



Neutral Citation Number: [2025] EWHC 267 (Comm)

Claim No: LM2023-000166

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**LONDON CIRCUIT COMMERCIAL COURT (KBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 13 February 2025

**Before :**

**DAVID QUEST KC**

**Sitting as a Deputy Judge**

-----  
**Between :**

**(1) CLARENDON DENTAL SPA LLP**  
**(2) CLARENDON DENTAL SPA (LEEDS) LIMITED**

**Claimants**

**- and -**

**(1) AVIVA INSURANCE LIMITED**  
**(2) ZURICH INSURANCE PLC**

**Defendants**

-----  
**Ben Quiney KC and Hamish Fraser (instructed by Fenchurch Law)**  
**for the Second Claimant**

**David Myhill (instructed by Clyde & Co)**  
**for the Second Defendant**

Hearing dates: **30 January 2025**  
-----

**JUDGMENT**  
-----

**This judgment was handed down remotely at 10am on Thursday 13 February 2025 by circulation to the parties' representatives by e-mail and release to the National Archives**

## **DAVID QUEST KC**

### **Introduction**

1. These proceedings concern a claim by the Second Claimant (**the Company**) under an insurance policy underwritten by the Second Defendant (**Zurich**) for losses caused by a fire in June 2021. A separate insurance claim by the First Claimant (**the LLP**) against the First Defendant (**Aviva**) in relation to the same fire has recently been settled and that part of the proceedings is stayed.
2. There are two applications before the court. The Company applies by application notice dated 25 November 2024 to strike out parts of Zurich's Defence or for partial summary judgment. Zurich applies by application notice dated 22 January 2025 for permission to amend its Defence. Following the hearing, the applications remain contentious only in relation to paragraphs 44, 44A, 45, 60 and 61 of the Defence, which are set out below. It is common ground that both applications turn on whether the case pleaded, or sought to be pleaded, in those paragraphs has a real prospect of success (applying the test in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339) and that for present purposes the tests for permitting the amendments, granting summary judgment and striking out are substantially the same.

### **Facts**

3. The relevant facts can be briefly stated. The Company carries on a dental practice (**the Practice**) from premises at 9 Woodhouse Square, Leeds (**the Property**). The Practice was founded in 2007 by Dr Ahmed Al-Ani and Dr Jayendra Patel. For reasons (it is said) of tax efficiency, the Practice was initially organised and carried on as a "mixed membership" limited liability partnership by the LLP. The LLP was formed with Dr Al-Ani and Dr Patel as members, together with two companies of which they were directors, PDS (Leeds) Limited (**PDS**) and JHP (Leeds) Limited (**JHP**). However, as a result of the Finance Act 2014 coming into force, the partnership structure ceased to be advantageous from a tax perspective. On 19 June 2014, Dr Al-Ani and Dr Patel incorporated the Company, which then took over the operations and goodwill of the Practice from the LLP (although Zurich contends that the LLP continued to own some of the equipment used in the Practice). Following that reorganisation, PDS and JHP resigned as members of the LLP on 14 August 2014, and both entered into creditors' voluntary liquidation. In November 2016, Dr Patel left the business and resigned as a member of the LLP and as a director of the Company.
4. The Property is owned by the LLP and has been since 2012. Between 2006 and 2012, it was owned by City Red (Holdings) Limited, and before that by Back-to-back Investments Limited (**BTB**). Dr Al-Ani was a director of BTB and City Red. BTB entered into insolvent liquidation on 22 December 2009.

5. There are issues between the parties about the nature and circumstances of certain tax arrangements made by PDS and JHP. HMRC challenged those arrangements, leading to settlements between HMRC, the liquidators and Dr Al-Ani. However, those issues are not relevant to the present applications.
6. From October 2014, the Company was insured by Zurich, which provided annual cover for loss of contents and business interruption, among other risks. The LLP was separately insured by Aviva for risks relating to the Property.
7. The Zurich and Aviva policies were renewed for the period including the fire on 4 October 2020 and 14 March 2021 respectively. As part of the renewal process, the Company was issued with a statement of fact recording certain information that had been provided by the Company (via brokers Lloyd & White Ltd) and relied on by Zurich in underwriting the insurance. The LLP was issued with a similar statement of fact by Aviva.
8. The Zurich statement of fact identified the Company as the “Policyholder” and described the “Policyholder’s Business” as “Dental Practice”. The statement then gave a warning about the importance of making a fair presentation of the risk:

This Statement of Fact is a record of the information advised to Zurich Insurance and facts assumed about your risk. These have been taken into account when calculating the premium on which your policy is based. The statement of facts, policy schedule and any endorsement and certificate should be read as if they are one document.

#### **Fair presentation of risk**

You must make a fair presentation of the risk to us at inception, renewal and variation of your policy. This means that you must tell us about all facts and circumstances which may be material to the risks covered by the policy in a clear and accessible manner and that you must not misrepresent any material facts. A material fact is one which would influence the acceptance or assessment of the risk. If you have any doubt about facts considered material, it is in your interest to disclose them to us. All information must be verified by your senior management and anyone else involved in buying the insurance cover. Please check that all of the information recorded in this document is correct. If there are any inaccuracies or omissions please inform us immediately. Failure to make a fair presentation of the risk could result in the policy being avoided, written on different terms and/or a higher premium being charged, depending on the circumstances surrounding the failure to present the risk fairly.

9. It then set out a series of questions and answers, including these:

<b>Have you or any partners, directors or family members involved in the business:</b>	
Been declared bankrupt or insolvent, or been disqualified from being a company director?	No
Been convicted, charged (but not yet tried) or been given an official police caution in respect of any criminal offence, other than motoring convictions?	No
Had any county court judgments or sheriff court decrees applied in the past 5 years?	No
Had any insurance proposal declined, renewal refused, special increased terms applied or had insurance cancelled mid-term?	No
Aware of any upcoming or existing employment disputes?	Unknown

I refer to the first question in that list as the “**Zurich insolvency question**”.

10. The Aviva statement of fact identified the LLP as the policyholder and described its business as “Dentistry”. It gave a similar warning about fair presentation of risk to that in the Zurich statement of fact, and then set out a series of declarations:

Neither You or Your directors or partners involved with The Business or any other company or business have:

- ever had a business insurance proposal declined, renewal refused, insurance cancelled or special terms applied
- ever been convicted of or charged (but not yet tried) or been given an Official Police Caution in respect of any criminal offence other than a motoring offence which are not spent under the Rehabilitation of Offenders Act
- in the last ten years been declared bankrupt or insolvent or been the subject of bankruptcy proceedings or insolvency proceedings or been disqualified from being a company director
- in the last ten years been the subject of a County Court Judgement, an Individual Voluntary Arrangement, a Company Voluntary Arrangement or a Sheriff Court Decree

I refer to the third declaration as the “**Aviva insolvency declaration**”.

11. On 27 June 2021, there was a fire at the Property causing substantial damage. The Company and the LLP both claimed on their respective policies. Zurich and Aviva both purported to avoid on the ground that there had been a failure to make a fair presentation of the risk when the insurances were last renewed before the fire.

### **Fair presentation**

12. Under section 3 of the Insurance Act 2015, an insured is required to make a fair presentation of the risk. The requirements for a fair presentation include (under section 3(4)) disclosure of every material circumstance that the insured knows or ought to know and (under section 3(3)(c)) ensuring that every material representation as to a matter of fact is substantially correct. Disclosure is not required of a circumstance as to which the insurer waives information (section 3(5)(e)). The insurer's remedies for breach of the duty of fair presentation are set out in schedule 1 to the Act.
13. Zurich pleads several breaches of duty in its Defence. However, the present applications are concerned only with those alleged breaches that relate to the liquidations of PDS and JHP, the former corporate partners of the LLP, and of BTB, the former owner of the Property. In that respect, Zurich's case is pleaded (or sought to be pleaded) in three ways:
  - i) first, that the Company made a material misrepresentation by incorrectly answering the Zurich insolvency question; that is the case that Zurich seeks to introduce by amendment in paragraph 44A of the Defence;
  - ii) second, as pleaded in paragraph 44 of the Defence, that the Company failed to disclose the fact of the liquidations;
  - iii) third, as pleaded in paragraphs 60 and 61 of the Defence (including proposed amendments), that the Company failed to disclose to Zurich that the LLP had previously made a misrepresentation to Aviva (by the Aviva Insolvency Declaration) or failed to disclose to Aviva the fact of the liquidations.

I address those in turn.

### **Paragraph 44A**

14. Zurich applies for permission to amend to introduce paragraph 44A in the following terms:

44A. In response to the matters set out under paragraph 60 of the Company's Reply, the Statement of Fact asked the question "Have you

or any partners, directors or family members involved in the business... Been declared bankrupt or insolvent, or been disqualified from being a company director?" to which the Company answered "no". That answer was incorrect and therefore false. Without prejudice to the generality of the foregoing, the "business" referred to in that question was the Practice. PDS and JHP were "partners... involved in the business" as they had been members of the LLP which operated the Practice before it was acquired by the Company, and had been declared insolvent. The correct answer was therefore "yes".

15. Zurich accepts that permission cannot be granted unless the amended case has a real prospect of success. The Company argues that it does not. It says that it correctly answered the Zurich insolvency question, and that the court can and should determine that summarily.
16. The parties agree that the new case turns on the interpretation of the Zurich insolvency question and, in particular, which persons are the subjects, or targets, of it.
17. If an application requiring summary determination on the merits turns on a point of law or construction, and if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, then it should grasp the nettle and decide it; see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (a case on summary judgment rather than amendment, but same principles apply). In the present case, neither party suggests that the exercise of interpretation could be affected by the resolution of any factual disputes or that the trial judge would otherwise be in a better position than I am to carry it out. Having received detailed written and oral arguments, I am satisfied that it is appropriate to grasp the nettle. There is also a potential practical advantage to dealing with the issue at this stage. If I refuse the amendment, then that will likely avoid the need for the trial judge to consider whether the fact of the liquidations was material and whether the alleged misrepresentation was reckless, which is relied on by Zurich in paragraph 66 of its Defence as giving it the right to avoid the insurance and retain the premium.
18. I turn to the rival interpretations. The Company argues that the subjects of the Zurich insolvency question are the identified policyholder ("you") together with (a) the current partners in the policyholder, if the policyholder is a partnership (i.e. current when the question was answered), (b) the current directors of the policyholder, if the policyholder is a company, and (c) family members of the policyholder currently involved in the business, if the policyholder is a sole trader or the business is operated as an informal family arrangement. In the present case, therefore, the subjects of the question would be the Company and its current directors only. None of those persons has been declared insolvent or bankrupt; the Company therefore answered the question correctly.

19. Zurich argues for a broader interpretation. It says that the question covers any partner in any partnership and any director of any company, provided that the partnership or company, or the partner or director, is currently or was previously involved in the business of the policyholder. In the present case, that would include PDS and JHP because they were formerly members of the LLP, and the LLP operated the Practice until 2014 (and, on Zurich's case, remained involved to some extent thereafter).
20. Insurance policy documents should generally be interpreted in accordance with the principles applicable to other commercial contracts. Those principles were set out by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173; they are well-known and I need not repeat them here. In the insurance context, the approach was conveniently summarised by Snowden J in *Ristorante Ltd v Zurich Insurance plc* [2021] EWHC 2538:
  32. There was no dispute that the interpretation of insurance policy documents should broadly follow the principles generally applicable to interpretation of contracts. The authors of *MacGillivray on Insurance Law* (14th Edition) state as follows at para 11-01:

“Insurance policies are to be construed according to the principles of construction generally applicable to commercial and consumer contracts. The task of a tribunal endeavouring to interpret a contract of insurance is to ascertain and give effect to the intention of the parties in relation to the facts in dispute. Their intention is, however, to be gathered from the wording chosen to express their agreement in the policy itself and from the wording of any other documents incorporated into it, so that: ‘the methodology is not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question resolves itself in a search for the true meaning of language in its contractual setting (*Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 at 1587, per Lord Steyn).”
  33. As is the case for the interpretation of contracts generally, the exercise of interpreting questions posed in proposals for insurance policies does not depend on the subjective intention or understanding of the parties. Rather, it is an objective exercise.
21. Zurich also stressed, and I accept, that in interpreting an insurance proposal or statement of fact it is not the function of the court to “punish insurers guilty of unclear and inaccurate wording” but to find out what the parties intended (objectively) to say; see *Doheny v New India Insurance Co* [2005] 1 Lloyd's Rep IR 251 at [12], per Longmore LJ.
22. There is, however, an additional, special rule that applies where there is an ambiguity in a question asked by an insurer. Snowden J explained that rule in *Ristorante* at [35]:

35. When the court is interpreting questions posed by insurers rather than a negotiated contract term, a different approach applies under which any genuine ambiguity is resolved in favour of the applicant. Thus, if faced with two rival constructions, both of which are objectively reasonable, the insurer will not be entitled to impugn as a misrepresentation of fact an answer given by the policy holder if that answer was true having regard to a construction which it was objectively reasonable to give to the question: see *MacGillivray* at para 16-026: “If there is genuine ambiguity in a question put to an applicant by insurers in a proposal form or elsewhere, the latter cannot rely upon the answer as a misrepresentation of fact if that answer is true having regard to the construction which a reasonable man might put upon the question.”

36. The same point is illustrated by the remarks of MacKinnon J in *Revell v London General Insurance Co Ltd* (1934) 50 Ll L Rep 114 at page 116: “I think Mr Samuels is right when he says—indeed, it is elementary—that if there is an ambiguity in this question so that upon one view of the reasonable meaning which is conveyed to the reasonable reader of it the answer was not false, the company cannot say that on the other meaning of the words the answer was untrue so as to invalidate the policy.”

23. With those principles in mind, I first consider the Zurich insolvency question from a linguistic perspective. It is significant that the statement of fact is a standard form document issued to policyholders whatever their legal form. That, in my view, explains the reference in the question to “partners, directors or family members”, which must be used disjunctively to cover the various possibilities that a policyholder is a partnership, a company, or a sole trader.
24. The question does not expressly ask about partners or directors *of the policyholder* (compare the Aviva insolvency declaration, which does). However, the juxtaposition (“you and any partners, directors...”) together with the fact that there is no reference in the question to any partnerships, companies, or trading entities other than the policyholder strongly indicates that that is what is intended. Moreover, “you and any partners, directors...” is naturally read as referring to *current* partners or directors (i.e. current at the date of the question), not to former partners or directors. That reading is reinforced by the use of the phrase “involved in the business”, which is naturally read as a reduced form of “[who are] involved in the business”, not “[who are or were]”.
25. Zurich stresses that the wording used in the question is “involved in the business” rather than “involved in the policyholder”. It argues that the question is therefore referring to “the trade rather than the corporate entity” and that its scope extends beyond the Company itself to partners or directors of any other partnerships or companies involved or formerly involved in the Practice, here including the LLP as the Company’s predecessor as owner and operator of the Practice. I am not persuaded by that. The business is described in the opening section of the statement of fact as the



“Policyholder’s Business”, i.e. the Company’s business. I do not think that the question can reasonably be interpreted as asking about *any* dental business carried on at the Property, by any person or entity, at any time. Zurich asserts that persons “involved in the business” includes those who have been but are no longer involved, but points to nothing in the wording or the context to justify that.

26. There is some further support for the Company’s interpretation in a comparison of the wording of the insolvency question with another question in the Zurich statement of fact about historical claims. That asks (my emphasis): “Have there been any claims, accidents or losses in the last 5 years? These relate to the covers to be insured under this policy (whether insured or not at the time of the loss) and to any business in which you or any partners or directors *are or have been* involved.” I take from the way in which that question is formulated that, if Zurich had intended to ask about a person’s former involvement in a business, then it could and would have asked that expressly.
27. I also consider whether the linguistic analysis is consistent with commercial and common sense. In that respect, it is relevant to see why Zurich says that the liquidations of JHP, PDS and BTB were material. That is pleaded in paragraph 45 of the Defence:

45. The fact of the Liquidations was material to a prudent underwriter. In particular, the fact that each of these companies had entered insolvent liquidation owing significant sums to creditors including HMRC and (in the case of PDS and JHP) in circumstances in which all or part of the businesses in which they were concerned continued operating was relevant to moral hazard, Dr Al-Ani’s competence as a director and operator of the Practice, and corporate prudence.

In its written argument, Zurich elaborated that an insurer would want to know about the insolvency history of others who had been involved in the business now operated by the policyholder and that it was “the risk profile of the Practice that is relevant, not only the entity seeking insurance”. I can see that, if Zurich were interested in moral hazard, managerial competence, and corporate prudence, then it might be reasonable to ask the Company about the insolvency or bankruptcy history of those who would be involved in the Practice during the period of cover. However, I do not see why a reasonable policyholder would think that its insurer (one providing contents and business interruption cover) would be interested in the insolvency history of a person (such as PDS, JHP or BTB) who is not, and never was, a partner or director of the policyholder and will not be involved in the business in any capacity during the period of cover.

28. A related problem is the practical difficulty that might be expected to be faced by the policyholder in answering the question, if it means what Zurich says. There would need to be an inquiry into the circumstances not only of the policyholder’s own former partners or directors but also of the partners or directors of predecessor owners and operators of the business. As part of that inquiry, the policyholder might have to make

a judgment about whether any potentially relevant person was sufficiently involved in the business to require investigation. An exercise of that kind seems in principle both unrealistic and unnecessary (it may be easier in the present case because of Dr Al-Ani's position as a director of the Company and a member of the LLP, but that would not generally be the case). Zurich argues that any uncertainty can be avoided if "involved" is understood as "materially involved", and that the policyholder always has the option of giving the response "unknown" to the question, rather than answering it "yes" or "no". In my view, however, those potential solutions only serve to demonstrate the uncertainty created by Zurich's interpretation.

29. The difficulty is exacerbated by the fact that, although the arguments on the applications are directed to the insolvency question, the Zurich statement of fact also asks questions, targeted at the same partners and directors, about convictions, adverse judgments and refusals of insurance. It seems equally unrealistic and unnecessary to expect the policyholder to seek and disclose that information about former partners or directors of predecessor entities.
30. A further problem arises when one considers the position of the LLP itself. Although Zurich sought to persuade me otherwise in oral argument, it is clear that the LLP (or any other predecessor entity operating the business) is not itself a subject of the Zurich insolvency question. It cannot be: even if, as Zurich alleges, the LLP is still involved in the Practice (a) the LLP is not "you", the policyholder and (b) being a limited liability partnership, the LLP cannot reasonably be described as a "partner" or "director" (or, obviously, a "family member"). But it would make little commercial sense for Zurich to ask about the insolvency of former partners or members of the LLP while not asking about the insolvency of the LLP itself. That potential inconsistency is further support for the conclusion that the question is not asking about either the LLP or its former partners or members but only about the policyholder Company and its current directors.
31. I was referred by the parties to three previous cases where the court had interpreted insurance proposals or statements of fact: *Doheny*, supra; *R&R Developments Ltd v Axa Insurance UK plc* [2009] EWHC 2429 (Ch); and *Ristorante*, supra. The common feature of the cases was that a director of the insured had also been a director of another company that had become insolvent; and the question was whether that fact had been misrepresented or should have been disclosed. In *Doheny*, the insured had declared that "no director/partner in the business, or any company in which any director/partner have had an interest, has been declared bankrupt, been the subject of bankruptcy proceedings or made any arrangement with creditors"; the court held that that declaration was false. In *R&R*, the insured had been asked, "Have you or any Partners or Directors either personally or in connection with any business in which they have been involved [e]ver been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?"; the court held that the insured correctly answered in the negative. In *Ristorante*, the insured had declared that "no owner, director,

business partner or family member involved with the business: has ever been the subject of a winding-up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation”; the court held that the declaration was true. The different outcomes reflected the fact that the declaration in *Doheny* referred to other companies in which a director had been involved whereas the question/declaration in *R&R* and *Ristorante* did not.

32. I do not think that those cases materially assist me in interpreting the Zurich insolvency question. Not only do they turn on the particular wording of different documents, prepared in different circumstances, but they were also concerned with a different point. Zurich’s complaint in the present case is not that a current director of the Company was formerly a director of an insolvent entity but that former members of the LLP, who were formerly involved in the Practice in that capacity, themselves entered into insolvency. That was not the issue in *Doheny*, *R&R* or *Ristorante*.
33. However, for all the other reasons I have given, I am satisfied that the Company’s interpretation of the Zurich insolvency question is correct. When the Company was asked the question, PDS and JHP were not “partners... involved in the business”, and the Company correctly answered the question in the negative.
34. I add that, if my view of the interpretation is wrong, then I would regard the Zurich insolvency question as at best ambiguous in two respects: first, as to whether it is asking only about partners or directors *of the policyholder* as opposed to other entities such as the LLP; and, second, as to whether it is asking only about *current* partners or directors or whether it extends also to former partners or directors. In deciding whether there had been a misrepresentation, that ambiguity would have to be resolved in favour of the Company.
35. The misrepresentation case in paragraph 44A therefore has no real prospect of success and I refuse permission to introduce it by amendment.

#### **Paragraph 44**

36. I turn to Zurich’s alternative case that, even if Zurich did not ask about it, the Company should have disclosed the fact of the liquidations of PDS, JHP and BTB. Paragraph 44 of the Defence states:

#### **Failure to disclose Dr Al-Ani’s directorship of companies in liquidation**

44. PDS, JHP and BTB entered liquidation (“the Liquidations”) because they were insolvent. The Company had a duty to disclose the fact of the Liquidations prior to inception of the Zurich Policy (and each of the

Previous Policies), but failed to do so. In particular, by reason of the fact that they were so closely connected to the Company's business, as PDS and JHP were previously members of the LLP which operated the Practice, and BTB was a previous owner of the Property, the Company could not reasonably have concluded that Zurich would not wish to know of the fact of those Liquidations.

37. The Company contends that that case has no real prospect of success because, by asking the insolvency question in the terms that it did, Zurich waived any right to disclosure.
38. The relevant test for waiver is not in dispute between the parties. As regards the effect of questions asked by insurers, both parties rely on *MacGillivray on Insurance Law* (15<sup>th</sup> ed.), which states:

16–081 The questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure...

16–083 It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the questions... if an insurer asks whether individual proposers have ever been declared bankrupt, they waive disclosure of the insolvency of companies of which they have been directors. Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?

That passage, in an earlier edition, was approved by Longmore LJ in *Doheny* at [17]. The decision on waiver in *Doheny* was obiter but the approach of the Court of Appeal was adopted in both *R&R* and *Ristorante*.

39. In *Doheny* at [21] Longmore LJ expressed the tentative (because it was obiter) view that, if the declaration by the insured (quote in paragraph 31 above) applied only to the insolvency of individuals, then the insurer had made it plain that it was not interested in the insolvency of the corporate vehicles through which the insured was trading. In *R&R*, Nicholas Strauss QC held at [42] that, by asking about the insolvency of the insured and its directors, it could be inferred that the insurer had no interest in the insolvency of any other person. Similarly, in *Ristorante*, Snowden J held at [91–92] that by asking about the insolvency of the owners, directors, business partners and family members involved with the business, the insurer had waived the right to disclosure of other insolvencies. He said:

91. To my mind, having identified previous liquidations as a subject on which the defendant required disclosure, and having specified the persons in respect of whom a previous liquidation would be disclosable, the defendant thereby limited its right of disclosure in respect of other (unspecified) persons or companies which had been placed into liquidation. The Other Insolvency Events were all liquidations. They were therefore precisely the same type of insolvency matters which were the subject of the Insolvency Question: the difference is that they related to a different set of persons than those identified in the question.

92. I therefore conclude that it was a reasonable inference for the claimant to draw that the defendant did not wish to know about any other liquidations (or, indeed, administrations, administrative receiverships, company voluntary arrangements, and so on), other than those specified in the Insolvency Question.

40. Although those cases concerned different documents, and the decision on waiver in *Doheny* was obiter, they clearly illustrate the point that if an insurer asks about the insolvency of specific persons, whether identified by name or by description or category, then a reasonable insured would be justified in thinking that insurer was interested in those persons only. That does not mean that the duty of disclosure is necessarily limited to the fact of the insolvency; in some cases disclosure of the circumstances might also be required (see *Doheny* [37–38] per Potter LJ). However, the insured can reasonably assume there is no requirement for disclosure in relation to insolvencies of other persons.
41. In arguing that there was no waiver, Zurich relies on a Scottish case on the Insurance Act 2015, *Young v Royal and Sun Alliance Insurance plc* [2019] SLT 622 and, on appeal, [2020] CSIH 25. *Young* drew a distinction between questions asked in a proposal form and those in other communications between insured and insurer, explained by the Inner House in this way:

[41] It is clear that an insurer can impliedly waive an insured's duty to disclose certain information by virtue of the questions it asks. A usual way of asking questions is by means of a proposal form, and cases about proposal forms and statements about proposal forms feature in the authorities...

[42] The significance of a proposal form is that by directing the insured to provide material information by the means of answering specific questions the insurer has taken control over the process of communicating information between it and the proposer. It has chosen the matters as to which it wishes information by asking questions directed at that information and, by implication, the matters as to which it does not wish information, by not asking questions which are so directed. That is not to say that the only way in which an insurer can waive information is by using a proposal form. Senior counsel for the defender accepted that. However, where it is contended, as here, that the

insurer impliedly waived its entitlement to disclosure of material information by reason of the terms in which parties communicated with each other, the expectation will be that there will be something in the nature of an enquiry by the insurer directing the insured to provide certain information but no other information....

[43] We do not consider that a reasonable reader of the email of 24 March 2017 [from the insurer] would understand it in [that] way.... Neither the generality of the email nor the wording relied on by the pursuer was couched in the form of an enquiry. The whole tenor of the email indicates that the defender has got beyond the stage of enquiry or looking for a more complete presentation of the risk. The email indicates that the defender considers that the presentation of the risk has been sufficient and that the defender has assessed and priced it, as the risk is further defined by the stated terms, conditions and limitations. the pursuer's argument was to get off the ground was absent.

42. I do not see that *Young* provides any support for Zurich's position. It is clear from the quoted passage that the decision turned on the opinion of the court, by reference to a review of all the communications, that the specific email relied on as giving rise to the waiver was not in the nature of an enquiry by the insurer. The present case is quite different. The Zurich insolvency question was self-evidently a record of an enquiry made to and answered by the Company, and the question and answer formed part of the presentation of the risk by the Company to Zurich.
43. Zurich also points to the explanation of the importance of fair presentation set out in its statement of fact, which I have set out above, and emphasises that it nowhere states expressly that Zurich was only interested in the information in the statement of fact. However, that in itself does not preclude a waiver. I note that there was a similar explanation in *Ristorante*; see the judgment at [18].
44. Zurich does not argue that the case on waiver depends on any disputed facts to be decided at trial, and I cannot see how it might. It is therefore an issue that can properly be resolved summarily. Following the approach in *Doheny*, *R&R* and *Ristorante*, I am satisfied that, by asking the insolvency question, Zurich waived disclosure of the fact of the insolvency of any persons other than the subjects of the question, who, as I have found, are the Company and its current directors. Accordingly, the allegation in paragraph 44 of the Defence that the Company was in breach of duty by failing to disclose the liquidations of PDS, JHP or BTB is bound to fail, and I strike it out. Paragraph 45 is struck out consequentially.

### Paragraphs 60 and 61

45. Zurich's case in these paragraphs is that the Company breached its duty of fair presentation by failing to disclose to Zurich that it had previously misrepresented or

failed to disclose to Aviva the liquidations of PDS and JHP (proposed amendments are underlined):

### **Prior misrepresentations or non-disclosures**

...

60. The Company failed to disclose that its director Dr Al-Ani, as a member of the LLP had not disclosed and/or had misrepresented the insolvency history of companies of which he was a director to Aviva when obtaining insurance for the LLP, when those matters were material to that policy. Without prejudice to the generality of the foregoing, when placing a policy of insurance with Aviva for the LLP the following in a statement of fact dated 13 March 2020 recorded: “Neither You or Your directors or partners involved with The Business or any other company or business have... • in the last ten years been declared bankrupt or insolvent or been the subject of bankruptcy proceedings or insolvency proceedings or been disqualified from being a company director...”

61. That statement was incorrect, as Dr Al-Ani knew or ought to have known, because in the 10 years prior to inception of the Aviva Policy Dr Al-Ani had been the director of PDS and JHP which had each been declared insolvent and had entered liquidation (i.e. had been subject to corporate insolvency proceedings), and each of PDS and JHP had been members of the LLP. Accordingly, the insolvency history of “any other company or business” operated by a member of the LLP and/or of a partner (i.e. former member of the LLP) involved in the business (i.e. the Practice and the ownership of the Property), had been misrepresented to Aviva and/or the liquidation of PDS and JHP had not been disclosed. The fact of a misrepresentation and/or non-disclosure to a different insurer would have been material to a prudent underwriter, as it went to the issue of moral hazard.

46. There was a debate between the parties about whether a non-fraudulent misrepresentation or non-disclosure of a material fact to Aviva could give rise to a material non-disclosure to Zurich as creating a moral hazard, and I was referred to the discussion of moral hazard in *Berkshire Assets (West London) Ltd v AXA Insurance UK Plc* [2022] Lloyd’s Rep IR 275 at [34–39] and *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] EWHC 2192 at [146]. I cannot resolve that issue summarily and I assume for present purposes that the Company was at least arguably under a duty to disclose to Zurich if it had failed previously to make a fair presentation to Aviva.
47. The question then is whether there is any real prospect of Zurich proving that there was a material misrepresentation or non-disclosure to Aviva, which depends on the proper interpretation of the Aviva insolvency declaration.

48. The Aviva insolvency declaration is about “You”, meaning the LLP as policyholder, and “your directors or partners involved with The Business or any other company or business”. That wording is clumsy. It is difficult to understand quite what is intended by the phrase “involved with The Business *or any other company or business*”. The subjects of the declaration are the policyholder and the policyholder’s directors or partners. Such a director or partner would necessarily be involved with the policyholder’s business, but might also be involved with another business. It is not clear how (or whether) the phrase is intended to qualify who is within the scope of the declaration. One possible way of making sense of it is to read “directors or partners involved with...” as “directors or partners [in connection with their involvement] with...” so as to require disclosure of the insolvency of a director or partner even if the insolvency was connected with a company or business unrelated to the policyholder. Similar wording was used expressly in the *R&R* question; see paragraph 31 above.
49. At any rate, and whatever the phrase means, I am satisfied that the insolvency declaration cannot reasonably be read as giving a confirmation about the insolvency history of “other companies with which the LLP or its members are involved”, as Zurich puts it in its skeleton argument. The declaration is clearly targeted at directors or partners of the policyholder itself. Moreover, Zurich’s interpretation gives rise to the same difficulty and uncertainty discussed in paragraphs 28–29 above about how the policyholder could reasonably assess whether any other company or entity is sufficiently involved to be covered by the declaration.
50. I am also satisfied that the declaration is referring only to current directors and partners of the policyholder. That is essentially for the same reasons given in paragraph 24–25 and 27–29 above. In summary: (a) “your directors or partners” is naturally read as “your current directors or partners”, not “current or former”; (b) “involved” does not without more indicate former involvement; (c) there is no obvious reason why the insurer would be interested in the insolvency of persons no longer involved in the business; and (d) there might be difficulties in the policyholder obtaining that information.
51. Zurich argues that the declaration must extend to former directors or partners because it covers insolvencies in the last ten years. I do not agree. In my view it is referring to former insolvencies, in the last ten years, of current directors or partners.
52. Finally, if I am wrong about the interpretation, then (like the Zurich insolvency question) the Aviva insolvency declaration is at best ambiguous as to whether it does or does not cover former directors or partners. Again, any ambiguity would be resolved in favour of the LLP. Zurich cannot therefore establish that the declaration was false by reference to the positions of PDS or JHP as former members of the LLP.



53. The analysis of waiver is the same as that set out above in relation to paragraph 44. By asking (as I have found) only about the insolvency of current members or partners of the LLP, Aviva waived disclosure of the insolvency history of other persons.
54. Zurich's case as pleaded in paragraphs 60 and 61 is therefore bound to fail, and I strike it out.
55. The Company raises a further and separate objection to the final sentence of paragraph 61 of the Defence. It argues that Zurich has not properly pleaded the nature of the moral hazard relied on as constituting materiality. It accepts that this is an objection only to the adequacy of the pleading. Since I have struck out the whole of paragraph 61, the objection is moot. However, if I had not struck it out, then I would have permitted Zurich to maintain the final sentence on the basis that any uncertainty or inadequacy in the pleading could be resolved, at least initially, through a request for further information.

### **Paragraph 66**

56. The proposed amendment to paragraph 66 of the Defence, by which Zurich seeks to avoid the insurance in reliance on general conditions 9(a) and 9(b) of the policy, was initially in dispute. However, in the course of the hearing the parties reached an agreement in principle as to how to address the amendment, including by directions for further pleading and evidence. I invited them to agree an order for approval by the court.

### **Disposition**

57. For the reasons given above:
- i) I refuse permission to amend to introduce the proposed paragraph 44A of the Defence and to amend paragraphs 60 and 61.
  - ii) I strike out paragraphs 44, 45, 60 and 61 of the Defence (and any references to those paragraphs).