

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

Dispatch

Adjudication: seeking a stay on enforcement ***Avanton Capital CC Ltd v LUC Construction Ltd*** [2026] EWHC 2630 (TCC)

Avanton sought summary enforcement of an adjudicator's decision. The parties had previously entered into a design and build contract under which LUC constructed three industrial units at Culvert Court. Practical completion was certified on 10 April 2025, after which disputes arose over the final account.

In May 2026, LUC commenced seven adjudications before seven different adjudicators, concerning different aspects of valuation. Avanton subsequently commenced its own adjudication, alleging that LUC had failed to serve a valid payment or pay less notice against a notified sum of £1,877,640.25.

Three of the LUC adjudications led to decisions that Avanton's contra-charges were overstated by an aggregate of £710,264. Nevertheless, the adjudicator in the Avanton referral decided that LUC must pay the notified sum, interest and adjudicator's fees. The remaining four adjudicators subsequently resigned.

LUC sought a stay on three connected grounds: (i) Avanton's probable inability to repay; (ii) a deterioration in Avanton's financial position since entering into the contract; and (iii) manifest injustice if enforcement forced LUC to cease trading and prevented it from pursuing arbitration. LUC also relied on the favourable valuation decisions and its contention that it would ultimately be the net receiving party.

Constable J applied the *Wimbledon Construction Company 2000 Ltd v Vago* principles (see *Dispatch*, [Issue 61](#)), and also referred to the case of *AWG Construction Services v Rockingham Motor Speedway* [2004] EWHC 888, where the judge had commented that:

"In general a court must balance (a) the intention of the legislation that adjudication should be enforced summarily; (b) the right of the successful party not to be prejudiced by being kept out of its money; and (c) in cases where there is a serious risk that the party will not be able to recover the money, that the defendant is not being seriously prejudiced in a way not contemplated by the Act which is silent as to the position where a defendant runs more than a nominal risk of being unable to recover money after trial or arbitration award."

The judge here noted that LUC's reliance on its own inability to pay the ordered notified sum was unusual. However, a defendant's own inability to pay can exceptionally be relevant, but financial difficulty alone is not ordinarily sufficient grounds for a stay. Otherwise, impecunious defendants could routinely avoid enforcement. The judge emphasised that an applicant such as LUC must show that it was unable to pay and address whether funding could realistically be obtained from shareholders, associated persons or other sources.

Constable J referred to the case of *J&B Hopkins Ltd v A&V Building Solution Ltd* [2023] EWHC 2475 (TCC) where Roger Ter Haar KC, sitting as a Deputy High Court Judge, had found it *"clear beyond doubt that A&V itself cannot afford to pay"*, and that family and friends had made loans to A&V, that the funding had since dried

up, and that the owner had exhausted all other obvious sources of finance. There was therefore an inability to pay. The judge in that case went on to exercise his discretion to stay the judgment in circumstances he described as *"exceptional"*, including the conduct of the judgment creditor in exacerbating the debtor's financial difficulties, the judgment creditor's own failure to pay an earlier adjudicator's award, and concerns about the merits of the decision sought to be enforced. Constable J agreed that whilst it will be rare for a defendant's impecuniosity, of itself, to play a material part in the exercise of discretion, a court may do so in exceptional circumstances where it gives rise to a risk of manifest injustice.

That said, Constable J agreed that where it is established that a defendant is unable to pay the judgment sum, even where a claimant would probably be unable to repay, the solvency risks in each direction cancel each other. The result of this is that the court is left only to consider (i) giving effect to the intention of the payment legislation that adjudication should be enforced summarily; and (ii) the right of the successful party not to be prejudiced by being kept out of its money, both of which favour enforcement. Where there were finely balanced competing risks of injustice arising either out of an inability to repay (on the part of the claimant) or to pay in due course (on the part of the defendant), the judge considered that the court should favour what would be the ordinary course – namely, enforcing the judgment.

Avanton was a Single Purpose Vehicle ("SPV") set up for the purposes of developing Culvert Court. Its financial position depended principally on the property, secured borrowing and group support. Constable J accepted that, on the available evidence, there was a negligible cash position, substantial secured borrowing and negative historical net assets. Avanton was plainly reliant upon discretionary third-party funding which might be removed at any stage. This supported a conclusion that Avanton might not be able to repay the sum in due course if the adjudicator's decision was reversed in arbitration. However, LUC had not established that Avanton would not repay following arbitration. The burden on LUC was to establish probable, rather than possible, inability to repay, not merely a material risk of non-payment. For example, in this case the evidence and accounts did establish that substantial group funding had historically been made available to Avanton during the development. There was direct evidence that, whilst not guaranteed, this would continue.

Was there a change in Avanton's financial standing? The judge thought not; Avanton's standing was always and remained uncertain. LUC had always understood that Avanton was an SPV with limited assets. Therefore, LUC had not shown that Avanton's accounting position represented a materially different repayment risk from that which LUC had knowingly accepted at the date of contracting.

As for LUC, it was accepted that LUC would not be able to pay the judgment without recourse to raising funds. However, the evidence did not address in any way what money, if any, could be raised from other sources. This was fatal to LUC's position as the evidence advanced by LUC, in the view of the judge, fell far short of what was required to establish an inability to pay, or

that its intention to pursue the arbitration to recover some or all of the sums forming part of the adjudicator's award would be stifled. In the absence of such a finding, it was not possible to conclude that refusing a stay would result in manifest injustice.

Summary judgment was therefore entered on behalf of Avanton.

Insolvency & payment under the HGCRA **Amber Construction Services Ltd v Ilyrian** **Construction Ltd**

[2026] EWHC 2603 (BP)

Amber applied under rule 7.24 of the Insolvency (England and Wales) Rules 2016 for final injunctions to restrain Ilyrian from presenting winding-up petitions founded on two statutory demands dated 15 November 2025. One concerned works at the Alton Estate in 2019, where £27k was said to be due; the other, works at Mander Court in 2021 where £39k was said to be due.

A court will restrain presentation of a winding-up petition where the debt on which it is founded is disputed on genuine and substantial grounds. In the case of *Elevate Estates Management Ltd v Fine Star Ltd* [2026] EWHC 1831 (Ch), it was held that:

"The term 'substantial' demands that the arguments possess weight, something that can bear scrutiny. The test would require a case to survive being probed and turned over."

Where there is a cross-claim, following *Re Bayoil SA* [1999] 1 WLR 147, that cross-claim: *"must be genuine and serious or, if you prefer, one of substance"*. It must also equal or exceed the debt that is not itself disputed.

The parties had also agreed that an applicant should not be kept out of a cross-claim by a failure to litigate that cross-claim, but the court is entitled to take into account the fact that a company has not even attempted to litigate the cross-claim, and consider whether there were reasons why it had not done so.

Chief ICC Judge Briggs noted that the HGCRA did not alter these principles. An employer who has failed to serve a pay less notice may still raise a genuine and serious cross-claim in answer to a petition.

On the Alton project, the judge held that Ilyrian did not have a debt that was capable of supporting a winding-up petition.

Firstly, the Payment Application relied upon had failed to comply with the mandatory requirements of the relevant clause under the contract. It was not, therefore, a valid application and did not give rise to a notified sum payable under the contractual and statutory payment machinery.

Applying the reasoning in *Netomnia Ltd v MJ Quinn Integrated Services Ltd*, (see *Dispatch*, [Issue 314](#)) the court rejected the argument that the recipient's practical understanding cured non-compliance. Amber's assessment of the account did not change the contract's meaning or validate the application.

Further, Amber had established a genuine and serious cross-claim arising from alleged delay, under-resourcing and defective workmanship. That claim was supported by contemporaneous material, including the notice of specified default served in November 2019. Although its quantification was open to criticism, the cross-claim could not be rejected on an application to restrain presentation of a winding-up petition.

Finally, Amber had a substantial limitation defence. Ilyrian's evidence identified 11 March 2020 as the final date for payment. No proceedings or adjudication were commenced before expiry of that period. Ilyrian said that, under clause 4.12.2. of the JCT subcontract, a failure to pay an interim payment postponed the start of the limitation period until the Final Payment Notice was served. The

judge noted that a claim to an interim payment is a claim in debt. The cause of action accrues when the sum falls due and is not paid. Each interim payment is a debt distinct from the final payment.

Here, nothing in clause 4.12 suspended or deferred a cause of action that has already accrued. The words *"without affecting the rights of the subcontractor in respect of any interim payment not paid in full by the contractor by its final date for payment"* preserved the right to an unpaid interim payment on its existing terms. They did not postpone it. Further, the Final Payment Notice showed the Final Sub-Contract Sum *"less the total amount previously due as interim payments"*. An interim payment that was due but unpaid is deducted in arriving at the final balance; it is not carried into it. Such a sum is recoverable only as an interim debt. Once that claim was statute-barred, the final account does not revive it.

No proceedings or adjudication were commenced before 11 March 2026. Nothing prevented Ilyrian from issuing a claim or referring the dispute to adjudication in the eleven weeks before the period expired. Service of a statutory demand was not the equivalent of the bringing of an action and did not stop time running.

The position was different on Mander Court. The judge did not consider that, with only limited exceptions, the deductions Amber alleged it was entitled to make had any substance.

The judge explained that there was a distinction to be drawn between the evidence produced to oppose the Alton statutory demand and the Mander demand. The opposition to the Alton statutory demand was supported by various contemporaneous documents that demonstrated a genuine claim. In respect of the Mander demand there were no contemporaneous records or evidence to quantify the deductions for rectification or overhead and profit. The judge said that: *"an inference cannot provide a connection that Amber has not itself asserted"*. Ilyrian in contrast provided contemporaneous documents concerning on the issues, including fire certification. The judge concluded that the:

"absence of documents produced to support deduction in the teeth of documents supporting Ilyrian's claim leads to a finding that the purported deductions are not justified."

The deduction for overhead and profit was unparticularised and lacked substance. Whilst Amber accepted that a sum was due, it was expressed to be conditional on a valid application. The acceptance is evidence that a valid application was made. The suggestion that the original payment application was invalid was therefore rejected.

The Mander debt was not disputed on genuine and substantial grounds. The whole debt claimed in the Mander statutory demand was due and owing. However this was not the end of the story. Despite that finding, the Mander petition was restrained because Amber had a genuine cross-claim on the Alton project which exceeded the sums due by some £9k. Remember the court had concluded that the Alton debt was not due. A cross-claim need not arise under the same contract. Typically, it will lie between the same parties in the same capacities. Applying *Re Bayoil*, the judge concluded that the presentation of the petition on Mander should be restrained unless there were special circumstances. There were none. Therefore, the judge granted a final injunction restraining Ilyrian from presenting a winding-up petition founded upon the Mander statutory demand.

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. Dispatch is a newsletter and does not provide legal advice.

Edited by [Jeremy Glover, Partner](#)

jglover@fenwickelliott.com

Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP

Aldwych House
71 - 91 Aldwych
London WC2B 4HN



www.fenwickelliott.com