Neutral Citation Number: [2021] EWHC 1999 (TCC)

Case No: HT-2020-CDF-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 16 July 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

ANGELA DENISE CURTISS and each of the other Claimants listed in the Schedule to the Claim Form	**Claimants**
- and -	
(1) ZURICH INSURANCE PLC (a company registered in the Republic of Ireland) T/A ZURICH BUILDING GUARANTEE AND ZURICH MUNICIPAL	
(2) EAST WEST INSURANCE COMPANY LIMITED (in administration)	**Defendants**

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Thomas Grant QC and **Ryan James Turner** (instructed by **Walker Morris LLP**) for the **Claimants**
Fiona Sinclair QC and **Tom Asquith** (instructed by **Clyde & Co LLP**) for the **First Defendant**

Hearing date: 13 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2 p.m. on Friday 16 July 2021.

JUDGE KEYSER QC:

Introduction

1. This is my judgment upon certain disclosure issues that have been argued before me at the case management conference ("CMC").

2. The case arises out of the Meridian Quay development ("the Development") in Swansea, which was constructed between 2006 and 2010. The Development suffers from significant defects; it is expected that remediation works will take until 2026 or 2027 to be completed.

3. The claimants, who number more than 100, are said to be the leasehold owners of apartments in the Development. When each claimant contracted to purchase the leasehold interest in the apartment from the developer, he or she also contracted with the developer to acquire, in respect of potential structural defects, a policy of New Home Warranty Insurance (the "Policy") that the developer had contracted for the first defendant ("Zurich") to issue in certain circumstances. Zurich employed surveyors who carried out inspections of new homes in respect of which it was considering issuing a Policy. Before Zurich issued a Policy for an apartment, one of its surveyors issued a Cover Note. The claimants' case in these proceedings is that in or by the issue of a Cover Note Zurich, by its surveyor for whom it was vicariously liable, made two representations: first, that a genuine final inspection of the relevant apartment had been carried out by a qualified surveyor; second, that the final inspection that had been carried out in relation to the apartment and the common parts was satisfactory and the apartment was complete or, in the case of certain apartments, required only snagging work in order to be complete. The claimants allege that these representations were made fraudulently, because the surveyors knew that they had not carried out any genuine final inspections and because Zurich had no real belief that they had done so, and that they were induced by the representations to purchase apartments that were considerably less valuable than the price they paid for them.

4. The relief sought by the claimants includes, in addition to compensatory damages, substantial exemplary damages, on the basis (set out fully later in this judgment) that Zurich cynically carried on its business in a manner that was wilfully regardless of the interests of the claimants or of the risk that, by reason of the failure of its surveyors to carry out proper inspections, they would purchase apartments that suffered from serious defects.

5. Zurich comprehensively denies the claims advanced against it, both as to liability and as to the alleged entitlement to exemplary damages.

6. The CMC occupied a full day of court time on 5 July 2021. After certain issues had been determined, it was adjourned part-heard for a further half-day on 13 July 2021 for determination of issues relating to disclosure and expert evidence. At a hearing lasting 4 hours, I determined a number of issues concerning disclosure but reserved judgment on disclosure issues relating to the claim for exemplary damages. This is my judgment on those issues. The issues concerning expert evidence await a further half-day hearing.

Exemplary damages: the statements of case

7. The context for the remaining disclosure issues is provided by the statements of case. The claimants' case is in paragraphs 86 and 87 of the particulars of claim.

> "86 In support of their claim to exemplary/punitive damages, the Claimants will rely on the following facts and matters (without limitation and in addition to any further matters revealed in the course of disclosure):
>
> 86.1 Zurich had a financial interest in minimising the costs incurred by it in providing New Home Warranty Insurance. This financial interest was a product of, among other things, the facts that:
>
> 86.1.1 New Home Warranty Insurance was unprofitable or of only low profitability compared to other forms of insurance offered by Zurich;
>
> 86.1.2 New Home Warranty Insurance carried long term liability risks for Zurich and required Zurich to provide claims-handling processes for a longer period, compared to other forms of insurance offered by Zurich.
>
> 86.2 Zurich acted with a cynical disregard for the Claimants' rights, entitlements and interests in the operation of the New Home Warranty business division both before and after the commission of the torts pleaded above. In particular:
>
> 86.2.1 Zurich intentionally understaffed its New Home Warranty business division in a way that inevitably meant that surveyors employed by it were so overstretched that they could not properly perform inspections and issue Cover Notes for all developments for which they were responsible (including for the Development) (for the avoidance of doubt this meant that in some instances, including as pleaded above, surveyors simply did not have time to perform inspections at all);
>
> 86.2.2 Zurich engaged in a redundancy process in relation to the New Home Warranty business division that exacerbated the inability of the surveyors to properly perform inspections and issue Cover Notes for all developments for which they were responsible (including for the Development);
>
> 86.2.3 Zurich was unwilling to sufficiently staff the New Home Warranty business division to allow

proper inspections to be carried out at all developments for which it had contracted to perform inspections and provide insurance, and could only do so by expending money and hiring further surveyors;

86.2.4 Zurich's approach to the management of this business division was driven by a desire to reduce costs insofar as possible while maximising revenue from the payment of insurance premiums. This approach led Zurich to prioritise the performance of inspections at developments other than the Development, further limiting the ability of Zurich's surveyors to perform inspections at the Development;

86.2.5 Zurich eventually closed down the New Home Warranty business division and purported to transfer or did transfer its liabilities under policies of new home warranty insurance to a company that is now in administration;

86.2.6 Zurich's claims handling process for New Home Warranty Insurance was managed, and (it is inferred) intended to be managed, in a way that sought to minimise and protract the payment of claims to or for the benefit of Zurich's insureds (including the Claimants);

86.2.7 Zurich knew, and its claims handling process exploited the fact, that insureds such as the Claimants were unlikely to pursue claims against Zurich because they suffered from a collective action problem, were likely to have fewer resources to support litigation than a commercial counterparty, and were unlikely to be repeat litigators but likely to be first-time-litigators.

86.3 Further, it is inferred that: Zurich took these steps with knowledge of the terms of the New Home Warranty Insurance Agreement, including, in particular, with knowledge that Zurich could require a developer to correct defects in a development at the developer's costs or require a developer to reimburse Zurich for benefits paid under a policy of insurance.

86.4 It is inferred that Zurich considered that liability resulting from its conduct would be able to be minimised by its claim handling process and/or that liability would ultimately fall on a developer, so that the benefits for Zurich outweighed the compensation that might ultimately be awarded to the Claimants.

87 In all of the premises:

87.1 Zurich's management of the New Home Warranty Insurance business division, and the acts of its surveyors (which are to be imputed to it and/or for which it is vicariously liable), were calculated by Zurich to make a gain at the expense of persons, such as the Claimants, who acquired a new home with the benefit of a policy of insurance.

87.2 Zurich's conduct ought to be sanctioned by an award of exemplary damages and the awarding of exemplary damages would serve a deterrent function for Zurich and/or other providers of new home warranty insurance."

8. Zurich's response to that case is set out in paragraphs 109 and 110 of the defence.

"109 As to paragraph 86:

109.1 Paragraph 86.1 is admitted in that every business has a financial interest in minimising its costs.

109.2 In 2008, Zurich sought to restructure its business across a number of business lines, including Zurich Building Guarantee ("ZBG"). This was against a backdrop of a downturn in new home construction which had reduced ZBG's workload and was anticipated to continue and an anticipation that time could be saved by using new technology to move from 100% physical inspections to a combination of inspections and desktop analysis of digital images.

109.3 In the circumstances, it is not proportionate for Zurich to investigate and plead to the allegation of relative unprofitability of New Home Warranty Insurance as compared to other lines of business at the time nor to the allegation of relative long term liability as compared to other lines of business.

109.4 Paragraph 86.2 is denied.

109.5 Paragraph 86.2.1 is denied. Zurich did not deliberately understaff its New Home Warranty business division and it would make no commercial sense for it to have done so: understaffing that division so it could not perform properly would increase Zurich's own exposure.

109.6 Paragraph 86.2.2 is denied. A redundancy process did take place but, given the anticipated reduced workload and time-saving through use of technology, the

process was not intended to prevent surveyors properly performing their underwriting inspections.

109.7 Paragraph 86.2.3 is denied. No particulars have been given, so Zurich cannot plead further.

109.8 Paragraph 86.2.4 is denied. No particulars have been given, so Zurich cannot plead further.

109.9 Paragraph 86.2.5 is admitted but irrelevant. The transfer of liabilities (which was actual rather than 'purported') to [the second defendant] was the subject of judicial approval by the Irish High Court.

109.10 Paragraph 86.2.6 is denied if it is alleged that Zurich did not manage or intend to manage its claim handling process in a manner which was compliant with the terms of the Policies.

109.11 Paragraph 86.2.7 is denied. No particulars have been given, so Zurich cannot plead further.

109.12 Paragraph 86.3 is denied for reasons set out above. Further, the paragraph misunderstands the exposure faced by Zurich under the Policies. A key function of the Policies is to provide assistance to insureds in circumstances where a developer is insolvent.

109.13 Paragraph 86.4 is denied. There is no proper basis for this allegation. The Claimants' case appears to be that Zurich considered it economically sensible deliberately not to inspect a building because in the event claims were made on policies Zurich would have a right of action against the developer. This case is speculative and misconceived.

110 As to paragraph 87:

110.1 Zurich naturally sought to make a profit from its businesses, where appropriate.

110.2 It is denied that Zurich operated its New Home Warranty Insurance business division in a cynical manner.

110.3 It is denied that the alleged acts of any surveyors are to be imputed to Zurich for the purposes of exemplary damages or that Zurich is vicariously liable for such acts.

110.4 It is denied that Zurich ought in any event to be subject to an award of exemplary damages."

Issues for Disclosure

9. Section 1A of the Disclosure Review Document ("DRD") listed 12 Disclosure Issues relating to these passages in the statements of case:

> "51. What was the profitability of the New Home Warranty business, how did Zurich assess that profitability, and how did that profitability compare to other forms of insurance offered by Zurich?
>
> 52. What were the long-term risks for Zurich (as assessed by Zurich) in the operation of the New Home Warranty business division and how did those risks factor into its management of the business division?
>
> 53. When and on what basis was the decision made to withdraw from the New Home Warranty market?
>
> 54. What factors were taken into account when Zurich engaged in a redundancy process in relation to the New Home Warranty business or determined the staffing levels for the business division?
>
> 55. How did Zurich assess the ability of the New Home Warranty business division to carry out inspections of Developments and what was the assessment of that ability by Zurich?
>
> 56. What role did the costs of the New Home Warranty business division play in decisions by Zurich about the management of the business division (including in relation to staffing decisions)?
>
> 57. Did Zurich prioritise inspections at particular developments (including prioritising Building Control inspections over underwriting inspections) and, if so, on what basis did that prioritization occur?
>
> 58. When was the decision made by Zurich to transfer the New Home Warranty business division to another insurer, and what factors were taken into account when making this decision? What discussions took place with third parties (including the regulators) in relation to the transfer and what agreements were put in place in order for the transfer to be put in place?
>
> 59. What guidance was given by Zurich to internal claims handlers and external claims handlers, such as those employed by Cunningham Lindsey, in relation to claims made under the New Home Warranty and how did Zurich or claims handlers on its behalf manage claims handling in

> relation to New Home Warranties? (For the avoidance of doubt, this issue includes guidance and conduct in relation to the refusal of claims, tactics to depress claims or settlement, and reliance on exceptions or limitations in the policy.)
>
> 60. How did Zurich factor the nature of purchasers or the difficulties that they faced in making claims into its assessment of the New Home Warranty business division or claims handling?
>
> 61. What was the downturn in new home construction and what effect did that downturn have on the New Home Warranty business division?
>
> 62. How did Zurich implement technology to reduce the number of physical inspections required to be carried out, what was the rationale for the introduction of technology, and how effective was technology expected to be and actually was in reducing the need for physical inspections?"

10. Zurich agrees Issues 54 and 55. There is a dispute as to the appropriate Model of disclosure: the claimants contend for Model E, while Zurich contends for Model D.

11. Zurich does not agree that Issues 51, 52, 53, 56, 57, 58, 59, 60, 61 and 62 are properly Issues for Disclosure. If they are, Zurich contends that the appropriate Model is Model D, not Model E as the claimants say.

Discussion

Principles on the identification of Issues for Disclosure

12. Disclosure in the present case is governed by the Disclosure Pilot in Practice Direction 51U. The parties dispensed, properly, with Initial Disclosure. I am concerned with Extended Disclosure. The following provisions of PD 51U are particularly relevant.

> "2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.3)."
>
> "6.3 Save where otherwise provided, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure that is search-based (i.e. Models C, D and/or E) where

it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

6.5 A request for search-based Extended Disclosure (i.e. Models C, D and/or E) must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4). Where Disclosure Model D or E is proposed parties should be ready to explain to the court why Disclosure Model C is not sufficient.

6.6 The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity."

"7.3 'Issues for Disclosure' means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue

> which is disputed in the statements of case by denial or non-admission.
>
> 7.4 The claimant should seek to ensure that the draft List of Issues for Disclosure provides a fair and balanced summary of the key areas of dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking search-based Extended Disclosure."

13. Guidance on the way in which the Disclosure Pilot is intended to work was given by the Chancellor, Sir Geoffrey Vos, in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch), [2020] Bus LR 699. His remarks on the identification of Issues for Disclosure were as follows:

> "44. The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination. Rather it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the issues for disclosure.
>
> …
>
> 46. It can be seen, therefore, that issues for disclosure are very different from issues for trial. Issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim. That is why paragraph 7.3 of PD51U provides that issues for disclosure are '*only those key issues in dispute*, which the parties consider will need to be determined by the court *with some reference to contemporaneous documents* in order for there to be a fair resolution of the proceedings' (emphasis added). Paragraph 7.3 goes on to explain, as I just have, that issues for disclosure do 'not extend to every issue which is disputed in the statements of case by denial or non-admission'.
>
> 47. This explanation demonstrates that, in many cases, the issues for disclosure need not be numerous. They will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure.
>
> …
>
> 55. The Disclosure Pilot is intended to operate proportionately for all kinds of case in the Business and Property Courts from the smallest to the largest. Compliance with it need not be costly or time-consuming.

> 56. The important point for parties to understand is that the identification of issues for disclosure is a quite different exercise from the creation of a list of issues for determination at trial. The issues for disclosure are those which require extended disclosure of documents (i.e. further disclosure beyond what has been provided on initial disclosure) to enable them to be fairly and proportionately tried. The parties need to start by considering what categories of documents likely to be in the parties' possession are relevant to the contested issues before the court.
>
> 57. Unduly granular or complex lists of issues for disclosure should be avoided. …"

14. Paragraph 7.3 of the Practice Direction makes clear that the mere fact that an issue is a matter of dispute in the statements of case does not suffice to make it a proper Issue for Disclosure. The Chancellor's remarks in *McParland* make clear that this is so even if the issue is central to the case. The parties must identify the undisclosed documentation that is likely to be available and assess whether it is likely to be relevant and important for the fair resolution of the claim. Paragraph 7.3 does not in terms explain what is meant by a "key" issue in dispute, but in the context of the entirety of the first sentence of the paragraph it seems to me that an issue in dispute will be a "key issue" if—and, I think, only if—it is an issue that must be determined in order for there to be a fair resolution of the proceedings. I believe that to be consistent with the guidance given by the Chancellor.

15. There was some argument before me as to the relationship that the Issues for Disclosure should have to the statements of case. Both paragraph 7.3 of the Practice Direction and the guidance in *McParland* show that an issue arising on the statements of case and requiring determination at trial need not be an Issue for Disclosure. An example given by the Chancellor was an issue as to the legal effect of undisputed facts and documents that were already available to all parties: no order for Extended Disclosure on that issue will be required. The question remains, however, whether it is a necessary, albeit not a sufficient, condition of being an Issue for Disclosure that an issue is a pleaded issue.

16. In *The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Limited* [2020] EWHC 1716 (Ch), Mr James Pickering QC, sitting as a deputy High Court judge, held that this was not a requirement. In so holding, at [47] he rejected the view of the Master at first instance that, "A List of Issues for Disclosure cannot include 'Issues' that are not issues that can be identified within the Statements of Case as they are at the date that the List of Issues for Disclosure is confirmed as an order of the court", and the submission of the respondents that, "the natural reading of the definition [of Issues for Disclosure] in paragraph 7.3 in the context of paragraph 7 as a whole leads inexorably to the conclusion that Issues for Disclosure can be identified within the statements of case as a whole". The deputy judge stated the primary reason for his decision as follows:

> "48. First, this is not what paragraph 7.3 (or indeed any paragraph) of the Pilot says. Paragraph 7.3 – which is of course the paragraph which defines the concept – defines 'Issues for Disclosure' as (with underlining added) as 'only <u>those key issues in dispute</u> which the parties consider will need to be determined

> by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.'
>
> 49. Litigation is a war within which there can be a number of battles. The trial will generally be the final conflict and that of course will be defined by the statements of case. Along the way, however, there will often be various skirmishes which give rise to issues which fall outside the parameters of the statements of case. Issues relating to jurisdiction, service and security for costs are examples but there are plenty of others.
>
> 50. Returning to the above wording of paragraph 7.3, as can be seen, reference is made to 'those key issues in dispute' and to a fair resolution of 'the proceedings'. Nowhere does the above wording limit the scope of Issues for Disclosure to those matters to be determined at trial and/or those issues raised in the statements of case.
>
> 51. It is right, as the Deputy Master observed, that the final sentence of paragraph 7.3 provides that Issues for Disclosure 'does not extend to every issue which is disputed in the statements of case by denial or non-admission'. As counsel for GE observed, however, it is a non sequitur to conclude from that, as the Deputy Master apparently did, that 'the disclosure obligation cannot extend to issues that are not included in the statements of case'. Indeed, just because not all issues in the statements of case are Issues for Disclosure, it does not follow that all Issues for Disclosure have to be issues in the statements of case."

17. In reaching his decision, the deputy judge declined to follow the reasoning of Mr Peter MacDonald Eggers QC, sitting as a deputy High Court judge, in *Lonestar Communications Corporation LLC v Kaye* [2020] EWHC 1890 (Comm), where Mr Eggers QC referred to the Practice Direction and to the guidance in [44] – [47] in *McParland* and concluded:

> "32. It follows from this that the Issues for Disclosure must also be issues crystallised in the statements of case. It is not every pleaded issue which should become an Issue for Disclosure; only a key issue in dispute should be identified as an Issue for Disclosure. The identification of the Issue for Disclosure must not become tangled in a complex distillation of issues, both great and small, thrown up by the statements of case (in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch); [2020] Bus LR 699, at paragraph 57, the Chancellor said that 'Unduly granular or complex lists of issues for disclosure should be avoided. Likewise, the models chosen should simplify the process rather than complicate it'). That said, if the relevant issue is not a pleaded issue, an issue which emerges from the parties' contrary cases in the pleadings, it cannot be formulated as an Issue for Disclosure."

18. I need say little about this disagreement. For the purposes of this CMC and most case management conferences at which extended disclosure must be considered, the approach of Mr Eggers QC in the *Lonestar* case is, in my judgment, the correct one. The question before me concerns the disclosure that is necessary for a fair determination of the issues at trial. Such disclosure must be directed to the issues in dispute on the statements of case. This is reflected in paragraphs 2.4, 7.3 and 7.4 of the Practice Direction. In the *IGE USA Investments* case, Mr Pickering QC was concerned with a rather different situation, namely a request for disclosure, pursuant to paragraph 18 of the Practice Direction, that related not to any issue on the existing statements of case but to an issue that would arise on a proposed amendment of a statement of case for the purpose of adding an allegation of fraud. The deputy judge made an order for disclosure on the basis that, as he said at [68]:

> "In the present case, the proposed amendments alleging fraud, while not yet issues identifiable on the face of the statements of case, are clearly issues which will need to be determined by the court in order for there to be a fair resolution of the proceedings as a whole – first, at the time when the court has to consider whether or not to grant those amendments and, second, if those amendments are granted, at the trial itself."

Thus the deputy judge apparently considered that the disclosure was required for the fair determination of a preliminary battle even if not necessarily for the trial of the claim. That was also the case in *Rome v Punjab National Bank* [1989] 2 All ER 136 (disclosure as to the regularity of service), on which the deputy judge relied as a second reason for his decision. As I say, I am concerned not with that situation—as to which, I say nothing—but with the disclosure necessary for the fair determination of the case at trial. In such a case, the Issues for Disclosure must in my view appear on the statements of case, though not all issues that so appear will be Issues for Disclosure.

19. In the light of this discussion of general principles, I turn to the remaining dispute as to the Issues for Disclosure.

The disputed Issues for Disclosure

20. Issue 51: I do not approve this as an Issue for Disclosure. If it is an issue in the case at all, it is not a key issue. The nub of the claimants' case is that Zurich deliberately cut costs and corners by understaffing its New Home Warranty business division to such an extent that the surveyors had insufficient time to perform their tasks properly. An assessment of the profitability of that business division, or the way in which Zurich itself assessed that profitability, or how that profitability compared with other of its business divisions, is irrelevant to that case. Further, the matter pleaded in paragraph 86.1.1 of the particulars of claim is no more than an example of what is said to have given Zurich a financial interest in minimising the costs of the business division. There is no issue in the case as to Zurich's interest in minimising costs or as to steps it took or planned to take to that end with respect to redundancies and use of technology. Further, the kind of comparative exercise that the claimants seek goes well beyond the scope of the issues in the case, let alone the key issues.

21. Issue 52: For much the same reasons, I do not approve this as an Issue for Disclosure. Justification for it is sought in the omission from the defence of any direct response to

paragraph 86.1.2 of the particulars of claim. That is an inadequate justification. The headline point in paragraph 86.1 (a financial interest in minimising costs) has been admitted. The claimants have been able to make the averment in paragraph 86.1.2 without disclosure; presumably, this is on the basis of a simple consideration of the nature of this kind of insurance (building defects) as compared with others (motor insurance, household insurance, etc). Disclosure is not required for that point. Zurich's internal long-term risk assessment for the New Home Warranty business division and for its other business divisions is not an issue in the case and disclosure such as is sought would anyway be disproportionate.

22. Issue 53: I do not approve this as an Issue for Disclosure. Indeed, I cannot identify any issue at all in this respect. Paragraph 86.2.5 of the particulars of claim avers that Zurich eventually closed down the New Home Warranty business division and either transferred or purported to transfer its liabilities under existing policies to another company (the second defendant). This is admitted. There is no issue as to the date of the decision or the basis for it, nor has any relevance of those matters been demonstrated.

23. Issues 54 and 55 are agreed Issues for Disclosure. This is important, because they concern the decisions as to staffing levels and the assessment of the ability of the remaining staff to carry out inspections of the Development and other developments. Disclosure on these issues goes, therefore, to the question whether Zurich cynically cut its staff to what it knew was an inadequate level and thereby imposed risk on purchasers of apartments in the Development. This ought to be borne in mind in a consideration of the appropriateness of permitting disclosure on differently formulated issues that go to the same fundamental point.

24. Issue 56: I do not approve this as an Issue for Disclosure. Any relevant matters are already provided for by issues 54 and 55. (They might also arise under issue 57, if that were to be approved.) Issue 56 is extraordinarily vague and wide-ranging and appears to be more in the nature of an enquiry than an effort to obtain disclosure on an issue between the parties, let alone one that requires determination at trial.

25. Issue 57: I do not approve this as an Issue for Disclosure. This issue is said to be justified by the averment in paragraph 86.2.4 of the particulars of claim that Zurich "prioritise[d] the performance of inspections at developments other than the Development". The response to that is in paragraph 109.8 of the defence: "Paragraph 86.2.4 is denied. No particulars have been given, so Zurich cannot plead further." I can see that the truth of the averment in paragraph 86.2.4 of the particulars of claim is potentially significant to the claim for exemplary damages and that disclosure might be relevant to determination of the issue. However, it seems to me that, if the claimants are in a position to aver that inspections at other developments were prioritised over inspections at the Development, they must be able to make the averment with some particularity. Such an averment devoid of any particulars is, when converted into a proposed Issue for Disclosure, a mere fishing expedition.

26. Issue 58: I do not approve this as an Issue for Disclosure. The reasons are essentially those already stated in respect of issue 53. I cannot see that there is any material issue at all, let alone a key issue.

27. Issue 59: I do not approve this as an Issue for Disclosure. It is said to arise from paragraph 86.2.6 of the particulars of claim, which avers that Zurich's claims handling process for claims under the Policies "was managed and (it is inferred) intended to be managed in a way that sought to minimise and protract the payment of claims" to the claimants. The response to this in paragraph 86.2.6 of the defence is that the averment is denied "if it is alleged that Zurich did not manage or intend to manage its claim handling process in a manner which was compliant with the terms of the Policies." That response points to what I regard as a difficulty with this issue, namely that the conduct complained of is not constitutive of any cause of action relied on (this is not a claim for breach of the terms of the Policy) and post-dates the alleged fraud on which the claim is based. Presumably, the claimants seek to rely on the manner of the handling of their claims and, in particular, any instructions that may have been given to claims handlers to be obstructive, in order to bolster their case that Zurich has treated them with cynical disregard in its pursuit of profit. For the purpose of this judgment, I am prepared to assume that such conduct, even if not relied on as a cause of action and post-dating any cause of action relied on, could be relevant to the claim for exemplary damages. However, in the absence of any averment, with particulars, supporting an inference that instructions were given to act in breach of contract, I regard this issue as neither a key issue requiring determination at trial nor one on which disclosure is necessary or proportionate.

28. Issue 60: I do not approve this as an Issue for Disclosure. It arises from paragraph 86.2.7 of the particulars of claim, which avers that Zurich knew, and through its claims handling process exploited, the weakness of the position of insureds such as the claimants. This issue is subject to much the same objections as issue 59. No particulars are given, as the defence points out; the matter appears to rest as an inference from the nature of the claimants as insureds and from unspecified problems they (or some of them?) are said to have had in having their claims accepted. The claimants are entitled to advance the contention that the inference is reasonable. However, I do not accept the submissions of Mr Grant QC, which amounted to saying that the making of such a plea justified, in the absence of an admission, an order for Extended Disclosure. In my judgment, the court should be wary of permitting the use of broad and unspecific pleadings, especially if relying on inferences said to be reasonably drawn from unparticularised facts, as a vehicle for obtaining far-reaching and speculative disclosure.

29. Issue 61: I do not approve this as an Issue for Disclosure. Zurich has itself averred that there was a downturn in new home construction. The correctness or otherwise of that averment is a matter that can be ascertained simply by matters in the public domain; it does not require disclosure from Zurich. Anyway, there does not appear to be an issue between the parties on this matter, let alone a key issue. The effect of the downturn has been stated by Zurich (defence, paragraph 109.2) to be a reduction in workload. I do not consider that there is a key issue in that regard. I also consider that the wording of the second part of the proposed issue is more apt for an enquiry than for identifying a focused matter to which disclosure should go.

30. Issue 62: I do not approve this as an Issue for Disclosure. Zurich has stated in Part 18 further information that technology, though at one stage proposed as a means of reducing physical inspections, was never introduced.

31. Accordingly, the Issues for Disclosure in the category of those that relate to the claim for exemplary damages will be limited to the two agreed issues, namely issues 54 and 55.

32. Miss Sinclair QC said in submissions that Zurich was willing to consider appropriate requests for specific documents or classes of documents beyond those produced by the Issues for Disclosure to which it has agreed. I consider that this is the proper course for the parties to follow.

Model for disclosure

33. There remains the question of the appropriate Model for Extended Disclosure in respect of Issues 54 and 55. At the hearing, I ruled that Model D was the appropriate Model for the other Issues for Disclosure by Zurich, rather than Model E as contended for by the claimants. For the same reasons, which I do not here repeat, I approve Model D in respect of Issues 54 and 55.