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The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Witness & expert evidence

Skykomish Ltd v Gerald Eve LLP

[2025] EWHC 1031 (Ch)

In a dispute about the valuation of a derelict building, Deputy Judge Farnhill expressed some concerns about the witness statements served by Skykomish. The deputy judge gave examples, showing that not only was the language in two of the statements "*strikingly similar*", but they contained similar errors. Further, at times, they were "*almost a cut and paste of one another*" with only "*trivial differences*".

It was initially suggested that this was potentially coincidence, perhaps the result of two witnesses who had worked closely together at the time recalling a structured transaction in the same terms. The deputy judge accepted that, if that was the case, they would have had no issue with these statements. However, the extent of the witness statement similarities had the deputy judge doubting coincidence as a reasonable explanation:

> *"It is not simply that the structure or flow of the points is the same; so, too, is the grammar, syntax and lexicon and both men made the same mistakes."*

The deputy judge considered that there were a number of "*logical*" possibilities: (1) the witnesses each saw the other's statement in draft and adopted sections of it; (2) the witnesses worked together; (3) the statements came from a common source document; or (4) the similarities in the statements were the result of the translation of witness interviews by the same lawyer (which the deputy judge accepted was permissible).

Ultimately, the deputy judge considered that logic suggested that at least one witness, or possibly both, was provided with quite an advanced draft of their respective statements prepared without proper reference to what that witness had said. The witness then tweaked the language. The judge noted that this did not mean that the evidence of either witness was untruthful. The problem was that: "*at least in places, it has become a single 'recollection,' and it is not even that of either witness*". Further:

> *"Nor is the problem limited to the areas of overlap. If both witnesses were working from a source document that has influenced their recollection, as I believe they were, then the areas of overlap simply show where that has happened; it does not show that there is no issue with the balance of each statement. To conclude that one would need to see the source document, over which privilege has presumably been asserted."*

The end result was that parts, possibly significant parts, of the statements of two of the critical witnesses in this case were "*not their own unaided recollection … not in their own words and so [were] exposed to the risks of contamination*".

The result was that the deputy judge had significant doubts about the robustness of their evidence.

The statement of another witness was summarised by the deputy judge in this way:

> *"I have read the witness statement of my colleague [X] of today's date and the exhibit [X1]. I have first-hand knowledge of its content and confirm the same to be true."*

Farnhill DJ said that such a statement would be of "*very dubious value*". It was not the evidence of the individual. On the facts of the case, the witness was effectively confirming the accuracy of an account in respect of meetings they did not attend, which plainly they could not do. But, further, they then said nothing about discussions to which they were a party and the other was not. That evidence would have been of value.

The deputy judge said that these were: "*serious failings, especially in the context of a trial such as this where much turns on the factual evidence of witnesses and not simply documents*". These were also points that went to the credibility of the witnesses, albeit the judge recognised it would be unfair to impute these failings onto the individual witnesses themselves, none of whom were legally qualified and none of whom could therefore have been expected to know the details either of the rules of evidence.

Finally there was an issue with one of the experts, who was the third expert from one particular valuation firm to be involved in these proceedings. It was put to the expert that they were defending their "*house view*". The expert rejected this and the deputy judge accepted that they were not consciously doing so. However, the deputy judge did consider that the evidence was affected by the history provided by the expert's two previous colleagues. This was described as "*anchoring*". Here the third expert was working at speed and the anchor was a view expressed by other experts including a former senior colleague, whose judgment the third expert respected. This led to the expert, on one occasion, not personally carrying out an element of work themselves; rather, the expert simply assuming that it was not necessary to replicate the exercise because they believed, without checking, that their colleague would have adopted an identical approach. As a result, the deputy judge had reservations about the value of the expert evidence put forward.

Adjudication: company in administration

Midas Construction Ltd v Harmsworth Pension Funds Trustees Ltd

[2025] EWHC 1122 (TCC)

Midas, a company in administration with no notice of distribution issued, sought enforcement of an adjudicator's decision, in the sum of £1.5 million, subject to a stay with proposed conditions. Midas had, in fact, entered into two building contracts with Harmsworth and had a decision in their favour on the second contract too.

The Administrators had engaged Pythagoras Capital to collect the debts owed by Harmsworth. Harmsworth did suggest initially that the enforcement claim was champertous (champerty prevents parties with no previous interest in a case from financing it with a view to sharing the profits). However this suggestion was not pursued.

The real issue for the court was the question of Midas providing security for the costs of any final proceedings that Harmsworth may bring to overturn the adjudication decision(s). What was a reasonable amount?

Deputy Judge Bowdery said that, in assessing the amount of security, one must look carefully at the actual issues to be determined in final proceedings and reject a generic estimate of likely costs divorced from the actual issues. The court will also give credit for work already done in the adjudication and elsewhere. This is likely to mean that less costs are required than when a matter is considered, and pleaded afresh with witness and expert evidence being gathered for the first time. A court will allow security for the likely recoverable costs rather than likely incurred costs. This is how the sum for security for costs is set generally even outside the context of security as a condition for enforcement of the adjudicator's decision.

Midas had suggested that, particularly bearing in mind there were two potential claims (the two projects), the security should be provided in stages. This would mean that security in relation to the first adjudication/project be provided now, and security in relation to the second adjudication/project being provided later. Harmsworth said that Midas were trying to constrain and restrain their opportunity to advance their claims as they see fit. The practical purpose of Harmsworth's proposed litigation could only be to overturn the adjudication decisions, since there was no prospect of them making any monetary recovery given the status of Midas. Accordingly, Harmsworth should be permitted to advance their claims in the manner which it considered might best achieve that objective, which would include permitting it to advance one claim first or to run both claims as part of one action.

The deputy judge agreed with the approach of Mr Justice Constable in *Meadowside Building Developments Ltd (in Liquidation) v 12-18 Hill Street Management Company Ltd* (See *Dispatch*, Issue 233). Here, the deputy judge had noted that a liquidator has a statutory obligation to collect the companies' debts. He also noted that no party is entitled in the context of security for costs' type orders to a complete indemnity in respect of their costs; it is always protection in relation to such costs' order as might be or is going to be ordered on the premise that the costs' protection becomes relevant, so typically around 60%.

Bowdery DJ noted here that, as near as possible, the safeguards (i.e. the proposed security) must seek to place the responding party (i.e. Harmsworth) in a similar position to if Midas was solvent. That should be the aim. Therefore, here there could be no suggestion that security be staged. The aim should be to provide security which was sufficient to permit Harmsworth to bring all its claims as it saw fit (subject to timescales). It would be wrong and unfair for Midas to be able to dictate by insisting on the staging of any security how Harmsworth should advance its claims against them.

It was more difficult to assess the amount of security which should now be provided. The deputy judge noted that Harmsworth did have the right to come back to court to obtain further security if the deputy judge were to underestimate the amount that was appropriate to be ordered at this stage. The parties produced witness statements explaining their position on the costs, which were considered to be helpful to some degree. However, the deputy judge (perhaps inevitably) viewed the figures advanced by Midas as being too low (especially when compared against their own cost budgets), but viewed the figures advanced by Harmsworth as being too high. Bowdery DJ decided to set the security at £150,000 and £400,000 in respect of each project, a figure in between those put forward.

The result was confirmation that Midas, an insolvent party, was able to enforce the adjudicator's decision, subject to the agreed stay, but Midas (through its third-party funder) also had to provide significant security to Harmsworth, in respect of the costs likely to be incurred in seeking a final court judgment in respect of that decision.

The use of AI

Ayinde, R (On the Application Of) v The London Borough of Haringey and *Hamad Al-Haroun v Qatar National Bank QPSC & Anor*

[2025] EWHC 1383 (Admin)

The perils of generative AI hallucinating and, in an effort to be helpful, making up new but false cases and/or citations are becoming increasingly well known. The two cases here, have led the Divisional Court to issue a clear final warning to lawyers about the use of AI, and also to call for urgent steps to be taken to address the misuse of artificial intelligence.

In the *Ayinde* case, as part of a judicial review, Ritchie J had to consider an application for wasted costs. One of the grounds of that application was that the claimant's barrister and solicitor put forward five fake cases (including one purporting to be from the Court of Appeal) in their client's statement of facts and grounds for the judicial review, but when requested to produce copies of those cases, they did not.

The judge concluded that this conduct had been: "*improper*" and "*unreasonable*". On the facts, the judge could not be certain that AI had been used, but if it had, and if those using it had not double-checked the references, then the conduct was "*negligent*" too.

The case was referred promptly to the Divisional Court, where the President of the Divisional Court gave the judgment. The court noted that:

> *"Artificial intelligence is a tool that carries with it risks as well as opportunities. Its use must take place therefore with an appropriate degree of oversight, and within a regulatory framework that ensures compliance with well-established professional and ethical standards if public confidence in the administration of justice is to be maintained...the administration of justice depends upon the court being able to rely without question on the integrity of those who appear before it and on their professionalism in only making submissions which can properly be supported."*

Further, the court continued that those who use AI to conduct legal research notwithstanding these risks have a professional duty therefore to check the accuracy of such research by reference to authoritative sources, before using it in the course of their professional work (to advise clients or before a court, for example):

> *"There are serious implications for the administration of justice and public confidence in the justice system if artificial intelligence is misused. In those circumstances, practical and effective measures must now be taken by those within the legal profession with individual leadership responsibilities (such as heads of chambers and managing partners) and by those with the responsibility for regulating the provision of legal services. Those measures must ensure that every individual currently providing legal services within this jurisdiction (whenever and wherever they were qualified to do so) understands and complies with their professional and ethical obligations and their duties to the court if using artificial intelligence."*

The court then reviewed existing guidance including from the Bar Council and SRA, highlighting guidance given to judges that: "*all legal representatives are responsible for the material they put before the court/tribunal and have a professional obligation to ensure it is accurate and appropriate*". There was further discussion about duties owed to professional bodies, possible contempt of court and wasted costs. In the case here, the deputy judge had ordered that counsel and the law centre each pay £2k to the defendant.

Before the divisional court, counsel explained that they: *"may also have carried out searches on Google or Safari"* and as a result may have taken account of artificial intelligence generated summaries of the results. This would mean that generative artificial intelligence tools would have been used to produce the list of cases. This is important: it is incredibly easy to use AI, without realising.

At the same time as considering the *Ayinde* case, the court considered a second case: *Al-Haroun*. Here, the claimant sought damages of £89.4 million for alleged fraud. The case was referred because the judge was concerned that in the course of correspondence with the court and in the witness statements, reliance was placed on numerous authorities, many of which appeared to be either completely fictitious or which, if they existed at all, did not contain the passages supposedly quoted from them. Here 45 cases were cited. In 18 cases, the case did not exist. The research had been carried out by a lay client, and then relied upon by their solicitors, something described by the court as "*extraordinary*", especially as one of the fake authorities that was cited to the judge in question, was a "*decision*" attributed to that judge.

The court did not however decide to initiate contempt proceedings in either case. There were a number of reasons for this, including a general warning to the legal profession:

> *"our overarching concern is to ensure that lawyers clearly understand the consequences (if they did not before) of using artificial intelligence for legal research without checking that research by reference to authoritative sources. This court's decision not to initiate contempt proceedings...is not a precedent. Lawyers who do not comply with their professional obligations in this respect risk severe sanction."*

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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