

# The limits of disclosure under the pilot—what you won't get even if you ask (*Curtiss v Zurich Insurance plc*)

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**Construction analysis: After an extensive contested case management conference (CMC) at which the claimants sought wide-ranging disclosure to support a claim against an insurer in which there is a claim for exemplary damages, the judge retired to give judgment on the question of Issues for Disclosure for a fair determination at trial. The judge reviewed the authorities and considered the test to be applied when ordering disclosure under the Disclosure Pilot in Practice Direction 51U, and then applied it by analysing each of the items the claimant had argued were Issues for Disclosure. The judge ordered a much more limited level and type of disclosure than the claimants had sought. Written by James Davison, barrister, 3PB Barristers.**

*Curtiss and others v Zurich Insurance plc (t/a Zurich Building Guarantee and Zurich Municipal) and another* [\[2021\] EWHC 1999 \(TCC\)](#)

## What are the practical implications of this case?

The immediate judgment concerns the application of the test in the Disclosure Pilot at a CMC in an ongoing case where wide-ranging and serious allegations had been pleaded by the claimants in their statement of case, including allegations of fraud by or on behalf of the defendants who were to provide insurance cover after the properties had been surveyed by them or on their behalf.

The judgment provides a framework for the approach the court will be inclined to take generally when applying the Disclosure Pilot, with the court taking a robust approach to both the pleading of the claimant and the list of Issues for Disclosure that had been presented and which were pithily addressed in paras [20] to [30] of the judgment.

The result was that the extent of disclosure ordered by the court was limited in comparison to what the claimants sought.

## What was the background?

There are in excess of 100 claimants who are said to be the leaseholders of the Meridian Quay Development in Swansea. The building was said to be constructed between 2006 and 2010. The judge noted that it suffers from extensive defects, and it is expected that remediation works will take until 2026 or 2027.

The claimants' transactions for their leaseholds included the acquisition of an insurance policy for structural defects from the first defendant, Zurich. It is said that before Zurich issued a policy for an apartment, one of its surveyors issued a Cover Note. The extent of the surveys actually carried out and the extent to which representations were made to the claimants by the issue of the Cover Notes is in dispute.

As the judge said at para [20]:

'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.'

Exemplary damages are sought, which drove the extent of the disclosure requested at the CMC.

The issue that seems to underlie the whole case is very topical—'How does the purchaser of defective property get compensation if the price paid did not reflect the condition of the property' (especially if they are a leaseholder).

## What did the court decide?

The court reviewed and applied the guidance of the court in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch). Accordingly, the judge considered the relationship of 'Issues for Disclosure' and content of 'Statements of Case' finding that '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' (para [18]).

This is a significant point for practitioners to heed both when pleading the claim and when considering the content of the defence and admissions to be made. In this case, the admissions in the defendant's Statement of Case and the degree of disclosure already provided or offered by the defendant in advance of the CMC appeared to stymie the claimant's arguments for the disclosure sought.

Ultimately, the court considered that the mere fact that a matter was pleaded and remained in dispute was not enough for disclosure to follow for those items, as paragraph 7.3 of Practice Direction 51U made clear.

The judge also noted that the approach of the court in *Lonestar Communications Corporation LLC v Kaye* [2020] EWHC 1890 (Comm) represented the correct approach to most CMCs where the court might properly order disclosure (for example, to support the proceedings as a whole or attendant to an application to amend or matters to do with expert appointment). However, the immediate question at the CMC in the current case was a different one being only 'the fair determination of the issues at trial' and that meant that the claimant did not get disclosure simply because they wanted it to build the claim for exemplary damages.

### Case details:

- Court: Business and Property Courts in Wales, Technology and Construction Court (QBD), High Court of Justice
- Judge: Judge Keyser QC
- Date of judgment: 16 July 2021

James Davison is a barrister at 3PB Barristers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).

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