Neutral Citation Number: [2022] EWHC 1514 (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: 17 June 2022

**Before**:

**HIS HONOUR JUDGE KEYSER QC**
**sitting as a Judge of the High Court**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **ANGELA DENISE CURTISS and others** | **Claimants** |
| **- and -** | |
| **(1) ZURICH INSURANCE PLC** | |
| **(2) EAST WEST INSURANCE COMPANY LIMITED (in administration)** | **Defendants** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**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 dates: 1 June 2022
Written submissions on costs: 8 and 10 June 2022

- - - - - - - - - - - - - - - - - - - - -

# 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.

.....

HIS HONOUR JUDGE KEYSER QC

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 p.m. on Friday 17 June 2022.

## JUDGE KEYSER QC:

1. This judgment concerns the costs of an application to strike out witness evidence pursuant to CPR PD57AC.

2. The proceedings have been brought by about 150 claimants, who are the owners of flats in the Meridian Quay development in central Swansea. The claims against the first defendant, Zurich Insurance plc ("Zurich"), are for damages for deceit. In a nutshell, the claimants say that they were induced to purchase their flats by fraudulent misrepresentations that were contained in cover notes issued by Zurich, to the effect that the flats in question had been given a final inspection by Zurich's surveyor and that the final inspection was satisfactory, whereas in fact the flats had not been inspected and any inspection would have shown that their condition was far from satisfactory. The claims are strongly contested. In accordance with directions given at the case management conference in July 2021, there is to be a trial of issues common to certain lead claimants. That trial is due to commence on 11 July 2022 and to continue until 18 August 2022; in all, 24 days have been set aside for the trial. (The second defendant, East West Insurance Company Limited, has entered into administration and the claims against it are stayed.)

3. On 26 January 2022 the claimants, by their solicitors, Walker Morris, served their witness statements. In all, there were 49 witness statements, of which 39 were relevant to the issues that fall to be considered at the forthcoming trial. The makers of the statements fell into four broad categories: claimants; conveyancers; mortgage lenders; and others. That final category comprised two witnesses: Zurich's surveyor who undertook warranty inspections at the development (Mr Dummer), and the solicitor who acted for the developer (Mr Davies). The total length of the witness statements, excluding exhibits, exceeded 400 pages.

4. In a letter dated 8 February 2022 Zurich's solicitors, Clyde & Co, intimated to Walker Morris that they would be writing separately in respect of compliance with PD57AC. The promised letter was dated 8 April 2022, two months later. The second paragraph said: "We have now completed our review of your clients' witness statements and are able to set out the numerous breaches we have identified." There followed the rest of the 16 pages of the letter, to which was appended a 109-page schedule giving particulars of non-compliance. As Zurich's solicitor said in the witness statement in support of the application, the analysis of the witness statements for compliance was a "substantial task". The final paragraph of the letter said: "[W]e require your response by no later than 22 April 2022." (Good Friday was on 15 April and the Easter Bank Holiday was on 18 April.)

5. After sending a holding response, Walker Morris sent a more detailed letter of response on 6 May 2022, responding to the complaints thematically rather than by itemised reference to the schedule. The letter was itself lengthy. In a preliminary section, it said:

> "1.1.3 Practice Direction 57AC was not intended to encourage a party to perform a line-by-line analysis of a witness statement with a metaphorical scalpel in hand ready to object to or excise a sentence in a witness statement that might stray beyond the bounds of Practice Direction 57AC. That would be inconsistent with the overriding objective, for it would generate satellite

> litigation and cause the parties to incur unnecessary cost in protracted pre-trial skirmishing. That is particularly so in a case such as this where there is an inequality in the financial resources of the parties."

6. By an application notice dated 13 May 2022 Zurich applied for an order pursuant to CPR PD57AC, para 5.2, striking out the entirety of four of the trial witness statements served on behalf of the claimants and parts of a further 29 of their witness statements, on the grounds that the witness statements did not comply with the provisions of PD57AC and the Statement of Best Practice appended to it. The application notice appended a revised version of the earlier schedule and was supported by a substantial witness statement by a solicitor at Clyde & Co with an exhibit running to several hundred pages. There was a witness statement in response by a partner in Walker Morris. The application notice asked for a hearing with a one-day time estimate. As the pre-trial review was listed for 31 May 2022, I directed that the application be heard immediately thereafter, on 1 June 2022. In their skeleton argument, counsel for Zurich suggested that pre-reading would take 5 hours. Counsel for the claimants suggested that 3 days would be required. I did not have even 5 hours available, though I did my best and, of course, had the pre-trial review fresh in my mind. In preliminary discussion at the end of the pre-trial review, Ms Sinclair informed me that it was supposed that I would reserve judgment on the application. I had to disabuse her of that supposition. The court has to form its own view as to the amount of time it will properly devote to any particular application. I formed mine. Very helpfully, Ms Sinclair and Mr Asquith turned their minds to the application that evening and decided to pursue only certain of the objections in the schedule.

7. I heard the application on that day, delivered an oral judgment and made an order that may be summarised as follows. The witness statements of four witnesses, two conveyancers (one of whom had made two witness statements) and two mortgage lenders, were struck out, essentially because they contained no relevant evidence from the personal knowledge and observations of the makers but tended to introduce opinion evidence on matters on which I had refused to permit expert evidence. Various parts of the lengthy witness statement of Mr Davies were also struck out, because they contained commentary or opinion on documents or on matters that I did not consider fell properly within the scope of the maker's evidence. Certain other parts of the application that were pursued were unsuccessful. In particular: I declined to order that Mr Dummer make a new witness statement (Zurich asked for this instead of pursuing 142 itemised objections to his existing witness statement); I declined to strike out "stock phrases", possibly indicative of a common draftsman, from six witness statements; and left in place some other parts of Mr Davies' statement which Zurich asked to be struck out.

8. For the purposes of this judgment, it is unnecessary for me to set out in any greater detail the reasoning behind my substantive decisions on the application or to set out or paraphrase the provisions of PD57AC or explain its application. Case law has quickly grown up around the Practice Direction. See, for example, *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) (O'Farrell J); *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) (Fancourt J); *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2022] EWHC 708 (Ch) (Bacon J); *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2022] EWHC 1244 (Ch) (Mellor J).

9. At the end of the hearing, as the hour was late, I directed that written submissions, with a strict page-limit, be filed on the question of costs. I am grateful to Ms Sinclair QC and Mr Asquith, counsel for Zurich, and Mr Grant QC and Mr Turner, counsel for the claimants, for their submissions.

10. This judgment is concerned with the principle of the payment of costs, not with their assessment. However, it is very relevant to know something of the level of costs that the application has generated. Each side had filed a statement of costs for summary assessment. Zurich's statement of costs was in the sum of £184,667.60, including £30,732.10 for VAT. The claimants' statement of costs was in the sum of £189,476.70, including £31,579.45 for VAT. Mr Grant informed me that the figure for the claimants contained an error and was overstated. Even so, the total costs incurred by both sides on this application, excluding VAT, exceed £275,000. I regard that with dismay. This is substantial litigation, involving a lot of evidence and quite a few issues. But, in my view, there is no rational world in which this sort of expenditure can have been justified on an application such as this. I should make it clear that I reject the submission of Ms Sinclair and Mr Asquith that the bulk of these costs would have been incurred anyway in the litigation process. That is certainly not true of the claimants' costs. As for Zurich, there is a big difference between examining witness statements for the purpose of preparing cross-examination and submissions on the evidence and going through them with a fine-tooth comb for the purpose of identifying breaches of the Practice Direction. Zurich included the costs in its schedule for the application and was correct to do so.

11. The award of costs is in the discretion of the court. The general principles relating to the exercise of that discretion are set out in CPR r. 44.2. Where costs are to be paid, they will generally be assessed on the standard basis. However, the court may order that they be assessed on the indemnity basis (see r. 44.3) where the conduct of the parties or the circumstances of the case take the case "out of the norm", which may be taken to signify something outside the ordinary and reasonable conduct of litigation.

12. The submissions for the claimants may be summarised as follows. Most of the application was abandoned. Much of what was pursued did not succeed. The application was prepared and, until a very late stage, presented on a scale that was disproportionate and unmanageable. It was not an attempt to conduct the litigation in a reasonable and proportionate manner but a piece of strategy (the costs identified in Zurich's statement of costs included counsel's advice in conference on "initial strategy") by a party with deep pockets and presented a major distraction in the run-up to trial. The application ought not to have been made. The claimants ought to have their costs on the indemnity basis. Zurich's modest level of success might be reflected in a discount from those costs, so that Zurich should pay only 85% of the claimants' costs.

13. The submissions for Zurich may be summarised as follows. Zurich succeeded in significant parts of its application; the starting point is that it was the successful party, albeit that its success was incomplete. Even on matters where it was unsuccessful, the application elicited from the court adverse remarks about the claimants' witness statements, in particular that the use of "stock phrases" showed that the claim that statements had been written in the witnesses' own words were "implausible". The claimants never accepted that there was merit in any of the objections raised; their uncooperative conduct should be taken into account. Although the application might appear disproportionate, it must be viewed in the context of substantial litigation (the

damages claimed exceed £25m in total) and very serious allegations of fraud. The application will have saved some costs in the long run by excluding some evidence from trial. A significant proportion of the costs attributed to the application would in any event have been incurred in trial preparation and might properly be made costs in the case. To the extent that Zurich did not pursue aspects of the application, it has reserved its right to raise its objections again at trial. Moreover, it was reasonable for the application to have been prepared and advanced in its initial form, because (a) the decision of HHJ Stephen Davies in *Blue Manchester Ltd v BUG-Alu Technic GmbH & Anor* [2021] EWHC 3095 (TCC) showed that the courts would be willing in principle to give detailed consideration to schedules of objections and (b) Zurich was entitled to take guidance from the remarks of Fancourt J in the *Greencastle* case, to the effect that it was not convenient or appropriate to leave such objections to be disentangled at trial by protracted cross-examination.

14. In my judgment, Zurich ought to pay 75% of the claimants' costs, to be assessed on the indemnity basis, and ought not to recover any part of its own costs.

15. In my view, this application was fundamentally inappropriate. That does not mean that no part of it had merit. If one makes hundreds of points, there are almost bound to be some good ones. That does not show that the application was justified. In giving my judgment on 1 June, I said that the application was not worth the candle. I remain of that view.

16. The remarks of Walker Morris, quoted in paragraph 5 above, stand as a pertinent criticism of Zurich's conduct. The preparation of the schedule extended over two months and, despite the efforts of Ms Sinclair and Mr Asquith to persuade me otherwise, seems to me to have been a waste of time and effort. My pre-reading (itself a partially wasted effort) took me through dozens of itemised complaints regarding the witness statement of Mr Dummer, Zurich's surveyor, nearly all of which I regarded as petty or pointless. A typical example chosen at random is an objection to the following passage in Mr Dummer's statement:

> "On more complex projects, such as the Development where there were a number of different buildings being constructed at the same time, I would usually be expected to inspect every 2 weeks or thereabouts during the busy stages of construction but in any event at least once a month as, without this, it would be impossible to keep up with the work, let alone reinspect works which had not been signed off due to the appearance of defects."

The application sought an order striking out that passage on the grounds that:

> "A witness statement must indicate which statements in it are matters of information or belief and the source for any matters of information or belief. Mr Dummer has provided no basis for these assertions."

As Mr Dummer was Zurich's surveyor responsible for the inspections at the development and was explaining his work as such, this objection seems absurd. But, even if there might be a genuine point behind it, it does not merit an application. The very next pair of objections related to a longer passage, the second part of which states:

> "Therefore, with regular inspections you should be able to identify each stage of construction as you ascend the building. This form of construction, or linear development, should also allow you to have access to and see the common parts so that you can identify a uniformity and quality of workmanship being established on each floor which means that a quality and safe outcome will be predictable. Regular inspections such as this are key as they give you the confidence that quality control was functioning correctly and that a quality and workmanlike outcome will be achieved."

To this, the objection was: "A witness statement must be drafted in the first person." Comment is, I hope, unnecessary. These and a myriad of other examples lead me to the view that the application was not, primarily, brought with a view to ensuring the efficiency of the trial process but in the hope of emasculating the evidence of a witness who is central to the claimants' case. Mr Grant and Mr Turner describe the application as "strategy", meaning that word in a pejorative sense, and I think they are right.

17. Ms Sinclair and Mr Asquith maintained their position that the witness statements were open to objection in the respects identified in the schedule and reserved their right to approach the evidence in that light at trial. However, they did not seek to adjourn any part of the application; as is common ground, the application itself does not subsist and has been dismissed. The trial will proceed without the distraction of the application. It will, of course, be open to counsel to cross-examine on the basis that a witness statement is not in the witness's own words, or that its contents have been improperly suggested by the person who took instructions for the statement, or on whatever other ground, or to submit that the evidence of a certain witness is of limited or no value.

18. It is quite correct to observe that the application had a measure of success and that the claimants never accepted that any of their witness statements were open to any objection. I take this into account, but it carries little weight, for two reasons. First, the meritorious points were set in the context of a disproportionate and oppressive schedule, much of which was patently lacking in merit. Walker Morris did in fact indicate, in their letter of 9 May, that they would give further consideration to the matter if Clyde & Co provided a revised schedule having regard to the points raised in the letter, but that invitation was not taken up. Second, the fact that I made an order striking out all or part of several witness statements does not show that the application was justified. Having heard and considered objections to these parts of the evidence, I thought it sensible to address them. But we could just as well have done without an application, leaving the points to be dealt with at trial by counsel cross-examining quickly and pertinently on some parts of the evidence, disdainfully ignoring other parts, and dealing appropriately with the evidence in submissions. The additional time that this would have taken in preparation and hearing time would have been modest and is far outweighed by the application.

19. I am also unimpressed by reliance on the guidance said to have been drawn from previous cases. I have mentioned some of the cases and, save for two instances below, shall not cite from them. If a court is satisfied that a party has failed to comply with PD57AC, it has a wide array of case management powers and must exercise its discretion with a view to giving effect to the overriding objective. Two points might be mentioned in the present case. First, applications for the imposition of sanctions for

breach of the Practice Direction should not be used as a weapon for the purpose of battering the opposition. Second, when assessing how to respond to a failure to comply with the Practice Direction, a party must use common sense and have regard to proportionality. Before the application in the present case was made, there were sufficient dicta to make it clear, if there had been any doubt, that the power to strike out offending parts of a witness statement will be exercised only where it is reasonably necessary and that in many cases the appropriate course will be for the court to place less, or no, weight on witness evidence that fails to comply with the requirements of the Practice Direction. Ms Sinclair and Mr Asquith refer in particular to the *Greencastle* case, where Fancourt J said at [22]:

> "It is not, in my judgment, convenient or appropriate to leave the dispute to sort itself out at trial. The whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination. The purpose is to limit factual evidence to admissible and relevant evidence of facts within the witness's own knowledge (including correctly identified hearsay evidence) that a witness can properly give in relation to disputed issues of fact."

That remark, to which I was referred as "guidance", was doubtless entirely apposite in the case with which Fancourt J was dealing, but it should not be taken as expressing, far less establishing, any general principle that it is never convenient or appropriate to leave matters of non-compliance with PD57AC until trial. In the *Lifestyle Equities* case Mellor J said at [98]:

> "[I]n my view, before an application is brought seeking to strike out passages in a witness statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD57AC (as, for example, in *Greencastle*). If there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner."

Again, that dictum does not purport to lay down any rule; though, with respect, I find it to be a helpful observation and one that might help to obviate any risk that the Practice Direction should give rise to disproportionate satellite litigation.

20. Having regard to these matters and to the written submissions generally, I consider that Zurich ought to pay 75% of the claimants' costs of the application. This takes into account the modest gains that were achieved by the determination of the points pursued on 1 June. It also reflects the fact that, although the generality of the witness statements for the claimants by no means demonstrated an egregious disregard for good practice, some witness statements and some parts of other witness statements did not accord with the requirements of the Practice Direction, a fact that ought to have been acknowledged. For reasons already indicated, no greater discount from the claimants' costs is justified.

21. As for the basis of assessment, I regard this case as justifying an award on the indemnity basis. The matters that I have referred to above mean that I cannot regard this application as falling within the ordinary and reasonable conduct of litigation. It is well outside the norm. If parties make such oppressive and disproportionate applications, resulting in the incurring of very substantial and quite unnecessary costs, they can hardly be surprised if their conduct is marked by an award of costs on the indemnity basis.