgment conclusively against that is amenable to further appeal. I do not consider the privilege issues should go further on appeal except to the limited degree of modification identified, but if leave to further appeal is to be granted, I have decided leave should capture the whole of the privilege argument.

[131] I have taken the merits of joinder on Aon's case that Mr Paterson had nothing to do with the placing slips, but *if* the policy wording had been addressed by him to identify that the wording did not unambiguously provide for the cover LPC required, then this *may* have meant LPC could have had the wording amended to that effect. While the pleading strongly suggests that LPC says it could have achieved that, it is far from apparent on the evidence so far before the Court. If LPC was entitled to an amended policy wording anyway, because there was no ambiguity in the placing slips, or the policy wording was unambiguous, then the case against Mr Paterson would never get started, as nothing he or Aon did would have caused loss. If LPC was not entitled to an amended wording because the placing slips were ambiguous, Mr Paterson did not cause that, nor could he have corrected that. He might have pointed out an ambiguity but that does not mean LPC would have achieved the policy wording it wanted. It all depends on whether anything he did or did not do caused loss, and only if the position could have been "saved" by him, could he be liable in principle. This LPC says is simply not possible.

E. CONCLUSION AND DISPOSITION

[132] By the track of argument set out above, I have come to the view, with some hesitation, that there is enough alive in my judgment for further argument, first in the question whether Mr Paterson's contractual obligations to LPC are irrelevant, which is LPC's contention. Secondly, Aon may be able after a further appeal to establish a basis for saying that if there was an ambiguity in the policy wording, of itself or set against the placing slips then that led to LPC not addressing the policy wording to get what it wanted. Whether it was entitled to is an entirely different matter. If it was not, then any 'loss' had nothing to do with Mr Paterson.

[133] I conclude that the issues identified in the tracked argument for Aon and discussion are such as to warrant a further appeal to the Court of Appeal, and for those reasons I grant leave for Aon to bring such an appeal, by the short judgment I issued for the convenience of the parties on 9 October 2018.

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Nicholas Davidson J

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