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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

Adjudicator's fees

McLean & Anor v Winchester Medical Aesthetics Ltd

[2026] EWHC 2941 (TCC)

The adjudicator sought payment for unpaid fees for his time in preparing a decision. As far as the adjudicator was concerned, as Kelly J explained, this was a "*straightforward debt enforcement claim*" pursuant to the terms of the contract agreed between the parties. The adjudicator sought payment for both his fees (£14k inc. VAT) and for his time reasonably expended pursuing recovery of those fees (approximately £6.5k).

The adjudicator was nominated by the RIBA. Both parties to the adjudication signed and returned the adjudicator's terms and conditions. At the time, Winchester did not make any objection to them.

Winchester resisted the adjudicator's claim for unpaid fees, alleging that:

- the adjudicator had acted outside his jurisdiction, was in breach of natural justice and/or had failed to act impartially;
- the adjudicator had refused to attend the site during the adjudication process despite the *"seriousness and complexity"* of the defects and despite *"acknowledging that photographs alone were insufficient";*
- the terms relied upon were not fairly nor properly incorporated and were in any event unreasonable and unenforceable under the Unfair Contract Terms Act 1977 (the "**UCTA**");
- the fees were unreasonable and/or inflated; and
- the fact that the issue of a winding up petition against them was restrained by final injunction, and costs awarded to them, demonstrated that the alleged debt was genuinely and substantially disputed.

Kelly J briefly summarised the summary judgment principles concerning the enforcement adjudicator's decisions, noting that:

> *"(f) An adjudicator is entitled to charge for his time and recover fees even if he delivers an unenforceable decision and is entitled to stipulate those terms in terms and conditions. Similarly, chargeable time may include time spent at court, the costs of securing payment of fees, expenses, and any disbursements. Adjudicators are entitled as a matter of course to have terms which make parties to an adjudication jointly and severally liable for fees and costs."*

Kelly J continued, stating that there is an implied obligation on the adjudicator that the fees he charges will be reasonable in all the circumstances. It is not enough to assert that the adjudicator's time or fees were unreasonable, or to put the adjudicator to proof. A party seeking to challenge the fees must set out a positive case explaining why they were unreasonable.

Kelly J did not accept Winchester's argument that the adjudicator's terms and conditions were void and/or unenforceable. Winchester objected to clause 2, which entitled the adjudicator to be remunerated at an hourly rate regardless of whether his decision was enforceable; clause 4, which entitled him to interest and his legal, administrative and other costs in the event of non- payment; and clause 8, which made the parties jointly and severally liable for his fees.

Winchester said that the terms and conditions were "*onerous and unusual*" and "*not fairly drawn to [Winchester's] attention*" particularly given its lack of bargaining power. However, the fact that Winchester was a small company with no specialist knowledge of construction or adjudication did not assist its case. The terms and conditions were "*entirely fairly*" set out to the parties and provided to Winchester as soon as the adjudicator indicated that he was willing to act. The wording was not complicated and Winchester could have sought legal advice, but did not do so.

The judge found that there was no inequality of bargaining power. Winchester did not identify any specific reason as to why it asserted that it lacked equal bargaining power. If Winchester did not like the terms and conditions proposed, it was free to refuse the appointment, withdraw its notice of adjudication and start again.

When it came to the UCTA, Kelly J noted that the CA in *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd* [2022] EWCA Civ 153 had already held a similar provision imposing joint and several liability to be reasonable, regardless of whether the decision was the enforceable.

There was no evidence that Winchester did anything other than simply accept and agree the terms without question or objection. Its failure to understand the law was no defence.

The adjudicator did not act in breach of natural justice. However, whether he had acted outside of his jurisdiction or in breach of natural justice was, in any event, irrelevant to this claim. While those matters might be relevant in respect of enforcement applications, this was a debt claim based on the adjudicator's contractual right to be paid. The agreed terms made clear that he was entitled to be paid in full regardless of whether his decision was enforceable. A defence based on natural justice or jurisdiction therefore had no prospect of success.

Kelly J noted that both the hourly rate charged and the hours worked were entirely reasonable, and that the hours worked were supported by contemporaneous timesheets. There was no evidence that the fees were inflated or are disproportionate to those charged by others.

During the adjudication, both parties raised procedural issues which had to be addressed. There were multiple rounds of submissions, with a vast number of supporting documents and expert evidence. An adjudicator is required to consider all submissions made to him to ascertain their relevance.

The decision not to conduct a site visit was a matter of procedure for the adjudicator. The judge noted that the case law was clear: whether a site visit was necessary was a matter of procedure for the adjudicator alone.

The fact that Winchester obtained an injunction did not assist its case either. The considerations relevant to restraining the presentation of a winding-up petition on the basis of a genuinely disputed debt were different from those applicable to whether a defence had a realistic prospect of success.

The adjudicator had also incurred further fees and costs in seeking payment and bringing the proceedings. The agreed terms and conditions entitled him to recover those fees, together with his reasonable legal costs, all of which were supported by appropriate evidence.

The interest claimed at 8 percent above base rate was consistent with the Late Payment of Commercial Debts (Interest) Act 1998. The judge commented that such a term was "*entirely usual and reasonable*". The adjudicator was also entitled under the terms and conditions to recover his legal costs. While Kelly J commented that these were possibly higher than they might otherwise have been, this appeared to result from the additional work required to address Winchester's "*unmeritorious and wide-ranging submissions*".

Insurance: building safety claims

Vivid Housing Ltd v Allianz Global Corporate & Specialty SE

[2026] EWCA Civ 1389

This was an appeal from Jefford J's decision of 16 December 2025, by which she dismissed the majority of an application by Allianz for summary judgment. Vivid was the freehold owner of a block of 72 flats and the insured under a Housing Warranty Insurance Policy covering the development. The operative clause of the insurance policy was 3(a), which provided:

> *"The Insurers agree to indemnify the Insured against the cost of repairing, replacing and/or strengthening the Premises following and consequent upon a Defect which becomes manifest and is notified to Insurers during the Period of Insurance and not excluded herein causing any of the following events:*
> *(i) destruction of the Premises; or*
> *(ii) physical damage to the Premises; or*
> *(iii) the threat of imminent destruction or physical damage to the Premises which requires immediate remedial measures for the prevention of destruction or physical damage within the Period of Insurance."*

The Period of Insurance was from 22 May 2008 to 21 May 2020. Shortly before the policy expired, Vivid notified a claim alleging the existence of five defects. The four defects in issue all concerned potential fire safety issues, including cladding, cavity barriers, and building debris.

Vivid notified its claim using a standard *"Latent Defect Claim Form"*. When asked to identify any urgent repairs required and provide an estimated cost, Vivid answered "*N/A*". It was also asked whether any repairs had been carried out before notification, to which Vivid referred to "'*Waking Watch*' *preventative and associated measures*", giving the date as "*Throughout*" and the cost as "*TBC*". The evidence before Jefford J at first instance also included a CBRE report entitled "*Façade Fire Risk Assessment*".

For there to be an insured event, Jefford J considered that there had to be a manifest defect posing an imminent threat of destruction or damage and requiring immediate remedial measures to prevent that outcome within the insurance period. The judge adopted the approach of Clarke J in *Gerling General Insurance Co and others v Canary Wharf plc* [2003] EWHC 2234 (Comm), who said:

> *"I accept that the question of whether damage is imminent is, at any rate in the first instance, to be considered prospectively, and objectively, that is to say by considering whether on the facts available at the relevant time a reasonable man would regard the damage in question as sufficiently likely to happen sufficiently soon that it should be described as imminent. Whether that will be so is a question of fact and degree. The question has, also, to be considered in the light of the structure viewed prospectively and objectively...".*

Applying that approach, Jefford J considered whether a reasonable observer in August 2019 could have regarded the fire risk as sufficiently serious, and its consequences sufficiently imminent, to satisfy the clause. The judge concluded that Vivid had a realistic prospect of establishing this at trial. The waking watch, for example, was capable of supporting Vivid's case by demonstrating concern about the potentially catastrophic consequences of a fire.

On appeal, Stuart-Smith LJ explained that Allianz's central complaint was that the judge had construed clause 3(a)(iii) in a way that failed to give the words "*imminent*" and "*immediate*" sufficient, or any effective, meaning.

Allianz criticised Jefford J's discussion of the constant threat of fire and the likely need for immediate remedial works where imminent damage was threatened. It said that the ordinary meaning of the clause required destruction or damage both to be likely and imminent. Any remedial measures also had to be necessary to prevent that outcome before the insurance period expired. On that basis, the clause did not respond to the "*passive*" fire-safety defects alleged by Vivid.

Stuart-Smith LJ said that this was, in effect, the question that the judge at first instance had answered. Jefford J had concluded that Vivid had a realistic prospect of establishing at trial (sufficient to defeat Allianz's claim for summary judgment) that a reasonable observer in August 2019 would have considered there to be "*a **serious risk** of fire*" and a "*consequent threat of destruction or damage **sufficiently soon***". Although the insured peril was not the threat of fire itself, but rather the threat of imminent destruction or physical damage to the premises caused by a defect, Stuart-Smith LJ considered that Jefford J had correctly formulated and answered the relevant question.

The CA said that this was an answer and a finding that the judge was entitled to make for the reasons given and it could not be overturned on the appeal. The judge had well in mind the principles applicable to a claim for summary judgment. In particular, the judge was "*astute*" enough not to express a concluded view on the ultimate outcome when all matters of fact and degree were brought into account. For example, Jefford J was entitled to observe that the effect of Allianz's proposed approach was that clause 3(a)(iii) would only respond to defects if there was some particular aspect of the property or the defects that made the ignition of a fire imminent. The CA noted that Vivid's evidence on this point was limited, but that it intended to develop that evidence should the matter go to trial.

Allianz also criticised the judge's approach to the need for urgent remedial works. Again the CA noted that Jefford J was astute not to express a concluded view. The urgency of remedial measures also required factual assessment. There was an obvious relationship between the severity of risk and urgency of repairs. CBRE's prioritisation of compartmentation defects was more informative than the notification's wording. This was a "*tenable*" submission that adopting a waking watch was a remedial step, given that it reduced the risk of spread of fire. Other issues such as the steps taken by Vivid to implement other remedial works would be matters for resolution at a trial, not a summary judgment application.

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.

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